IP Boxes from a European, Liechtenstein and Swiss Perspective

IP Boxes d'un Point de Vue Européen, Liechtensteinois et Suisse

Thèse présentée à la Faculté de droit
de l'Université de Neuchâtel

Pour l'obtention du grade de docteur en droit

Par

Marco Felder

Acceptée sur proposition du jury :

Prof. Dr. Florence Guillaume, Faculté de droit de l'Université de Neuchâtel, Présidente

Prof. Dr. Robert Danon, Faculté de droit de l'Université de Neuchâtel, directeur de thèse

Prof. Dr. Daniel Kraus, Faculté de droit de l'Université de Neuchâtel, rapporteur interne

Prof. Dr. Madleine Simonek, Faculté de droit de l'Université de Zürich, rapporteur externe

Prof. Dr. Pasquale Pistone, Faculté de droit de l'Université de Vienne et à l'Université de Salerne, rapporteur externe

Soutenue le 8 mai 2013

Université de Neuchâtel
2013

Imprimatur pour la Thèse

UNIVERSITÉ DE NEUCHÂTEL

FACULTÉ DE DROIT
Av. du 1er Mars 26
2000 Neuchâtel
+41 (0)32 718 12 00
secretariat.droit@unine.ch

IMPRIMATUR POUR LA THESE

IP Boxes from a European, Liechtenstein and Swiss Perspective

Marco FELDER

UNIVERSITE DE NEUCHATEL

FACULTE DE DROIT

La Faculté de droit de l'Université de Neuchâtel,
sur le rapport des membres du jury

M. Florence Guillaume (présidente)
M. Robert Danon (directeur de thèse)
M. Daniel Kraus (rapporteur interne)
Mme Madeleine Simonek, professeure à l'Université de Zürich (rapporteur externe)
M. Pascale Pistone, professeur à l'Université de Vienne et à l'Université de Salerne (rapporteur externe)

autorise l'impression de la présente thèse.

Neuchâtel, le 8 octobre 2013

Florence Guillaume
Doyenne de la Faculté de droit

Mots clés en français

Droit fiscal, IP box, box de licence, propriété intellectuelle, recherche et développement, R&D, aides d'État, Code de Conduit, OCDE

Mots clés en anglais:

Tax law, IP box, license box, intellectual property, research and development, R&D, State aid, Code of Conduct, OECD

Résumé:

The tax treatment of income derived from intellectual property ("IP") is currently in the spotlight and receives a great deal of policy attention. This is because income derived from IP generally is highly mobile and IP boxes are designed to make jurisdictions more attractive for relevant income in this respect.

IP boxes provide an incentive on the basis of reduced tax for undertakings to retain and commercialise existing intangibles as well as to develop new innovate products and processes protected by relevant IP rights in a jurisdiction, or to perform services. This hence encourages undertakings to locate value added in form of high-value jobs associated with these functions in the jurisdiction. In doing so, IP boxes can make investments in innovation more attractive compared to other investments.

Against this backdrop, an increasing number of jurisdictions without IP box regimes consider tax policies providing incentives to encourage undertakings to retain intangibles in those jurisdictions once created or developed. Most recent research findings acknowledge that IP boxes stimulate some new innovation and incentivise undertakings to create more patentable technologies. It follows that in the long run reduced taxation of profits from intangibles by means of IP box benefits is likely to inspire undertakings to invest more in R&D. This will lead to a greater number of IP rights and in particular an increase in valuable IP rights, which may produce significant benefits for an economy.

It should be stressed that particularly for small jurisdictions like Liechtenstein and Switzerland, which are poor in natural resources, it is essential to safeguard the future for the long term through R&D by protecting and realising innovative achievements thereof. Countries and territories subject to this treatise, such as Belgium, Liechtenstein, Luxembourg, the Netherlands, the Swiss Canton of Nidwalden and also the United Kingdom, have already implemented IP box legislation.

The treatise extensively deals with the IP box legislations of these countries. It further focuses on most recent EU and OECD developments and based thereon

includes a detailed commentary on the Liechtenstein IP box. The commentary is certainly of relevance to practice and aims to support legal practitioners in their handling of IP regimes.

A material discussion of the Nidwalden IP box is also included. In addition, a Swiss IP box model is proposed. Given that a Swiss IP box has to reflect fundamental rights, the analysis pays proper attention to constitutional issues.

Foreword

"When the sun of small states is high in the sky, it throws a lot of light even on large states." (Marco Felder)

An effective corporate income tax system reflects current economic realities. As such all tax systems are in need of constant reform[1]. Given the intense global competition for economic advantage and growth, targeted and sustainable improvements of the tax systems of Liechtenstein and Switzerland are of crucial importance for the economies of these countries[2].

Technology and science are important drivers of economic advantage and growth. They result in innovative products and services, increased productivity and higher corporate income[3].

Regions with the largest number of patents per capita also rank among the highest in income per capita[4]. An increasing number of jurisdictions have thus adopted tax incentives in the field of research and development and also implemented tax incentives in the form of IP boxes in order to stimulate research achievements[5].

The location in which an undertaking commercialises its intellectual property in principle determines where the resulting income is taxed. For instance, Microsoft reportedly saved at least USD 500 million in taxes by licensing its intellectual property from an Irish subsidiary[6].

The present treatise deals with IP boxes from a European, Liechtenstein and Swiss perspective. It not only discusses tax policies to promote the commercialisation of technological and scientific research achievements, but also aims to assist the practical handling of IP boxes especially by offering an extensive commentary on the Liechtenstein IP box.

---

1 Atkinson/Andes, p. 1.

2 Hurter, p. 637; Linder/Müller, Steuerliche Anreize, p. 152.

3 Müller/Wenger/Linder, Steuerliche Förderung, p. 846; Hurter, p. 637; Müller/Wenger/Linder, Tax Incentives, p. 3, 4; Keuschnigg/Ribi, p. 6, 23; Schweizer Parlament, Motion Hurter, Stellungnahme des Bundesrates, 19 May 2010; Müller/Gramigna/Linder, p. 803; Schweizer Parlament, Motion Noser, Stellungnahme des Bundesrates, 18 February 2009.

4 Bal/Offermanns, p. 167.

5 Atkinson/Andes, p. 1.

6 Griffith/Miller/O'Connell, Location of Intellectual Property, p. 4; See also Rivette/Kline; Warshofsky.

I first would like to express my gratitude to Prof. Dr. Robert Danon of the University of Lausanne.

Special thanks for their support are then due to:

– Andreas Staubli, Armin Marti and Peter Schmid of PwC Switzerland;

– Bernhard Büchel of the Fiscal Authority of the Principality of Liechtenstein;

– Dr.rer.nat. Dr.oec. Bernd-Günther Harmann of Kaminski Harmann Patentanwälte AG;

– Albert Rädler of the European Commission; and my friend

– Dr. Peter Altenburger of Altenburger Ltd legal + tax.

Ultimately, I would like to thank my family warmly for their sincere and unwavering encouragement and everyone else who has supported me in the writing of this treatise.

Vaduz, October 2013 MARCO FELDER

Contents

Table of Contents

List of Abbreviations

AMR	Actual marketing royalty
AP	Annual period
APA	Advanced pricing agreement
BEPS	Base erosion and profit shifting
BOIP	Benelux Office for Intellectual Property
BPOT	Business property occupation tax
CFC	Controlled foreign company
CHF	Swiss franc
CITA	Corporate Income Tax Act
CSA	Cost sharing arrangement
CTA	Corporation Tax Act
DNS	Domain name system
DTA	Agreement for the avoidance of double taxation
DTR	Double tax relief
EBIT	Earnings before interest and taxes
EC	European Community
ECJ	European Court of Justice
ECOFIN	Council of Economics and Finance Ministers
ECR	European Court reports
EC Treaty	Treaty establishing the European Community
Ed.	Editor
EEA	European Economic Area
EFTA	European Free Trade Association
e.g.	for example – abbreviation of Latin “exempli gratia”
EGC	General Court
EPO	European Patent Office
ESA	EFTA Surveillance Authority
EStG	Income Tax Act
ETR	Effective tax rate
et seq.	and the following – abbreviation of Latin “et sequens”
EU	European Union
EUR	Euro

EU Treaty	Treaty on European Union
Fn	Footnote
FTA	Free Trade Agreement
GAAP	Generally Accepted Accounting Practice
GBER	General block exemption Regulation
GDP	Gross domestic product
IAS	International Accounting Standard
Id.	Idem
i.e.	that is – abbreviation of Latin "id est"
IP	Intellectual property
IPO	Intellectual property office
ITA	Income Tax Act
ITC	Income Tax Code
JCD	Joint Committe Decision
LIHK	Liechtenstein Chamber of Commerce and Industry
MAR	Marketing assets return
MNE	Multinational enterprise
MS	Member State
N/A	Not applicable
NID	Notional interest deduction
NMR	Notional marketing royalty
OECD	Organisation for Economic Cooperation and Development
OECD MC	OECD Model Convention with respect to Taxes on Income and on Capital
OHIM	Office for Harmonization in the Internal Market
p.	Page
PE	Permanent establishment
PGR	Law on Persons and Companies
PITA	Personal Income Tax Act
PID	Patent income deduction
R&D	Research and development
R&D&I	Research and development and innovation
RIPI	Relevant IP income

RL	Relevant IP loss
RP	Relevant IP profit
RRP	Relevant residual IP profit
SCT	Small claims threshold
SME	Small and medium enterprise
SPC	Supplementary certificate of protection
TFEU	Treaty on the Functioning of the European Union
TP	Notional IP owner
UK	United Kingdom
UN MC	UN Model Double Tax Convention
USD	US Dollar
WBK-N	Kommission für Wissenschaft, Bildung und Kultur des Nationalrates
WHT	Withholding tax
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

List of Literature

1. Books

Adamczyk Łukasz, The Sources of EU Law Relevant for Direct Taxation, in: Lang/Pistone/Schuch/Staringer (Eds.), Introduction to European Tax Law on Direct Taxation, Linde (2010), p. 13.

Baudenbacher Carl, Wie sollen Konfikte im Verhältnis Schweiz-EU gelöst werden?, in: Heinemann/Hilty/Nobel/Sethe/Zäch (Eds.), Festschrift für Rolf H. Weber zum 60. Geburtstag, Stämpfli Verlag AG (2011), p. 821.

Benkard Georg, Patentgesetz, Gebrauchsmustergesetz, in: Verlag C.H. Beck München (Ed.), Beck'sche Kurz-Kommentare, Volume 4, 10th edition (2006), p. 806.

Borghi M., Kommentar zu Art. 27^{sexies} Bundesverfassung, in: Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft vom 29. Mai 1874, Helbing & Lichtenhahn (1996), p. 1.

Di Bucci Vittorio, Direct Taxation – State Aid in Form of Fiscal Measures, in: Sanchez Rydelski (Ed.), The EC State Aid Regime, Distortive Effects of State Aid on Trade Competition & Trade, Cameron May (2006), p. 73.

Europäisches Patentamt, Nationales Recht zum EPÜ, Europäische Patentanmeldungen und Patente: Recht und Praxis der EPÜ-Vertragsstaaten, Erstreckung europäischer Patente, 15th Edition (2011), p. 84.

European Economic Area, Selected Instruments, Van Stiphout/Kvarenes/Griffiths (Ed.), European Free Trade Association (2006).

Felder Marco, Perspektiven des Standorts Liechtenstein im internationalen Steuerrecht, in: Baudenbacher (Ed.), Aktuelle Entwicklungen des Europäischen und Internationalen Wirtschaftsrechts, Helbing & Lichtenhahn Verlag, 8th Edition (2006), p. 103 (cit. *Perspektiven*).

Flett James/Walkerova Katerina, An Ecotax under the State Aid Spotlight: The UK Aggregates Levy, in: Harcourt Professional Publishing (Ed.), EC State Aid Law: Liber Amicorum in Honour Francisco Santaolalla, Wolters Kluwer (2008), p. 223.

Friederiszick Hans/Röller Lars-Hendrik/Verouden Vincent, EC State Aid and Control: An Economic Perspective, in: Sanchez Rydelski (Ed.), The EC State Aid Regime, Distortive Effects of State Aid on Trade Competition & Trade, Cameron May (2006), p. 145.

Gey-Ritter Katja, Internationalrechtliche und europarechtliche Aspekte des liechtensteinischen Immaterialgüterrechts – mit besonderer Berücksichtigung des Markenrechts und seiner Erschöpfung, GMG Juris Verlags-AG (Ed.) (1999).

Grabrucker Marianne, Gründungschronik des Bundespatentgerichts, in: Bender/Schülke/Winterfeldt (Eds.), 50 Jahre Bundespatentgericht: Festschrift zum 50-jährigen Bestehen des Bundespatentgerichts am 1. Juli 2011, Carl Heymanns Verlag GmbH, 1st edition (2011).

Granstrand Ove, The Economics and Management of Intellectual Property, Towards Intellectual Capitalism, Edward Elgar Publishing (Ed.) (2000).

Haase Florian, Nationales und Internationales Steuerrecht der immateriellen Wirtschaftsgüter, Verlag Dr. Otto Schmidt (Ed.) (2012).

Hancher Leigh/Ottervanger Tom/Slot Piet Jan, EU State Aids, Sweet & Maxwell (Ed.), 4th edition (2012).

Hangartner Yvo, Der Grundsatz der Allgemeinheit der Besteuerung, in: Cagianut/Vallender (Eds.), Steuerrecht, Ernst Höhn (1995), p. 91.

Harmann Bernd-Günther, Immaterialgüterrechte in Liechtenstein mit ausgewählten Aspekten des Patent- und Markenrechts, in: Schulthess (Ed.), DACH Schriftenreihe (2011) (cit. *Immaterialgüterrechte in Liechtenstein*).

Harmann Bernd-Günther, Patente als strategisches Instrument zum Management technologischer Diskontinuitäten, Difo-Druck GmbH, Bamberg (2003) (cit. *Patente als strategisches Instrument*).

Hinny Pascal, Die steuerrechtliche Behandlung der Marke im Konzern (einschliesslich Steuerplanung), in: Schriftenreihe Finanzwirtschaft und Finanzrecht, Haupt (1995) (cit. *Steuerrechtliche Behandlung der Marke im Konzern*).

Hirsbrunner Simon, Wer hat Recht im Steuerstreit mit der EU? Anmerkungen aus europarechtlicher Sicht, in: Europa Institut an der Universität Zürich, Institut für deutsches und europäisches Gesellschafts- und Wirtschaftsrecht an der Universität Hamburg, Schulhess Juristische Medien AG (2007), p. 46.

Hirsbrunner Simon/Seidl Simone, Kantonale Steuervergünstigungen im Visier der Europäischen Kommission, Ein Diskussionsbeitrag zur Auseinandersetzung zwischen der Schweiz und der Europäischen Union über die kantonalen Unternehmenssteuern, in: Die Schweizerische Vereinigung für internationales Recht (SVIR) (Ed.), Zeitschrift für internationales und europäisches Recht, Schulthess Juristische Medien AG (2006), p. 541.

Höhn Ernst/Waldburger Robert, Steuerrecht Band I: Grundlagen, Grundbegriffe, Steuerarten, Interkantonales und Internationales Steuerrecht, Steuerverfah-

rens- und Steuerstrafrecht, in: Haupt (Ed.), Schriftenreihe Finanzwirtschaft und Finanzrecht, 9th edition (2001).

Hosp Thomas/Langer Matthias, Steuerstandort Liechtenstein, Gabler Verlag (Ed.), 1st edition (2011) (cit. *Steuerstandort Liechtenstein*).

Kaufer Erich, The Economics of the Patent System, Harwood Academic Publishers GmbH (Ed.) (1989).

König Beat/Reich Markus, Europäisches Steuerrecht, Schulthess Juristische Medien AG (Ed.) (2006), p. 43.

Kuebart Jan, Verrechnungspreise im internationalen Lizenzgeschäft, Erich Schmidt Verlag GmbH & Co. (Ed.) (1995).

Lamon Hugues, Cross-border business restructuring, in: Sdu Uitgevers (Ed.), IFA cahiers de droit fiscal international, Volume 96a (2011), p. 127.

Legitech (Ed.), Luxembourg Business Law Book (2012).

Leskien Dan/Flitner Michael, Intellectual Property Rights and Plant Genetic Resources: Options for a Sui Generis System, in: Jan Engels (Ed.), Issues in Genetic Resources No. 6 (1997).

Lübbig Thomas/Martin-Ehlers Andrés, in: C.H. Beck Verlag (Ed.); Beihilfenrecht der EU, Das Recht der Wettbewerbsaufsicht über staatliche Beihilfe in der Europäischen Union (2002).

Mamut Marie-Ann, The State Aid Provisions of the EC Treaty in Tax Matters, in: Lang/Pistone/Schuch/Staringer (Eds.), Introduction to European Tax Law: Direct Taxation, Linde Verlag Wien Ges.m.b.H. (2008), p. 65.

Metzler Vanessa E., The relevance of the fundamental freedoms for DTC's with EEA States, in: Lang/Schuch/Staringer (Eds.), Tax Treaty Law and EC Law, Linde Verlag (2007), p. 265.

Micheau Claire, State aid and taxation in EU law, in: Szyszczak Erika (Ed.), Research Handbook on European State Aid Law, Edward Elgar Publishing Limited (2011).

Mors Matthias, Der Steuerwettbewerb in der EU: Erfahrungen mit dem Verhaltenskodex zur Unternehmensbesteuerung, in: Kellermann/Zitzler (Eds.), Steuern im europäischen Wettbewerb. Unterbieten oder gemeinsam gestalten? (2007).

Müller Johann, The Netherlands in International Tax Planning, Chapter 11: Royalty and interest box, in: Online Books IBFD (Ed.) (2 May 2012).

Nieder Michael, Die Patentverletzung, Materielles Recht und Verfahren, in: Verlag C.H. Beck München (Ed.) (2004), p. 62.

Nordhaus William D., Invention, Growth, and Welfare, A Theoretical Treatment of Technological Change, The M.I.T. Press (Ed.) (1969).

Opilio Antonius, Liechtensteinisches Sachenrecht II: Arbeitskommentar zum

Sachenrecht des Fürstentums Liechtenstein, Edition Europa (Ed.) (2010).

Oppermann Thomas/Classen Claus Dieter/Nettesheim Martin, in: Verlag C.H. Beck (Ed.), Europarecht, 3rd edition (2005).

Pike Christopher, Virtual Monopoly, Building an intellectual property strategy for creative advantage – from patents to trademarks, from copyrights to design rights, Nicholas Brealey Publishing (Ed.) (2001).

Raysman Richard/Pisacreta Edward A./Adler Kenneth A., Intellectual Property Licensing: Forms and Analysis, in: Lslf edition (Ed.), Law Journal Seminars Press (1999).

Reich Markus, Steuerrecht, Schulthess (Ed.) (2012) (cit. *Steuerrecht*).

Rivette Kevin G./Kline David, Rembrandts in the Attic, Unlocking the Hidden Value of Patents, Harvard Business School Press (Ed.) (2000).

Roth Patrick, Grundriss des neuen liechtensteinischen Steuerrechts, GMG AG (Ed.) (2011).

Schmid Gerhard/Schott Markus, Kommentar zu Art. 64 Bundesverfassung, in: Ehrenzeller/Mastronardi/Schweizer/Vallender (Ed.), Die schweizerische Bundesverfassung, Kommentar, 2nd Edition, Dike (2008), p. 1196.

Schramm Carl, Der Patentverletzungsprozess: Patent- und Prozessrecht, Carl Heymanns Verlag Gmbh (Ed.), 6th edition (2010).

Seitz Claudia, Autonomie der Regionen bei Steuerregelungen, Neuere Entwicklungen im Europäischen Beihilferecht und ihre Bedeutung für die Schweiz, in: Ivo Schwander (Ed.), Aktuelle Juristische Praxis, Dike Verlag AG (2007), p. 415.

Teece David J., Managing Intellectual Capital, Organizational, Strategic, and Policy Dimensions, Oxford University Press (Ed.) (2000).

Vallender Klaus A., Leitlinien der Bundesfinanzordnung, in: Ivo Schwander (Ed.), Aktuelle Juristische Praxis, Dike Verlag AG (1999), p. 687 (cit. *Leitlinien*).

Vanhaute Patrick A.A., Belgium in International Tax Planning, Chapter 5: Tax Incentives, in: Online Books IBFD (Ed.) (15.02.2012).

Waldburger Robert, Holding- und Domizilprivileg im Steuerharmonisierungsgesetz, Kantonale Freiräume bei der Ausgestaltung des Holding- und Domizilprivilegs gemäss Art. 28 Abs. 2 bis 5 des Steuerharmonisierungsgesetzes, in: Schriftenreihe der Treuhand-Kammer, Band 146 (1996) (cit. *Holding- und Domizilprivileg im Steuerharmonisierungsgesetz*).

Wanger Markus, Steuergesetz (SteG) 2011: Gesetz über die Landes- und Gemeindesteuern in Liechtenstein – Kommentar mit Gesetzesmaterialien, Volume 15, Wanger Trust Company Ltd. (Ed.) 1st edition (*2011)* (cit. *Kommentar Steuergesetz*).

Wanger Markus, Liechtensteinisches Markenschutzgesetz – Kommentar mit einer Einführung in die EU-Gemeinschaftsmarke, Wanger Trust Company Ltd. (Ed.) (2002) (cit. *Kommentar Markenschutzgesetz*).

Warshofsky Fred, The Patent Wars, The Battle to Own the World's Technology, John Wiley & Sons, Inc. (Ed.) (1994).

Weber Dirk, Technologietransfer im internationalen Konzern, Die steuerliche Lizenz- und F&E-Umlageverrechnung, Erich Schmidt Verlag GmbH & Co. (Ed.) (2003).

WIPO, WIPO Intellectual Property Handbook: Policy, Law and Use, WIPO (Ed.) (2004) (cit. *Handbook*).

Yersin Danielle, Les buts extra-fiscaux assignés aux impôts directs, au regard de quelques principes constitutionnels, in: Höhn/Vallender (Eds.), Steuerrecht im Rechtsstaat, FS Francis Cagianut (1990), p. 47 (cit. *Les buts extra-fiscaux*).

2. Articles

Atkinson Robert D./Andes Scott, Patent Boxes: Innovation in Tax Policy and Tax Policy for Innovation, The Information Technology & Innovation Foundation (ITIF), October 2011.

Baaijens Gaby G./Breuer Almut, Niederlande: Steuerliche Impulse für Forschung und Entwicklung: Die "Innovatiebox" und flankierende Regelungen, Betriebs-Berater, BB 48.2010, 22 November 2010, p. 2932.

Bal Aleksandra, Competition for Research & Development Tax Incentives in the European Union – How an Optimal Research & Development System Should Be Designed, Bulletin for International Taxation, October 2012, p. 573.

Bal Aleksandra/Offermanns René, R&D Tax Incentives in Europe, European Taxation, April 2012, p. 167.

Barten Ernst, Netherlands Patent Research Dev Box, 9 May 2008, available at http://www.twobirds.com/German/News/Articles/Seiten/Netherlands_Patent_Research_Dev_Box.aspx (11 May 2012).

Bartholet Oliver, WTO und Steuern Interdependenzen von WTO-Grundprinzipien und nationalem Steuer- und Abgaberecht, Archiv für Schweizerisches Abgaberecht 72, p. 337.

Benz Rolf, Urteilssprechung: Degressive Steuern sind verfassungswidrig, zsis) 6/07, p. 12.

Cadosch Roger, Switzerland: Taxation of Employment Income – Compliance of Swiss Tax Law with the EC-Swiss Sectoral Agreement on Free Movement of Persons, Intertax, Volume 32, Issue 12, 2004, p. 586.

Cagianut Francis/Cavelti Ulrich, Degressive Steuersätze, Verfassungsrechtliche Überlegungen zu den im revidierten Steuergesetz des Kantons Obwalden festgelegten neuen Steuersätzen sowie grundsätzliche Erwägungen, IFF Forum für Steuerrecht 2006, p. 150.

Cavelti Ulrich, Bemerkungen zum Gutachten über "Lizenzbox des Kantons Nidwalden" von Prof. Dr. iur. Pascal Hinny, available at http://www.fdk-cdf.ch/110719_ustriii_nw-box_stn_cavelti_zu_hinny_def.pdf (11 May 2012) (cit. *Bemerkungen*).

Cavelti Ulrich, Besteuerung nach dem Aufwand, IFF Forum für Steuerrecht 2010, p. 144 (cit. *Besteuerung nach dem Aufwand*).

Chérot Jean-Yves: La Grande Chambre la CJUE donne à la Commission les moyens de mieux lutter au titre des aides d'État contre la concurrence fiscale dommageable, Concurrences: Revue des droits de la concurrence, N° 1-2012, p. 162.

Cops Gerard/De Haen Kurt, Patent tax benefit creates European benchmark, International Tax Review, 1 June 2007.

Cops Gerard/Lemaire Dimitri, Tax optimising your R&D investments: Belgium, a first choice location, Tax Planning International Review, 03/09, p. 12.

Dikmans Sylvia, New Netherlands Corporate Income Tax Provisions for 2007, European Taxation, April 2007, p. 158.

Domínguez Jordi, Amendments to the Corporate Income Tax Act, International Tax Review, 1 July 2007.

Donnat Francis, Chronique annuelle 2011 de jurisprudence de la Cour de justice de l'Union européenne, Revue juridique de l'économie publique, July 2012, p. 1.

Dubout Edouard/Maitrot de la Motte Alexandre, Normalité, sélectivité et légitimité des régimes fiscaux dans l'Union européenne: les paradis fiscaux au purgatoire des aides d'État?, Revue de droit fiscal, 2 February 2012, p. 49.

Engelen Frank, State Aid and Restrictions on Free Movement: Two Sides of the Same Coin? European Taxation, May 2012, p. 206.

Evers Lisa/Miller Helen/Spengel Christoph, Intellectual Property Box Regimes: Effective Tax Rates and Tax Policy Considerations, Discussion Paper No. 13-070, ZEW Centre for European Economic Research, September 2013, available at http://ftp.zew.de/pub/zew-docs/dp/dp13070.pdf (26 September 2013).

Eynatten Wim, European R&D and IP Tax Regimes: A Comparative Study, 36 Intertax 11 (2008), p. 502.

Eynatten Wim/Brauns Patrick, Benelux tax competition to attract IP income is on again, International Tax Review, March 2010.

Felder Marco/Harmann Bernd-Günther, Die Liechtensteinische IP-Box: Kurzkommentierung ausgewählter Aspekte und Ausblick, Liechtensteinische Juristenzeitung 2/13, p. 71.

Freimoser Gregor/Huber Markus Frank/Kubaile Heiko/Ziegler Philipp, Entwicklungen im internationalen Steuerrecht, Steuer Revue 62/2007, p. 394.

Fridensköld Emilie, Bread for stones: Access to justice and the standard of review in general State aid cases, European Law Reporter, No 4, April 2009, p. 126.

Gemma Martinez Bárbara, Advocate General Opinions on Tax Autonomy of European Regions: From the Basque Country Case (1999) to the Gibraltar Case (2011), European Taxation, April 2012, p. 155.

Gjems-Onstad Ole, The EEA Agreement and Taxation, European Taxation, July 1995, p. 210.

Griffith Rachel/Miller Helen/O'Connell Martin, Corporate Taxes and the Location of Intellectual Property, Centre for Economic Policy Research, June 2011 (cit. *Location of Intellectual Property*).

Griffith Rachel/Miller Helen/O'Connell Martin, Corporate Taxes and Intellectual Property: Simulating the Effect of Patent Boxes, Institute for Fiscal Studies (2010) (cit. *Effect of Patent Boxes*).

Groot Koerkamp Susan, New Dutch innovation box regime, Tax Planning International Review, 05/10, p. 39.

Gudmundsson Jon, European Tax Law in the Relations with EFTA Countries, Intertax, Volume 34, Issue 2, 2006, p. 58.

Hausmann Rainer, Roth Philipp, Krummenacher Oliver, Lizenzbox als alternatives Steuermodell zur gemischten Gesellschaft, Besteuerung von Lizenzerträgen unter Berücksichtigung internationaler und europarechtlicher Bestimmungen, Der Schweizer Treuhänder, 1-2/2012, p. 87.

Hendrickx Pierre-Philippe, Déduction pour revenus de brevets: état des lieux critique, Revue Générale de Fiscalité, No 8, October 2010, p. 14.

Hickman Andrew/Rockall Kirsty/Hall Laura, Transfer pricing: the key to the Patent Box, Transfer Pricing International Journal, 02/12, p. 10.

Hinny Pascal, Lizenzbox des Kantons Nidwalden, Rechtliche Prüfung unter Gesichtspunkten des Verfassungs- und Harmonisierungsrechts, IFF Forum für Steuerrecht 2011, p. 138 (cit. *Lizenzbox des Kantons Nidwalden*).

Hinny Pascal, Markenverwertung aus steuerlicher Sicht, SteuerRevue, 3/1998, p. 134 (cit. *Markenverwertung*).

Honold Kersten/Zimmermann Theo, Neue "Lizenzboxlösung" im Kanton

Nidwalden, Tax News Ernst & Young, December 2010.

Horacek Rados, Commission's negative decision on Gibraltar corporation tax reform: findings on regional and material selectivity, Competition Policy Newsletter, Number 2, Summer 2004, p. 97.

Hosp Thomas/Langer Matthias, Die Besteuerung von Immaterialgüterrechten – Wie attraktiv ist die liechtensteinische IP-Box, Praxis Internationale Steuerberatung, 1-2012, p. 16 (cit. *Besteuerung von Immaterialgüterrechten*).

Hurter Thomas, Steuervergünstigungen für Forschung und Entwicklung, Der Schweizer Treuhänder, 8/2011, p. 637.

Idot Laurence, Mesures fiscales et sélectivité matérielle, Europe: Actualité du Droit de l'Union Européenne, January 2012, p. 38.

Jennewein Klaus/Durand Thomas/Gerybadze Alexander, When Brands Complement Patents in Securing the Returns from Technological Innovation: The Case of Bayer Aspirin, Management international / International Management / Gestión Internacional, Volume 14, No 3, 2010, p. 73.

Jung Marcel R., The Switzerland-EC Agreement on the Free Movement of Persons: Measures Equivalent to Those in the EC Treaty – A Swiss Income Tax Perspective, European Taxation, November 2007, p. 508.

Kachinsky Christine/Medallis Charles/Leibsker Frances, The Importance of Global R&D Incentives in the Creation and Use of Intellectual Property, Tax Notes International, 12 October 2009, p. 123.

Kalloe Vinod, Corporate Tax Treatment of Interest: EU State Aid and the EU Code of Conduct as a Means of Combating Harmful Tax Competition, European Taxation, December 2011, p. 504.

Kessler Wolfgang/Eicke Rolf, The Emergence of R&D Tax Regimes in Europe, Tax Notes International, 9 June 2008, p. 845.

Keuschnigg Christian/Ribi Evelyn, Volkswirtschaftliche Analyse der steuerlichen Förderung von Forschung und Entwicklung, Universität St. Gallen, 14 February 2011.

Kociubinski Jakub, Selectivity Criterion in State Aid Control, Wroclaw Review of Law, Administration & Economics, Vol 2:1 2012.

Kohler Stefan/Friedli Lukas, Ergänzende Schutzzertifikate für Arzneimittel, Aktueller Stand der Praxis in der Schweiz, sic!, 2/2011.

Krever Richard, Devising a U.K. Patent Box Regime, Tax Notes International, 1 March 2010, p. 755.

Lang Michael, Das Gibraltar-Urteil des EugH: Neue beihilferechtliche Vorgaben für das Steuerrecht?, ÖStZ 24/2011, Artikel-Nr. 1070, p. 593 (cit. *Das Gibraltar-Urteil*).

Lang Michael, Steuerrecht, Grundfreiheiten und Beihilfeverbot, IStR 15/2010,

p. 570 (cit. *Steuerrecht*).

Leegaard Thor, Impact of the European Economic Area Agreement on Direct Taxation: A Norwegian Perspective, European Taxation, March 2002, p. 110.

Lehmann Christoph/Zanettin Isabelle, Lizenz-Box als Standortmagnet für Forschungsarbeit und innovative Industriebetriebe, PwC Inside Liechtenstein, October 2011, p. 10.

Linder Thomas/Müller Andreas, Steuerliche Anreize für Forschung und Entwicklung, Ein Standortvergleich – Handlungsbedarf der Schweiz, Der Schweizer Treuhänder, 2008/3, p. 146 (cit. *Steuerliche Anreize*).

Linn Alexander, Die Anwendung des Beihilfeverbots im Unternehmenssteuerrecht, IStR/2008, p. 601.

Luja Raymond, Highlights & Insights on European Taxation, 2012/1, p. 98 (cit. *Highlights*).

Luja Raymond, Opinion: Substance over Legal Form: Should (non-) incorporated Businesses be Considered Comparable for Fiscal State Aid Purposes?, European State Aid Law Quarterly, 2/2010, p. 283 (cit. *Opinion*).

Luja Raymond, Taxation of Intra-Group Interest, State Aid and De Facto Selectivity, Working paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1422615&download=yes (8 August 2013) (cit. *Working paper*).

Lüthi Daniel, Schädlicher Steuerwettbewerb, Internationale Bestrebungen zur Bekämpfung schädlicher Steuerpraktiken, Der Schweizer Treuhänder 9/99, p. 841.

Mahalingham Shiv/McFarlane Tom/Hindley Kevin/Oliver Matt, The UK Patent Box Regime, Transfer Pricing International Journal, 09/11, p. 9.

Marti Armin/Küttel Remo, Corporate tax reform: Why Corporate Tax Reform III is essential for Switzerland's future, International Tax Review, 12 March 2013.

Matteotti René/Roth Philipp, Die schweizerische Unternehmensbesteuerung zwischen Kompetivität und Kompatibilität: Enge Handlungsspielräume in einem stark regulierten internationalen Umfeld, in: Economiesuisse, Steuerstandort Schweiz: Herausforderungen und Lösungen, June 2013.

Matute Nárdiz Antonio, Spanish patent box regime: an attractive location for R&D, International Tax Review, 1 April 2008.

Maute Wolfgang/Senn Philip/König Benedikt, Lizenzbox-Modell in Liechtenstein und der Schweiz, Steuer Revue 68/2013, p. 416.

Merks Paulus/Postmus Ed, Patent Box Regime Extended, Tax Notes International, 31 August 2009, p. 721.

Merrill Peter R./Shanahan James R. Jr./Tomé Gómez José Elías/Glon Guillaume/Grocott Paul/Lamers Auke/MacDougall Diarmuid/Macovei Alina/Montredon Rémi/Vanwelkenhuyzen Thierry/Cernat Alexandru/Merriman Stephen/Moore Rachel/Muresan Gregg/Van Den Berghe Pieter/Linczer Andrea, Is It Time for the United States to Consider the Patent Box?, Tax Notes, 26 March 2012, p. 1665.

Micheau Claire, Tax selectivity in State aid review: a debatable case practice, EC Tax Review, 2008/6, p. 276.

Muguet-Poullennec Gwenaël, Répartition et charge de la preuve en matière d'aides d'État, Revue Lamy de la Concurrence, April – July 2012, p. 85.

Müller Andreas/Wenger Jean-David/Linder Thomas, Steuerliche Förderung von F&E in der Schweiz – Nötige Ergänzung zur bestehenden Innovationsförderung, SteuerRevue, Nr. 11/2011, p. 845 (cit. *Steuerliche Förderung*).

Müller Andreas/Gramigna Ralph/Linder Thomas, Forschungsstandort Schweiz – Mehr Attraktivität durch steuerliche Anreize, Konkreter Vorschlag für die Einführung von steuerlichen Förderungsmassnahmen, Der Schweizer Treuhänder, 2008/10, p. 803.

Müller Andreas/Portmann Markus/Schreiber Susanne, Steuerliche Anreize für Finanzierungsaktivitäten, Aktuelle Tendenzen in der EU und neue Ansätze für die Schweiz, in: Treuhand-Kammer, Der Schweizer Treuhänder, 10/2008, p. 820.

Muntendam Frank/Chiarella Jose, New Luxembourg Tax Regime for Intellectual Property Income, European Taxation, May 2008, p. 223.

Munting W.R./Brassem E.A., Is de innovatiebox volwassen geworden?, Kluwer, Weekblad voor Fiscaal Recht, WFR 2010/1482, 25 November 2010, p. 1482.

Nicholls Wendy/Smith Paul, Questions raised on the new UK patent box, International Tax Review, 1 October 2011.

Nouwen Martijn, The Gathering Momentum on International and Supranational Action against Aggressive Tax Planning and Harmful Tax Competition: The State of Play of Recent Work of the OECD and European Union, European Taxation, September 2013, p. 1.

Obrist Thierry, The End of Switzerland's Cantonal Tax Regimes Is Near : What's Next ?, Tax Analysts, 12 August 2013, p. 647.

Obuoforibo Belema R., The Technical Aspects of the UK Patent Box Rules, European Taxation, September 2013, p. 1.

Onkelinx Ivo/Rens Philippe, Les premières décisions anticipées sont publiées, le Fiscologue, 1180, 6 November 2009, p. 3.

Onkelinx Ivo/Van den Berg Pieter, Nouvelle "déduction fiscale pour revenus de brevets", le Fiscologue, 1067, 20 April 2007, p. 1.

Paardekooper Willem Jan/Brassem Edwin/Gommers Edwin, The Netherlands to Introduce 10 Percent Corporate Tax Rate for Patented Intangible Assets, Tax Planning International Review, 10 January 2006, p. 1.

Parillo Kristen A., U.K. Tax Bill Includes CFC Reforms, Patent Box, Tax Notes International, 12 December 2011, p. 770.

Paterno Lisa, State Aid and Fiscal Protectionism in the European Union from the Perspective of Competitors, Bulletin for International Taxation, June 2011, p. 343.

Philipps Kevin/Danes Chris, UK Patent Box: A boost to R&D, Tax Planning International Review, 06/12, p. 7.

Pinto Carlo, EC State Aid Rules and Tax Incentives: A U-Turn in Commission Policy? (Part I), European Taxation, August 1999, p. 295.

Pistone Pasquale, The Growing Importance of the Prohibition of State Aids in Tax Matters, Intertax, Volume 40, Issue 2, 2012, p. 84.

Prendina Dutler Claudia, Ein Blick über die Grenze auf die europäischen Entwicklungen bei der Besteuerung von Immaterialgüterrechten, IFF Forum für Steuerrecht 2013, p. 135.

Probst Thomas, Der Lizenzvertrag: Grundlagen und Einzelfragen, Jusletter, 2 September 2013, p. 1.

Prokisch Rainer, Neue steuerliche Rahmenbedingungen für Forschung und Entwicklung in den Niederlanden, IWB, 6/2010, p. 218.

Reich Markus, Verfassungsrechtliche Beurteilung der partiellen Steuerdegression am Beispiel des Einkommens- und Vermögenssteuertarifs des Kantons Obwalden, Archiv für Schweizerisches Abgaberecht 74, 2005/2006, p. 689 (cit. *Verfassungsrechtliche Beurteilung*).

Reich Markus, Gedanken zur Umsetzung des Steuerharmonisierungsgesetzes, Archiv für Schweizerisches Abgaberecht 62, 1993/94, p. 577 (cit. *Umsetzung Steuerharmonisierungsgesetz*).

Reich Markus, Allgemeinheit der Steuer und Besteuerung nach der wirtschaftlichen Leistungsfähigkeit, Der Schweizer Treuhänder, 4/90, p. 171 (cit. *Allgemeinheit der Steuer*).

Reich Markus, Das Leistungsfähigkeitsprinzip im Einkommenssteuerrecht, in: Archiv für Schweizerisches Abgaberecht 53, 1984/85, p. 5 (cit. *Leistungsfähigkeitsprinzip*).

Reichmann Jerome H., Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement, The International Lawyer, Vol. 29, No. 2 Summer 1995, p. 345.

Reiss Seth M., Commentary on the Paris Convention for the Protection of Industrial Property, World Intellectual Property Rights and Remedies, Oxford University Press and the Center of International Legal Studies, 2008 –

2010.

Rossi-Maccanico Pierpaolo, Gibraltar: Beyond the Pillars of Hercules of Selectivity, European State Aid Law Quarterly, 2/2012, p. 443 (cit. *Beyond the Pillars*).

Rossi-Maccanico Pierpaolo, Prohibited selectivity of business tax measures and tax policy, Academy of European Law, 1 June 2011, p. 205 (cit. *Prohibited Selectivity*).

Rossi-Maccanico Pierpaolo, The Gibraltar Judgment and the Point on Selectivity in Fiscal Aids, EC Tax Review, 2009/2, p. 67 (cit. *Gibraltar Judgment*).

Rossi-Maccancico Pierpaolo, State Aid Review of Business Tax Measures, Proposals for State Aid Control of Direct Business Tax Measures, State Aid Review of Business Tax Measures, EStAL 2/2007, p. 215 (cit. *Proposals*).

Rossi-Maccanico Pierpaolo, Commentary of State Aid Review of Multinational Tax Regimes, A Comprehensive Illustration of Main State Aid Cases, State Aid Review of Multinational Tax Regimes, EStAL, 1/2007, p. 25 (cit. *Commentary*).

Roth Philipp, Der Steuerstreit zwischen der Schweiz und der Europäischen Union, Die Vereinbarkeit der kantonalen Steuerprivilegien mit dem FHA im Licht des Rechts der EU und WTO, Der Schweizer Treuhänder 10/2010, p. 721 (cit. *FHA im Licht des Rechts der EU und WTO*).

Rouenhoff Andre, Erste Analyse des OECD-Diskussionspapiers zur Berücksichtigung von Intangibles bei der Festlegung von Verrechnungspreisen, IStR 17/2012, p. 654.

Schaffner Jean/Manhaeve Katia/Trouiller Florent, Favourable Tax Regime for Intellectual Property Rights: Clarification by a New Circular, European Taxation, July 2009, p. 381.

Schäuble Günter/Giger Reto, Lizenzbox in Nidwalden, Ein Steilpass für andere Kantone und den Bund, Der Schweizer Treuhänder, 10/2010, p. 711.

Schellekens Marnix, The Netherlands as an Innovation Hub: An Appraisal of the Innovation Box Regime, European Taxation, October 2013, p. 525.

Schelling Christoph, Die Unternehmensbesteuerung im Spannungsfeld zwischen internationaler Akzeptanz und Wettbewerbsfähigkeit, Die Volkswirtschaft: Das Magazin für Wirtschaftspolitik, 9/2013, p. 43.

Scheunemann Marc P./Dennisen Andre, Steuerliche Strukturierung von Forschung und Entwicklung im internationalen Konzern, Der Betrieb, Nr. 08, 26 February 2010, p. 408.

Schweizer Mark, Das neue Bundespatentgericht: besser, schneller, billiger?, Jusletter, 12 March 2012.

Service Richard/Blundell Rosemary, Government patent box proposal not as generous as hoped, Tax Planning International European Tax Service,

08/11, p. 19.

Shaheen Salman, British business welcomes changes to patent box, International Tax Review, 10 June 2011.

Siegwart Karine/Felder Daniel, Die sektoriellen Abkommen Schweiz-EG von 1999 und 2004 sowie das Freihandelsabkommen Schweiz-EWG von 1972 in der praktischen Anwendung, Schweizerisches Jahrbuch für Europarecht, 2005/2006, p. 481.

Smit P.M./Van Strien J./Valkenburg J.W., Netherlands Government Bites the Bullet: Fiscal Agenda – Tax Policy and Reform Announcements, Bulletin for International Taxation, September 2011, p. 508.

Sporken Eduard/Gommers Edwin, The Patents Box: Approved and Implemented in the Netherlands, International Transfer Pricing Journal, May/June 2007, p. 198 (cit. *The Patents Box*).

Sporken Eduard/Gommers Edwin, Transfer Pricing Implication of the Proposed Patents Box, International Transfer Pricing Journal, September/October 2006, p. 266 (cit. *Transfer Pricing Implication*).

Springael Brent, "Revenus de brevets": le SDA vient en aide aux PME, le Fiscologue, 1198, 26 March 2010, p. 8 (cit. *Revenus*).

Springael Brent, Revenus "réels" de brevets: où la protection des brevets est-elle requise?, le Fiscologue, 1202, 23 April 2010, p. 6 (cit. *Protection*).

Springael Brent/Van de Velden Kim, Déduction pour revenus de brevets: "FAQ" améliorés, le Fiscologue, 1170, 28 August 2009, p. 2.

Sullivan A. Martin, The Extraordinary Complexity of The U.K. Patent Box, Tax Notes International, 2 January 2012, p. 11.

Sunderman Michiel, Patents Box: Favourable Tax Regime for Income from Intangibles, Derivatives & Financial Instruments, November/December 2007, p. 227.

Szudoczky Rita/Van de Streek Jan L., Revisiting the Dutch Interest Box under the EU State Aid Rules and the Code of Conduct: When a "Disparity" Is Selective and Harmful, Intertax, Volume 38, Issue 5, p. 260.

Temple Lang John, The Gibraltar State Aid and Taxation Judgment – A "Methodological Revolution"?, European State Aid Law Quarterly, 4/2012, p. 805.

Vallender Klaus A., Verfassungsmässiger Rahmen und allgemeine Bestimmungen, Archiv für Schweizerisches Abgaberecht 61, 1992/1993, p. 263 (cit. *Verfassungsmässiger Rahmen*).

Van den Berghe Pieter/Kelley Patrick L., New Patent Deduction in Belgium: A Powerful Incentive, Bulletin for International Taxation, August/September 2008, p. 374.

Van den Hurk Hans, Does the Reach of the European Court of Justice Extend Beyond the European Union, Bulletin for International Fiscal Documentation, June 2002, p. 275.

Van Eck Kasper/Schreuders Kimberly, The Netherlands: The Innovation Box, available at http://www.twobirds.com/English/News/Articles/Pages/The_Netherlands_The_Innovation_Box.Aspx (18 August 2012).

Van Stappen Dirk, Belgium: Patent income deduction stimulates innovation business, International Tax Review, 1 September 2007.

Van Stappen Dirk/Delanoy Andres/De Groote Yves, New Patent Taxation Regime: Patent Income Deduction Creates Opportunities for Innovative Companies, International Transfer Pricing Journal, September/October 2007, p. 291.

Vils Hans/Bürkler Markus, Das neue Liechtensteiner Steuergesetz – europäisch anerkannt, KPMG, Tax, July 2011.

Warson Eric/Foriers Manuella, The Belgian Patent Income Deduction, European Taxation, February 2008, p. 70.

Warson Eric/Glaes Ruth, The Belgian Patent Income Deduction, European Taxation, July 2010, p. 319.

Warson Eric/Van Ende Koen, Belgium: Research and development: Belgian tax opportunities, International Tax Review, 3 January 2012.

Wattel Peter J., Forum: Interaction of State Aid, Free Movement, Policy Competition and Abuse Control in Direct Tax Matters, World Tax Journal, Volume 5, No. 1, 7 February 2013.

Wegener Jessen Pernille, State Aid and Taxation in Relation with Third Countries, Intertax, Volume 40, Issue 2, p. 132.

Wenz Martin, Steuerstandort Liechtenstein: Konzept zur Totalrevision des Steuergesetzes, liechtenstein-journal, 3/2009, p. 87.

Wenz Martin/Linn Alexander, The Liechtenstein Tax Reform from the Perspective of Community Law, European State Aid Law Quarterly, 4, 2009, p. 453.

Yersin Danielle, Steuerharmonisierung und kantonales Recht, Archiv für Schweizerisches Abgaberecht 64, 1995/96, p. 97 (cit. *Steuerharmonisierung*).

Zurkinden Philipp E., Der merkwürdige "Entscheid" der EU-Kommission, in: Neue Zürcher Zeitung, Recht im Spiegel der NZZ, Nr. 69, 23 March 2007, p. 19.

List of Materials

1. Judicature

I. Europe

ECJ, 15 November 2011, Joined Cases C-106/09 P and C-107/09 P, European Commission v Government of Gibraltar, ECR I-00000 (cit. *Joined Cases C-106/09 P and C-107/09 P*).

ECJ, Judgment in Joined Cases C-106/09 and C-107/09, Press Release No 120/11, 15 November 2011 (cit. *Joined Cases C-106/09 and C-107/09, Press Release)*.

ECJ, 8 September 2011, Joined Cases C-78/08 to C-80/08, Paint Graphos and Others, ECR 2011 I-07611 (cit. *Joined Cases C-78/08 to C-80/08*).

ECJ, 8 September 2011, Case C-279/08 P, European Commission v. Kingdom of the Netherlands, ECR 2011 I-07671 (cit. *Case C-279/08 P*).

ECJ, 17 November 2009, Case C-169/08, Presidente del Consiglio del Ministri, ECR 2009 I-10821 (cit. *Case C-169/08*).

ECJ, 22 December 2008, Case C-487/06 P, British Aggregates Association v. Commission of the European Communites and United Kingdom, ECR 2008 I-10515 (cit. *Case C-487/06 P*).

ECJ, 13 March 2008, Case C-248/06, Commission of the European Communities v. Kingdom of Spain, ECR 2008 I-00047 (cit. *Case C-248/06*).

ECJ, 6 September 2006, Case C-88/03, Portuguese Republic v Commission, ECR 2006 I-07115 (cit. *Case C-88/03*).

ECJ, 22 June 2006, Joined Cases C-182/03 and C-217/03, Kingdom of Belgium and Forum 187 ASBL v Commission, ECR 2006 I-05479 (cit. *Joined Cases C-182/03 and C-217/03*).

ECJ, 10 January 2006, Case C-222/04, Cassa di Risparmio di Firenze and Others, ECR 2006 I-00289 (cit. *Case C-222/04*).

ECJ, 21 April 2005, Joined Cases C-207/03 and C-252/03, Novartis AG, University College London and Institute of Microbiology and Epidemiology v Comptroller-General of Patents, Designs and Trade Marks for the United Kingdom (C-207/03) and Ministre de l'Économie v Millennium Pharmaceuticals Inc. (C-252/03), ECR 2005 I-03209 (cit. *Joined Cases C-207/03 and C-252/03*).

ECJ, 10 March 2005, Case C-39/04, Laboratoires Fournier SA v. Direction des verifications nationales et internationals, ECR 2005 I-02057 (cit. *Case C-39/04*).

ECJ, 3 March 2005, Case C-172/03, Heiser, ECR 2005 I-01627 (cit. *Case C-172/03*).

ECJ, 29 April 2004, Case C-308/01, GIL Insurance v Commissioners of Customs & Excise, ECR 2004 I-04777 (cit. *Case C-308/01*).

ECJ, 23 September 2003, Case C-452/01, Ospelt and Schlössle Weissenberg Familienstiftung, ECR 2003 I-09743 (cit. *Case C-452/01*).

ECJ, 22 November 2001, Case C-53/00, Ferring SA v ACOSS, ECR 2001, I-09067 (cit. *Case C-53/00*).

ECJ, 8 November 2001, Case C-143/99, Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke v Finanzlandesdirektion für Kärnten, ECR 2001 I-08365 (cit. *Case C-143/99*).

ECJ, 13 March 2001, Case C-379/98, Preussen Elektra, ECR 2001 ECR I-2099 (cit. *Case C-379/98*).

ECJ, 19 September 2000, Case C-156/98, Germany v Commission, ECR 2000 I-06857 (cit. *Case C-156/98*).

ECJ, 8 July 1999, Case C-254/97, Société Baxter and Others v. Premier Ministre, ECR 1999 I-04809 (cit. *Case C-254/97*).

ECJ, 17 June 1999, Case C-75/97, Belgium v Commission, ECR 1999 I-03671 (cit. *Case C-75/97)*.

ECJ, 14 September 1994, Joined Cases C-278/92, C-279/92 and C-280/92, Spain v Commission, ECR 1994 I-4103 (cit. *Joined Cases C-278/92, C-279/92 and C-280/92*).

ECJ, 1 July 1993, Case C-312/91, Metalsa Srl., ECR 1993 p. I-03751 (cit. *Case C-312/91*).

ECJ, 16 July 1992, Case C-163/90, Administration des Douanes et Droits Indirects v Léopold Legros and others, ECR 1992 p. I-04625 (cit. *Case C-163/90*).

ECJ, 14 October 1987, Case C-248/84, Germany v Commission, ECR 1987 p. 04013 (cit. *Case C-248/84*).

ECJ, 26 October 1982, Case C-104/81, Hauptzollamt Mainz v C.A. Kupferberg & Cie KG, ECR 1982 p. 03641 (cit. *Case C-104/81*).

ECJ, 29 April 1982, Case C-17/81, Pabst & Richarz KG v Hauptzollamt Oldenburg, ECR 1982 p. 01331 (cit. *Case C-17/81*).

ECJ, 9 February 1982, Case C-270/80, Polydor Limited and RSO Records Inc. V Harlequin Records Shops Limited and Simons Records Limited, ECR 1982 p. 00329 (cit. *Case C-270/80*).

ECJ, 17 September 1980, Case 730/79, Philip Morris v Commission, ECR 1980 p. 02671 (cit. *Case 730/79*).

ECJ, 2 July 1974, Case 173/73, Italy v Commission, ECR 1974 p. 00709 (cit. *Case 173/73*).

EFTA Court, 26 June 2007, Case E-2/06, ESA v Norway, ECR 2007, p. 164 (cit. *Case E-2/06*).

EFTA Court, 23 November 2004, Case E-1/04, Fokus Bank A SA, ECR 2004, p. 11 (cit. *Case E-1/04*).

EFTA Court, 12 December 2003, Case D-1/03, ESA v Iceland, ECR 2003, p. 143 (cit. *Case D-1/03*).

EFTA Court, 10 December 1998, Case E-3/98, Herbert Rainford-Towning, ECR 1998, p. 205 (cit. *Case E-3/98*).

EGC, 18 December 2008, Cases T-211/04 and T-215/04, Governement of Gibraltar v Commission of the European Communities, ECR 2008 II-03745 (cit. *Joined Cases T-211/04 and T-215/04*).

EGC, Judgment in Joined Cases T-211/04 and T-215/04, Press Release No 99/08, 18 December 2008 (cit. *Joined Cases T-211/04 and T-215/04, Press Release*).

EGC, 26 January 2006, Case T-92/02, Stadtwerke Schwäbisch Hall v Commission, ECR 2006 II-00011 (cit. *Case T-92/02*).

EGC, 22 January 1997, Case T-115/94, Opel Austria GmbH v Council of European Union, ECR 1197 II-00039 (cit. *Case T-115/94*).

Opinion of Advocate General Jääskinen, 7 April 2011, Joined Cases C-106/09 P and C-107/09 P, European Commission v Government of Gibraltar, ECR I-00000.

Opinion of the Court, 14 December 1991, Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, ECR 1991 p. I-06079 (cit. *Opinion of the Court 1/91*).

II. Liechtenstein

Staatsgerichtshof des Fürstentums Liechtenstein, 1 July 2011, StGH 2011/13, Aufhebung des Artikels 33 Abs. 1 der Steuerverordnung (cit. *Liechtenstein Constitutional Court, StGH 2011/13*).

III. Switzerland

Eidgenössische Rekurskommission für Infrastruktur und Umwelt, 20 October 2005, H-2004-174, Urs Saxer v Die Schweizerische Post (cit. *H-2004-174*).

Schweizerisches Bundesgericht, 1 June 2007, 2P.43/2006, Halter-Durrer und

Mitbeteiligte v Kanton Obwalden, Verfassungsmässigkeit der degressiven Obwaldner Steuertarife (cit. *BGE 133 I 206*).

Schweizerisches Bundesgericht, 8 March 2005, 1A.71/2004, Sonderabfallverwertungs-AG, SOVAG v Bundesamt für Umwelt, Wald und Landschaft (BUWAL) sowie Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation (UVEK) (cit. *BGE 113 II 271*).

Schweizerisches Bundesgericht, 8 December 1998, 114 Ia 221, Willy Müller v Kanton Basel-Landschaft (cit. *BGE 114 Ia 221*).

Schweizerisches Bundesgericht, 24 May 1996, BGE 122 I 101, E.M. v Kantonale Steuerverwaltung St. Gallen und Verwaltungsgericht St. Gallen (cit. *BGE 122 I 101*).

Schweizerisches Bundesgericht, 9 December 1988, BGE 114 Ia 321, Electra Massa und 21 Mitbeteiligte v Kanton Wallis (cit. *BGE 114 Ia 321*).

Schweizerisches Bundesgericht, 25 January 1979, BGE 105 II 49, Bosshard Partners Intertrading AG v Sunlight AG (cit. *BGE 105 II 49*).

2. Laws and authority publications

I. Belgium

Code des impôts sur les revenues 1992.

Code des sociétés du 7 mai 1999.

Loi sur les brevets d'invention du 28 mars 1984.

II. Liechtenstein

Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, OJ L 344, 31 January 1994 and EFTA States' official gazettes (cit. *SCA*).

Agreement on the European Economic Area, OJ No L 1, 3 January 1994, p. 3 and EFTA States' official gazettes (cit *EEA Agreement*).

Agreement on Trade-Related Aspects of Intellectual Property Rights (cit. *TRIPS Agreement*).

Amt für Volkswirtschaft, Design, available at http://www.llv.li/amtsstellen/llv-avw-immaterialgueterrecht/llv-avw-immaterialgueterrecht-design.htm (21 July 2012) (cit. *Design*).

Amt für Volkswirtschaft, Marken, available at http://www.llv.li/amtsstellen/llv-avw-immaterialgueterrecht/llv-avw-immaterialgueterrecht-marken.htm

(21 July 2012) (cit. *Marken*).

Bericht und Antrag der Regierung an den Landtag des Fürstentums Liechtenstein betreffend die Abänderung des Steuergesetzes sowie Postulatsbeantwortung zur Einführung eines neuen Grenzsteuersatzes für Spitzenverdiener (cit. *Liechtenstein Government, Report and Application No 139/2012*).

Bericht und Antrag der Regierung an den Landtag des Fürstentums Liechtenstein betreffend die Abänderung des Steuergesetzes, Nr. 123/2011, 31 October 2011 (cit. *Liechtenstein Government, Report and Application No 123/2011*).

Bericht und Antrag der Regierung an den Landtag des Fürstentums Liechtenstein betreffend die Totalrevision des Gesetzes über die Landes- und Gemeindesteuern (Steuergesetz; SteG) sowie Abänderung weiterer Gesetze, Nr. 48/2010, 4 May 2010 (cit. *Liechtenstein Government, Report and Application No 48/2010*).

Berne Convention for the Protection of Literary and Artistic works, revised at Stockholm on 14 July 1967 (cit. *Berne Convention*).

Convention on the Grant of European Patents of 5 October 1973 (cit. *European Patent Convention*).

Abkommen zwischen dem Fürstentum Liechtenstein und der Bundesrepublik Deutschland zur Vermeidung der Doppelbesteuerung und der Steuerverkürzung auf dem Gebiet der Steuern vom Einkommen und vom Vermögen (cit. *DTA Liechtenstein-Germany*).

EFTA Surveillance Authority, State aid: Liechtenstein tax rules on revenues from intellectual property rights approved, Press release (12)81, 12 December 2012 (cit. *State Aid*).

EFTA Surveillance Authority, Decision of 12 December 2012 on Article 55 of the Liechtenstein tax act, 480/12/COL, Not yet published in OJ (cit. *480/12/COL*).

EFTA Surveillance Authority, Decision of 1 June 2011 on tax deductions in respect of intellectual property rights, OJ C 278, 22 September 2011 (cit. *OJ C 278*).

EFTA Surveillance Authority, Decision of 30 June 1999 introducing guidelines on the application of state aid rules to measures relating to direct business taxation and amending for the 19th time the Procedural and Substantive Rules in the field of state aid, OJ L 137/20, 8 June 2000 (cit. *OJ L 137/20*).

Einführungs-Gesetz vom 13. Mai 1924 zum Zollvertrag mit der Schweiz vom 29. März 1923 (cit. *Introductory Law for the Customs Treaty*, *EGZV*).

Ergänzungsvereinbarung zwischen dem Fürstentum Liechtenstein und der Schweizerischen Eidgenossenschaft zum Vertrag vom 22. Dezember 1978 über den Schutz der Erfindungspatente (cit. *Supplementary Agreement*).

Finanzgesetz vom 22. November 2012 für das Jahr 2013 (cit. *Finance Act for the Year 2013*).

Finanzgesetz vom 24. November 2011 für das Jahr 2012 (cit. *Finance Act for the Year 2012*).

Gesetz vom 24. April 2013 über die Abänderung des Steuergesetzes, Liechtenstein Law Gazette, Year 2013, No 202, published on 31 May 2013 (cit. *Amended Tax Act*).

Gesetz vom 23. September 2010 über die Landes- und Gemeindesteuern, Liechtenstein Law Gazette, Year 2010, No 340, published on 18 November 2010 (cit. *Tax Act*).

Gesetz vom 11. September 2002 über den Schutz von Design (cit. *Design Act*).

Gesetz vom 19. Mai 1999 über das Urheberrecht und verwandte Schutzrechte (cit. *Copyright Act*).

Gesetz vom 19. Mai 1999 über den Schutz von Topographien von Halbleitererzeugnissen (cit. *Topography Act, ToG*).

Gesetz vom 18. Dezember 1997 über den Verkehr mit Arzneimitteln sowie den Umgang mit menschlichen Geweben und Zellen im Europäischen Wirtschaftsraum (cit. *EEA Medicinal Products Act, EEA-AMG*).

Gesetz vom 12. Dezember 1996 über den Schutz von Marken und Herkunftsangaben (cit. *Trademark Protection Act*).

Kundmachung vom 3. April 2012 der aufgrund des Patentschutzvertrages im Fürstentum Liechtenstein anwendbaren schweizerischen Rechtsvorschriften (Anlagen I und II) (cit. *Announcement regarding Swiss provisions applicable in Liechtenstein because of Patent Treaty*).

Landtag des Fürstentums Liechtenstein, Landtag April 2013, Decisions item 12, available at http://www.landtag.li/default.aspx?newsid=-1&news=44758 (12 May 2013) (cit. *Landtag 2013*).

Landtag des Fürstentums Liechtenstein, Landtag April 2012, Agenda item 2, available at http://www.landtag.li/default.aspx?newsid=-1&news=44758 (12 May 2013) (cit. *Landtag 2012*).

Paris Convention for the Protection of Industrial Property, revised at Stockholm on 14 July 1967 (cit. *Paris Convention*).

Personen- und Gesellschaftsrecht, Government Legal Services (Ed.) (2010) (cit. *Law on Persons and Companies, PGR*).

Sachenrecht vom 31. Dezember 1992 (cit. *Property Law, SR*).

Stellungnahme der Regierung an den Landtag des Fürstentums Liechtenstein zu den anlässlich der ersten Lesung betreffend die Änderung des Steuergesetzes sowie Postulatsbeantwortung zur Einführung eines neuen Grenzsteuersatzes für Spitzenverdiener aufgeworfenen Fragen, Nr. 5/2013, 12 March

2013 (cit. *Liechtenstein Government, Statement No 5/2013*).

Stellungnahme der Regierung an den Landtag des Fürstentums Liechtenstein zu den anlässlich der ersten Lesung betreffend die Änderung des Steuergesetzes aufgeworfenen Fragen, Nr. 21/2012, 7 March 2012 (cit. *Liechtenstein Government, Statement No 21/2012*).

Stellungnahme der Regierung an den Landtag des Fürstentums Liechtenstein zu den anlässlich der ersten Lesung betreffend die Totalrevision des Gesetzes über die Landes- und Gemeindesteuern (Steuergesetz; SteG) sowie die Abänderung weiterer Gesetze aufgeworfenen Fragen, Nr. 83/2010, 24 August 2010 (cit. *Liechtenstein Government, Statement No 83/2010*).

Steuerverwaltung des Fürstentums Liechtenstein, Steuererklärungen, available at http://www.llv.li/llv-stv-steuererklaerungen (30 July 2012) (cit. *Steuererklärungen*).

Steuerverwaltung des Fürstentums Liechtenstein, Wegleitung zur Steuererklärung 2011 für juristische Personen *(cit. Wegleitung juristische Personen*).

Steuerverwaltung des Fürstentums Liechtenstein, Wegleitung zur Steuererklärung 2011 für natürliche Personen (cit. *Wegleitung natürliche Personen*).

Steuerverwaltung des Fürstentums Liechtenstein, Merkblatt betreffend verbindlichen steuerlichen Vorbescheiden, available at http://www.llv.li/pdf-llv-stv-stv_mb_rulings.pdf (25.07.2012) (cit. *Merkblatt*).

Vernehmlassungsbericht der Regierung betreffend die Abänderung des Steuergesetzes, 18 September 2012, RA 2012/1856-0701 (cit. *Liechtenstein Government, Consultation Report RA 2012/1856-0701*).

Verordnung vom 26. Februar 2013 über die Abänderung der Steuerverordnung, Liechtenstein Law Gazette, Year 2013, No 108, published on 28 February 2013 (cit. *Amended Tax Ordinance*).

Verordnung vom 21. Dezember 2010 über die Landes- und Gemeindesteuern, Liechtenstein Law Gazette, Year 2010, No 437, published on 29 December 2010 (cit. *Tax Ordinance*).

Vertrag vom 22. Dezember 1978 zwischen dem Fürstentum Liechtenstein und der Schweizerischen Eidgenossenschaft über den Schutz der Erfindungspatete (cit. *Supplementary Agreement to the Patent Treaty*).

III. Luxembourg

Administration des contributions directes, Charge fiscale globale des collectivités, available at http://www.impotsdirects.public.lu/az/c/charg_fisc/index.html (7 February 2013) (cit. *Charge fiscale*).

Administration des contributions directes, Circulaire du directeur des contributions, Exonération partielle des revenus produits par certains droits de propriété intellectuelle, 5 March 2009 (cit. *Circulaire*).

Loi d'adaptation fiscale du 16 octobre 1934 (cit. *Tax Adjustment Act*).Loi générale des impôts du 22 mai 1931 (cit. *General Tax Code*).

Loi portant règlement de procédure devant les juridictions administratives du 21 juin 1999 (cit. *Rules of Procedure before Administrative Courts*).

Loi sur les droits d'auteur, les droits voisins et les bases de données du 18 avril 2001 (cit. *Law on Copyrights, Neigbouring Rights and Databases, Copyright Act*).

Loi sur l'évaluation des biens et valeurs du 16 octobre 1934 (cit. *Valuation Act*).

IV. Netherlands

Algemene wet inzake rijksbelastingen (cit. *National Tax Act*).

Besluit voorkoming dubbele belasting 2001.

Ministry of Finance, 2010 Tax Plan: More enterprise, and fewer barriers to enterprise, Newsrelease, 15 September 2009.

Wet inkomstenbelasting 2001 (cit. *Personal Income Tax Act).*

Wet op de vennootschapsbelasting 1969 (cit. *Corporate Income Tax Act*).

V. Switzerland

Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972, OJ 300, 31 December 1972, p. 189 (cit. *Agreement between the European Economic Community and the Swiss Confederation 1972*).

Botschaft des Bundesrates an die Bundesversammlung über die neuen Bildungs- und den Forschungsartikel der Bundesverfassung (Art. 27, 27bis und 27quater vom 19. Januar 1972 (cit. *Botschaft Art. 27 Bundesverfassung*)

Bundesgesetz über Arzneimittel und Medizinprodukte (Heilmittelgesetz, HMG) vom 15. Dezember 2000 (cit. *Therapeutic Products Act*).

Bundesgesetz über die direkte Bundessteuer vom 14. Dezember 1990 (cit. *Direct Tax Act, FTL*).

Bundesgesetz über die Harmonisierung der direkten Steuern der Kantone und Gemeinden vom 14. Dezember 1990 (cit. *Tax Harmonisation Act, FTHL*).

Bundesgesetz über die Erfindungspatente (Patentgesetz, PatG) vom 25. Juni 1954 (cit. *Patent Act*).

Bundesratsbeschluss vom 14. Dezember 1962 betreffend Massnahmen gegen die ungerechtfertigte Inanspruchnahme von Doppelbesteuerungsabkommen des Bundes (cit. *BRB 1962*).

Eidgenössisches Finanzdepartement (EFD), Bund und Kantone wollen mit der Reform der Unternehmensbesteuerung den Standort Schweiz stärken, 17 May 2013, available at www.admin.ch (23 June 2013) (cit. *Stärkung Stand-*

ort Schweiz mit Reform der Unternehmensbesteuerung).

Eidgenössisches Finanzdepartement (EFD), Massnahmen zur Stärkung der steuerlichen Wettbewerbsfähigkeit (Unternehmenssteuerreform III), Zwischenbericht des Steuerungsorgans zuhanden des EFD, 7 May 2013 (cit. *Zwischenbericht USTR III*).

Eidgenössisches Finanzdepartement (EFD), Faktenblatt Steuerdialog Schweiz – EU, Das Wichtigste in Kürze, available at www.admin.ch (23 June 2013) (cit. *Faktenblatt Steuerdialog Schweiz – EU*).

Eidgenössisches Finanzdepartement (EFD), Steuerdialog Schweiz – EU, 14 January 2013; available at www.admin.ch (23 June 2013) (cit. *Steuerdialog Schweiz – EU*).

Eidgenössisches Finanzdepartement (EFD), Company taxation: dialogue with the EU, 4 July 2012, available at www.admin.ch (23 June 2013) (cit. *Company taxation: dialogue with the EU*).

Eidgenössisches Finanzdepartement (EFD), Federal Council adopts mandate text on EU dialogue on corporate tax regimes, 1 June 2012, available at www.admin.ch (23 June 2013) (cit. *Federal Council adopts mandate text on EU dialogue*).

Eidgenössisches Finanzdepartement (EFD), Staatliche Beihilfen an Unternehmen: Unternehmensbesteuerung und Steuerwettbewerb – Entwicklungen in der Europäischen Union, Bericht des Bundesrates in Erfüllung des Postulats 07.3003, 7 November 2007 (cit. *Staatliche Beihilfen an Unternehmen*).

Eidgenössisches Finanzdepartement (EFD), Switzerland considers the decision of the European Commisson to be unfounded – no infringement of Free Trade Agreement by cantonal tax provisions, 13 February 2007, available at www.admin.ch (23 June 2013) (cit. *No infringement of FTA*).

Gesetz über die Steuern des Kantons und der Gemeinden vom 22. März 2000 (cit. *Steuergesetz Nidwalden*, *Tax Act*).

Kanton Nidwalden, Landrat, Protokoll Sitzung, 3 February 2010 (cit. *Landrat*).

Kanton Nidwalden, Regierungsrat, Gesetz über die Steuern des Kantons und der Gemeinden, Änderung Ergebnis der Vernehmlassung, 27 October 2009 (cit. *Regierungsrat*).

Kantonales Steueramt Nidwalden, Richtlinie zur Besteuerung von Lizenzerträgen, 17 January 2011.

Kantonsrat/Parlament Kanton Luzern, Kottmann Raphael, P 203 – Postulat, Einführung einer Lizenzbox-Regelung (IPR-Box) bei der Besteuerung von Lizenzverträgen von juristischen Personen, 19 June 2012.

Kreisschreiben ESTV vom 1. August 2010 bezüglich des Verhältnisses zwischen Missbrauchsbestimmungen im Doppelbesteuerungsabkommen und BRB 1962 (cit. *KS ESTV 1. August 2010*).

Kreisschreiben ESTV vom 19 März 2004 betreffend Besteuerung von Dienstleistungsgesellschaften (cit. *KS ESTV 19. März 2004)*.

Kreisschreiben ESTV vom 17. Dezember 1998 bezüglich der Anwendung der Missbrauchsvorschriften ("BRB 1962") auf aktiv tätige, börsenkotierte und Holdinggesellschaften (cit. *KS ESTV 17. Dezember 1998*).

Kreisschreiben ESTV vom 31. Dezember 1962 betreffend Massnahmen gegen die ungerechtfertigte Inanspruchnahme von Doppelbesteuerungsabkommen des Bundes (cit. *KS ESTV 31. Dezember 1962*).

Schweizer Parlament, Maier Thomas, 12.447 – Parlamentarische Initiative, Steuersystem umbauen, Innovation fördern, Standort Schweiz stärken, 14 June 2012 (cit. *Initiative Maier*).

Schweizer Parlament, Kommission für Wirtschaft und Abgaben NR (08.3853), 10.3894 – Postulat, Steuerliche Fördermassnahmen im Bereich der Forschung und Entwicklung, 22 November *2010 (cit. Postulat WAK-N*).

Schweizer Parlament, Hurter Thomas, 10.3233 – Motion, Forschung und Entwicklung in der Schweiz stärken, 19 March 2010 (cit. *Motion Hurter*).

Schweizer Parlament, Noser Ruedi, 08.3853 – Motion, Einführung von steuerlichen Fördermassnahmen zur Stärkung des Forschungsstandortes Schweiz, 17 December 2008 (cit. *Motion Noser*).

Schweizerische Eidgenossenschaft, Neuordnung der Verfassungsbestimmungen zur Bildung, Volksabstimmung vom 21. Mai 2006, Erläuterungen des Bundesrates (cit. *Neuordnung Verfassungsbestimmungen*).

Verordnung über die pauschale Steueranrechnung vom 22. August 1967.

Vollzugsverordnung zum Gesetz über die Steuern des Kantons und der Gemeinden vom 19. Dezember 2000 (cit. *Steuerverordnung Nidwalden*, *Nidwalden Tax Ordinance*).

VI. United Kingdom

Consultation draft, Schedule 1 – Profits Arising from the Exploitation of Patents etc, Part 1 – Amendments of CTA 2010 (cit. *Consultation draft*).

Finance (No. 4) Bill, Schedule 2 – Profits arising from the exploitation of patents etc, Part 1 – Amendments of CTA 2010 (cit. *Finance (No. 4) Bill*).

HM Revenue & Customs, The Patent Box: Technical Note and Guide to the Finance Bill 2012 clauses, 29 March 2012 (cit. *Finance Bill 2012*).

HM Revenue & Customs, The Patent Box: Technical Note and Guide to the Draft Legislation, 6 December 2011 (cit. *Draft Legislation*).

HM Treasury, Patent Box, available at http://www.hm-treasury.gov.uk/patent_box.htm (2 April 2012) (cit. *Patent Box*).

HM Treasury/HM Revenue & Customs, Consultation on the Patent Box, June

2011 (cit. *Consultation*).

HM Treasury/HM Revenue & Customs, Corporate Tax Reform: Delivering a More Competitive Systems, 11 January 2011 (cit. *Corporate Tax Reform*).

3. IBFD Tax Research Platform

I. Belgium

Offermanns René, Draft law containing fiscal and financial measures presented to Lower House, IBFD Tax Research Platform (26 April 2013) (cit. *Draft Law*).

Offermanns René/Michel Bob, Belgium, Corporate Taxation, Country Surveys, 1. Corporate Income Tax (21 June 2012).

Offermanns René/Michel Bob/Vanhaute Patrick, Belgium, Corporate Taxation, Country Analyses, 1. Corporate Income Tax (21 June 2012).

II. Liechtenstein

Felder Marco, Liechtenstein, Corporate Taxation, Country Surveys, 1. Corporate Income Tax (18 July 2012) (cit. *Country Survey*).

III. Luxembourg

Bardini Chiara/Lambion Michel, Luxembourg, Corporate Taxation, Country Analyses, 1. Corporate Income Tax (21 May 2012).

O'Neal James/Molitor Uljana, Luxembourg, Corporate Taxation, Country Surveys, 1. Corporate Income Tax (21 May 2012).

IV. Netherlands

European Union, News, EU Commission approves Dutch patent box regime while further investigates group interest box (2 May 2012) (cit. *IBFD News about EU Commission Approval*).

Offermanns René, Netherlands, Corporate Taxation, Country Surveys, Corporate Income Tax (29 April 2012) (cit. *Netherlands Country Survey*).Offermanns René, Netherlands, Corporate Taxation, Country Analyses, 1. Corporate Income Tax (18 July 2012) (cit. *Netherlands Country Analysis*).

Netherlands, News, Application of Netherlands patent box clarified (2 May 2012) (cit. *IBFD News about Patent Box Application*).

V. Tax News Service

Michel Bob, IFA 67th Congress in Copenhagen, Seminar F: IFA/OECD – Base erosion and profit shifting (BEPS), 29 August 2013 (cit. *Tax News Service BEPS*).

4. Other

I. European Union

Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972, OJ 300, 31 December 1972, p. 189 (cit. *Agreement between the European Economic Community and the Swiss Confederation 1972*).

Commission, Community framework for state aid for research and development and innovation, OJ C 323/01, 30 December 2006 (cit. *Framework for State Aid*).

Commission Decision, 26 January 2011, State aid C 7/10 (ex CP 250/09 and NN 5/10), Scheme for the carry-forward of tax losses in the case of restructuring of companies in difficulty (Sanierungsklausel), C(2011) 275, OJ L 235, 10 September 2011 (cit. *Sanierungsklausel*).

Commission Decision on the Groepsrentebox Scheme, 8 July 2009, No C4/2007 (ex N 465/2006)), C(2009)4511 final (cit. *Groepsrentebox Scheme*).

Commission Decision, 13 February 2008, State aid N 470/2007, Spain – The reduction of tax from intangible assets, C(2008)467 final, OJ C 80, 1 April 2008 (cit. *Intangible Assets*).

Commission Decision, 13 February 2007, Incompatibility of certain Swiss company tax regimes with the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972, C(2007) 411 final (cit. *Incompatibility of certain Swiss company tax regimes under FTA 1972*).

Commission Decision, 22 September 2004, State aid N 354/2004 – Ireland Company Holding Regime, C(2004)3498 fin, OJ C 131, 28 May 2005 (cit. *Ireland Company Holding Regime*).

Commission Decision, 30 March 2004, Gibraltar corporation tax reform, 2005/261/EC, OJ L 85, 2 April 2005 (cit. *Gibraltar Corporation Tax Reform*).

Commission Decision, 11 December 2002, Adapting national tax system to the

specific charateristics of the Autonomous Region of the Azores, 2003/442/EC, OJ L 150, 18 June 2003 (cit. *Autonomous Region of the Azores*).

Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Promoting Good Governance in Tax Matters, COM(2009) 201 final, 28 April 2009 (cit. *Good Governance*).

Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, Towards a more effective use of tax incentives in favour of R&D, COM(2006) 728 final, 22 November 2006 (cit. *Tax Incentives*).

Commission of the European Communities, State Aid Action Plan, Less and better targeted state aid: a roadmap for state aid reform 2005 – 2009, COM(2005) 107 final, 7 June 2005 (cit. *State Aid Action Plan*).

Commission of the European Communities, Report on the implementation of the Commission notice on the application of the state aid rules to measures relating to direct business taxation, C(2004)434, 9 February 2004 (cit. *Implementation Report*).

Commission of the European Communities, Communication from the Commission, Investing in research: an action plan for Europe, COM(2003) 226 final/2, 4 June 2003 (cit. *Investing in Research*).

Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, A package to tackle harmful tax competition in the European Union, COM(97) 564 final, 5 November 1997 (cit. *Package*).

Commission of the European Communities, Communication from the Commission to the Council, Towards tax co-ordination in the European Union, A package to tackle harmful tax competition, COM(97) 495 final, 1 October 1997 (cit. *Tax Co-ordination*).

Commission of the European Communities, Taxation in the European Union, Report on the Development of Tax Systems, COM(96) 546 final, 22 October 1996 (cit. *Tax Systems*).

Commission of the European Communities, Taxation in the European Union, SEC(96) 487final, 20 March 1996 (cit. *EU Taxation*).

Commission notice on the application of the state aid rules to measures relating to direct business taxation, C 384/3, 10 December 1998 (cit. *Notice on the Application of State Aid Rules*).

Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Ar-

ticles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214/3, 9 August 2008 (cit. *General Block Exemption Regulation*) .

Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 83/47, 30 March 2010 (cit. *Treaty on the Functioning of the EU*).

Council, Conclusions of the ECOFIN Council Meeting on 1 December 1997 concerning taxation policy, OJ C 2, 6 January 1998 (cit. *ECOFIN Meeting Conclusions*).

Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments.

Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.

Council of the European Union, Report of the Code of Conduct Group (Business Taxation) to the Council, 10903/12, FISC 77, 11 June 2012 (cit. *Code of Conduct Report June 2012*).

Council of the European Union, Report from Code of Conduct Group (Business Taxation) to Council, 17081/1/11 REV 1, FISC 144, 13 December 2011 (cit. *Code of Conduct Report December 2011*).

Council of the European Union, Report from Code of Conduct Group (Business Taxation) to Council, 17081/11, FISC 144, 21 November 2011 (cit. *Code of Conduct Report November 2011*).

Council of the European Union, Report from Code of Conduct Group (Business Taxation) to Council (ECOFIN), 10857/11, FISC 75, 27 May 2011 (cit. *Code of Conduct Report May 2011*).

Council of the European Union, Report from General Secretariat to Council, 17380/10, FISC 149, 3 December 2010 (cit. *General Secretariat Report December 2010*).

Council of the European Union, Report from General Secretariat to COREPER, 16769/10, FISC 140, 26 November 2010 (cit. *General Secretariat Report November 2010*).

Council of the European Union, Report from Code of Conduct Group (Business Taxation) to Council, 16766/10, FISC 139, 22 November 2010 (cit. *Code of Conduct Report November 2010*).

Council of the European Union, Report from COREPER to the Council, 10595/10, FISC 57, 2 June 2010 (cit. *COREPER Report June 2010*).

Council of the European Union, Report from Code of Conduct Group (Business Taxation) to the ECOFIN Council, 10033/10, FISC 47, 25 May 2010 (cit. *Code of Conduct Report May 2010*).

Council of the European Union, Report from Code of Conduct Group (Business Taxation) to ECOFIN Council, 16233/09, FISC 163, 18 November 2009

(cit. *Code of Conduct Report November 2009*).

Council of the European Union, Report from Code of Conduct Group (Business Taxation) to ECOFIN Council, 16084/1/08 REV 1, FISC 166, 26 November 2008 (cit. *Code of Conduct Report November 2008*).

Council of the European Union, Report from Code of Conduct Group (Business Taxation) to ECOFIN Council, 9047/07, FISC 62, 26 April 2007 (cit. *Code of Conduct Report April 2007*).

Council of the European Union, Report of the Code of Conduct Group (Business Taxation) to the ECOFIN Council, SN 4901/99, 23 November 1999 (cit. *Code of Conduct Report November 1999*).

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernisation, COM(2012) 209 final, 8 May 2012 (cit. *EU State Aid Modernisation*).

European Commission, Communication from the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth, COM(2010) 2020, 3 March 2010 (cit. *Growth Strategy*).

European Commission, EU Joint Transfer Pricing Forum, Report on Cost Contribution Arrangements on Services not creating Intangible Property (IP), JTPF/008/FINAL/2012/EN, June 2012 (cit. *TP Forum*).

European Commission, Press Release, State aid: Commission launches major initiative to modernise state aid control, IP/12/458, 8 May 2012 (cit. *Press Release May 2012*).

European Commission, Report from the Commission, state aid Scoreboard, Report on state aid contribution to Europe 2020 Strategy, Spring 2011 Update, COM(2011) 356 final, 22 June 2011 (cit. *Commission Report June 2011*).

European Commission, Press Release, EU-Switzerland: State aid decision on company tax regimes, IP/07/176, 13 February 2007 (*cit. Press Release February 2007*).

European Commission, State aid No C 4/2007 (ex N 465/2006) – The Netherlands Interest group box (Groepsrentebox), C(2007)308, 7 February 2007 (cit. *State aid No C 4/2007*) (cit. *Dutch Interest Group Box*).

European Commission, The EU Single Market, IAS 38 Intangible Assets, available at http://ec.europa.eu/internal_market/accounting/ias/standards-_en.htm (26 July 2012) (cit. *EU Single Market*).

European Commission, Trade, Switzerland, available at http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/switzerland/ (23 August 2012) (cit. *Trade with Switzerland*).

Foreign & Commonwealth Office, Statement on European Court Judgment on

taxation in Gibraltar, available at http://www.fco.gov.uk/en/news/latest-news/?view=PressS&id=715040782 (22 August 2012).

Office for Harmonization in the Internal Market, Trade Marks and Designs, available at http://oami.europa.eu/ows/rw/pages/index.en.do (21 July 2012).

II. Liechtenstein

Felder Marco, "Der Finanzplatz wird sich konsolidieren, aber gestärkt daraus hervorgehen", in: Hasler, Liechtensteiner Volksblatt, 16 March 2013, p. 13 (cit. *Finanzplatz*).

Felder Marco, "Lizenzbox besitzt riesiges Potenzial", in: Stahl, Wirtschaft Regional, 23 February 2013, p. 7 (cit. *Potenzial Lizenzbox*).

Felder Marco, Besteuerung von Einkünften aus Immaterialgüterrechten, presentation at IFA branch Liechtenstein, 26 August 2011 (cit. *Besteuerung von Einkünften*).

Friedrich Brian/Friedrich Laura/Spector Brian, PD Net, International Accounting Standard 38 (IAS 38), Intangible Assets, available at www.cga-pdnet.org (26 July 2012).

Gilmore John, RSA claiming trademark on all uses of "RSA" to describe algorithm, available at http://www.sandelman.ottawa.on.ca/ipsec/1999/03/msg00124.html (11 September 2012).

Government Spokesperson's Office, The Principality of Liechtenstein – Encounter with a Small State, 2009.

IBFD, Tax Treatment of Research & Development Expenses, December 2004, available at http://ec.europa.eu/taxation_customs/resources/documents/eu_rd_final_rep_dec_2004.pdf (22 September 2012) (IBFD, Tax Treatment of Research & Development Expenses).

Intel Inside Program, Anatomy of a Brand Campaign, available at http://www.intel.com/pressroom/intel_inside.htm (11 September 2012).

Lowensohn Josh, Jury awards Apple more than $1B, finds Samsung infringed, available at http://news.cnet.com/8301-13579_3-57500159-37/jury-awards-apple-more-than-$1b-finds-samsung-infringed/ (11 September 2012).

Novartis, Connecting with patients, Pioneering initiatives to enhance access to healthcare, available at http://www.novartis.com/downloads/corporate-responsibility/Connecting_with_patients_ATM.pdf (9 September 2012).

Republic of Austria, Parliament, Verwaltungsgerichtsbarkeits-Novelle 2010, available at http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00129/index.shtml (29 September 2012).

Shanahan Jim, PwC Global Research & Development Incentives Group, 1 May 2012 (cit. *Incentives Group*).

Shanahan Jim, Is it time for your country to consider the ”patent box”?, PwC’s Global R&D Tax Symposium on Designing a Blueprint for Reducing the After-Tax cost of Global R&D, Dublin, 23 May 2011 (cit. *Patent Box*).

Storck Alfred, Tax Planning in International Companies, lecture at MAS Neuchâtel, 4 September 2012.

WIPO, Hague System for the International Registration of Industrial Designs, available at www.wipo.int/hague/en/ (9 November 2012) (cit. *Hague System*).

WIPO, International Classification for Industrial Designs under the Locarno Agreement, Ninth Edition, available at http://www.wipo.int/classifications/nivilo/locarno/index.htm (24 October 2012) (cit. *International Classification*).

WIPO, Trademarks Gateway, available at www.wipo.int/trademarks/en/ (09.11.2012) (cit. *Trademarks Gateway*).

Zimmermann Philip R., From PGP to OpenPGP, available at http://openpgp.vieprivee.org/prz060203.txt (11 September 2012).

III. Luxembourg

Clifford Chance, Luxembourg IP-Derived Income Tax Regime: Managing IP and fostering R&D in Luxembourg, February 2010, p. 2.

Loyens & Loeff, Newsflash, Luxembourg: clarification on IP regime, 11 March 2009.

O’Neal/Macovei-Grencon/Van Eysinga, Free translation of circular letter of the director of the tax office, Partial tax exemption on income derived by certain intellectual property rights, 5 March 2009.

IV. OECD

OECD, Action Plan on Base Erosion and Profit Shifting, OECD Publishing (Ed.) (2013), available at http://dx.doi.org/10.1787/9789264202719-en (30 July 2013) (cit. *OECD Action Plan on BEPS*).

OECD Public Consultation, Revised Discussion Draft on Transfer Pricing Aspects of Intangibles, 30 July 2013 (cit. *OECD Revised Discussion Draft*).

OECD Discussion Draft, Revision of the Special Considerations for Intangibles in Chapter VI of the OECD Pricing Guidelines and related provisions, 6 June 2012 (cit. *OECD Discussion Draft*).

OECD, Frascati Manual: Proposed Standard Practice for Surveys on Research and Experimental Development, OECD Publications Service (Ed.) (2002) (cit. *OECD Frascati Manual*).

OECD Model Tax Convention on Income and on Capital: Condensed Version

2010, OECD Publishing (Ed.) (2010) (cit. *OECD MTC*).

OECD, Report on Harmful Tax Competition, An Emerging Global Issue, available at http://www.oecd.org/tax/harmfultaxpractices/1904176.pdf (25 August 2012) (cit. *OECD Harmful Tax Competition Report*).

OECD, Transfer Pricing Country Profile Switzerland, available at http://www.oecd.org/tax/transfer-pricing/Swiss_TPcountryprofile_-Dec2012.pdf (16 June 2012) (cit. *OECD TP Country Profile Switzerland*).

OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010, OECD Publishing (Ed.) (2010) (cit. *OECD TP Guidelines*).

V. Switzerland

Brodach Georg, ABB Switzerland, Innovation and Research, available at http://www.swisscore.org/sitecollectiondocuments/sc_sib_2009_Brodach.pdf (9 September 2012), p. 5.

Danon Robert/Pistone Pasquale, "La Suisse peut reprendre la main dans le dossier fiscal", in: Favre, Le Temps, 9 March 2013.

Economiesuisse, Steuerstandort Schweiz: Herausforderungen und Lösungen, available at http://www.economiesuisse.ch/de/PDF%20Download%-20Files/STUDIE_steuerstandortch_03062013.pdf (21 June 2013) (cit. *Economiesuisse, Steuerstandort Schweiz*).

Eidgenössisches Institut für Geistiges Eigentum, After granting, available at https://www.ige.ch/en/patents/after-issuance.html (20 July 2012) (cit *After Granting*).

Eidgenössisches Institut für Geistiges Eigentum, Patent – first steps, available at https://www.ige.ch/en/patents/patents-first-steps.html (20 July 2012) (cit. *First Steps*).

Eidgenössisches Institut für Geistiges Eigentum, Paediatric extension to the duration of the Supplemenatary Protection Certifiacate, available at https://www.ige.ch/en/patents/after-issuance/spc/extension-paediatric-medicines.html (20 July 2012) (cit. *Paediatric Extension*).

Eidgenössisches Institut für Geistiges Eigentum, Supplementary Protection Certificate ("SPC"), available at https://www.ige.ch/en/legal-info/legal-areas/patents/spc.html (20 July 2012) (cit. *SPC*).

Felder Marco/Danon Robert/Marti Armin, Kreativität gefragt, in: Schöchli, Neue Zürcher Zeitung, 23 November 2012, p. 29.

Felder Marco, Die Wunderwaffe im Streit mit der EU heisst Lizenzbox, in: Valda, Tages-Anzeiger, 10 November 2012, p. 53 (cit. *Wunderwaffe*).

Hausmann Rainer, Unternehmenssteuerrefrom III: Attraktivität der Schweiz als Wirtschaftsstandort erhöhen, Ernst & Young Tax News June 2013, availab-

le at www.ey.com/ch/tax (24 June 2013), p. 5.

Jäggi Oliver, Unternehmensstrukturen ohne Zukunft, Neue Zürcher Zeitung, available at www.nzz.ch (29 August 2013).

Kanton Nidwalden, Tax Perspectives, Nidwalden Exclusive, Edition 2011.

Linder Thomas/Andreas Müller, Lizenzboxen auch für KMU, Steuerliche Förderung von Innovationen, Neue Zürcher Zeitung, 29 August 2013, p. 33 (cit. *Lizenzboxen auch für KMU*).

Müller Andreas/Wenger Jean-David/Linder Thomas, KPMG, Tax Incentives for R&D in Switzerland (cit. *Tax Incentives*).

Neue Zürcher Zeitung, "Gemeinsame Regeln,aber keine Steuerharmonisierung"; Eveline Widmer-Schlumpf zum Steuerplan und AIA der G-20, 20 July 2013, p. 25 (cit. *NZZ, Gemeinsame Regeln, aber keine Steuerharmonisierung*).

Neue Zürcher Zeitung, Schäuble greift Lizenzboxen an, 10 July 2013, p. 26 (cit. *NZZ, Schäuble greift Lizenzboxen an*).

PricewaterhouseCoopers, TAXeNEWS, OECD: BEPS Comprehensive Action Plan, 25 July 2013, available at www.pwc.ch/tax (30 July 2013) (cit. *PwC, TAXeNEWS BEPS Comprehensive Action Plan*).

PricewaterhouseCoopers, TAXeNEWS, Unternehmenssteuerrefrom III, Eine Schweizerische Lizenboxlösung, 13 June 2013, available at www.pwc.ch/tax (21 June 2013) (cit. *PwC, TAXeNEWS Lizenzboxlösung*).

PricewaterhouseCoopers, The board: duty calls, June 2013, available at www.pwc.ch (17 August 2013) (cit. *PwC, The board: duty calls*).

PricewaterhouseCoopers, TAXeNEWS, Unternehmenssteuerrefrom III, Stärkung der steuerlichen Wettbewerbsfähigkeit, 17 May 2013, available at www.pwc.ch/tax (21 June 2013) (cit. *PwC, TAXeNEWS Stärkung der steuerlichen Wettbewerbsfähigkeit*).

PricewaterhouseCoopers, TAXeNEWS, Unternehmenssteuerrefrom III, Stand der Dinge, 21 March 2013, available at www.pwc.ch/tax (23 June 2013) (cit. *PwC, TAXeNEWS Stand der Dinge*).

PricewaterhouseCoopers, Tax Bulletin, Gibraltar – EU State Aid Case, 29 April 2011, available at http://www.pwc.gi/publications (5 August 2013) (cit. *PwC, Tax Bulletin Gibraltar*).

Robinson Philip, Mehr Innovation dank Unternehmenssteuerrefom, Neue Zürcher Zeitung, 12 September 2013.

Roche, Innovation is the backbone of Roche's strategy, available at http://www.roche.com/research_and_development/r_d_overview.htm. (9 September 2012).

Schweizerische Depeschenagentur, EU-Kommission kritisiert britische Patent-

box, available at http://www.sda-ats.ch (11 October 2013).

SwissHoldings, Nächste Schritte bei der Unternehmensbesteuerung: Die Schweiz am Scheideweg, Newsletter September 2011.

VI. United Kingdom

Cahill Ann, UK's patentbox 'breaches EU tax code', Irish Examiner, available at http://www.irishexaminer.com (16 October 2013).

Jones Rhiannon/Hickman Andrew, The UK Patent Box: The newest entry in Europe's tax efficient IP incentive regimes, in: KPMG (Ed.), Reaction Chemical Magazine, Sixth Edition (2012), p. 4.

Legendre Raphaël, Algirdas Šemeta : «La nouvelle fiscalité britannique sur les entreprises est nuisible», available at http://www.lopinion.fr (11 October 2013).

Van der Made Bob, EBIT: update UK patent box; agenda for code of conduct meeting 22 October, available at: www.pwc.com/ebit (16 October 2013).

Introduction

1. Justification of the subject

I. Why IP boxes?

1. Tax incentive for commercialisation of innovation

The tax treatment of income derived from intellectual property ("IP") is currently in the spotlight and receives a great deal of policy attention[7]. This is because income derived from IP generally is highly mobile and IP boxes are designed to make jurisdictions more attractive for relevant income in this respect[8].

IP boxes provide an incentive on the basis of reduced tax for economic operators to retain and commercialise existing intangibles as well as to develop new innovate products and processes protected by relevant IP rights in a jurisdiction, or to perform services. This hence encourages undertakings to locate value added in form of high-value jobs associated with these functions in the jurisdiction[9]. In

---

7 Evers/Miller/Spengel, p. 1; Robinson; Obrist, p. 649; Felder/Harmann, p. 71; Hausmann, p. 5; Economiesuisse, Steuerstandort Schweiz PwC, p. 6, 19, 27, 30, 31, 50 et seq, 63; TAXeNEWS Lizenzboxlösung; EFD, Zwischenbericht USTR III; Felder, Finanzplatz, p. 13; Marti/Küttel; Danon/Pistone; Felder, Potenzial Lizenzbox, p. 7; Felder/Danon/Marti, p. 29; Felder, Wunderwaffe, p. 53; Kantonsrat/Parlament Kanton Luzern; Schweizer Parlament, Initiative Maier; Hausmann/Roth/Krummenacher, p. 87; Müller/Wenger/Linder, Steuerliche Förderung, p. 847; SwissHoldings; Hurter, p. 637, 638; Griffith/Miller/O'Connell, Effect of Patent Boxes, p. 1; Honold/Zimmermann, p.11; Schweizer Parlament, Postulat WAK-N; Schweizer Parlament, Motion Hurter; Schweizer Parlament, Motion Noser; See also Müller/Wenger/Linder, Tax Incentives, p. 3, 8; Müller/Gramigna/Linder, p. 804; Cavelti, Bemerkungen, p. 1; Keuschnigg/Ribi, p. 2, Hinny, Lizenzbox des Kantons Nidwalden, p. 138, 158, 159; Kanton Nidwalden, Landrat; Kanton Nidwalden, Regierungsrat; Linder/Müller, Steuerliche Anreize, p. 152; See also Bal, p. 573.

8 Griffith/Miller/O'Connell, Effect of Patent Boxes, p. 17; See also Linder/Müller, Steuerliche Anreize, p. 148; Pike; Granstrand; Teece.

9 Evers/Miller/Spengel, p. 4; HM Treasury/HM Revenue & Customs, Consultation, p. 5 recital 1.7; HM Revenue & Customs, Draft Legislation, p. 4 recital 1.1; See also Müller/Wenger/Linder, Tax Incentives, p. 4; See also Müller/Wenger/Linder, Steuerliche Förderung, p. 845; Hurter, p. 638; Müller/Wenger/Linder, Tax Incenti-

doing so, IP boxes can make investments in innovation more attractive compared to other investments[10].

Countries and territories subject to this treatise, such as Belgium, Liechtenstein, Luxembourg, the Netherlands and also the Swiss Canton of Nidwalden, have implemented IP box legislation. Furthermore, the United Kingdom ("UK") has implemented its IP box regime in April 2013[11].

It should be noted that in these jurisdictions, IP boxes are also referred to as patent boxes, license boxes, innovation boxes or patent income deductions[12]. The types of intangibles that qualify for preferential tax treatment vary among different jurisdictions. Patents or patented IP generally qualify for IP box purposes. Some jurisdictions, such as Liechtenstein, Luxembourg and the Swiss Canton of Nidwalden, have expanded their lists of relevant IP or IP rights, including utility models, trademarks, designs, software and certain other types of information. The Netherlands achieves the same effect by using so-called R&D declarations[13].

2. Change in the location of holding intangibles

Intangibles are not necessarily held in the lowest tax jurisdictions. This is because anti-avoidance rules may diminish the tax benefits of such low tax locations, while effective tax planning and thus costs such as those related to hold intangibles can make a higher tax jurisdiction more attractive[14].

Nevertheless, the introduction of IP boxes leads to significant shifts in the holding of intangibles towards those jurisdictions operating such favourable regimes. Following the introduction of IP box regimes in the Benelux countries, the proportion of new patent applications filed in Belgium, the Netherlands and Luxembourg increased considerably, while the share of new patent applications in the UK decreased of almost a third[15].

---

ves, p. 15; Shaheen; Müller/Gramigna/Linder, p. 804; Kessler/Eicke, p. 847; For a critical opinion, see: Sullivan, p. 11.

10 Atkinson/Andes, p. 7.

11 Matteotti/Roth, p. 62; Philipps/Danes, p. 7; HM Treasury, Patent Box; HM Revenue & Customs, Finance Bill 2012, p. 8 recital 1.1, p. 12 recital 1.36; See also Evers/Miller/Spengel, p. 6.

12 Shanahan, Patent Box, p. 3; Griffith/Miller/O'Connell, Effect of Patent Boxes, p. 2, 6.

13 Shanahan, Patent Box, p. 4.

14 Griffith/Miller/O'Connell, Location of Intellectual Property, p. 2.

15 Griffith/Miller/O'Connell, Effect of Patent Boxes, p. 7.

3. Supplementation of input elements

Tax incentives for research and development ("R&D") can be distinguished between input incentives and output incentives. Input incentives provide vital stimuli for undertakings to invest more in technological and scientific R&D. In recent years a number of jurisdictions have gone a step farther by creating output incentives. This kind of tax incentive aims at stimulating the subsequent exploitation of input R&D achievements[16]. IP box regimes thus differ from R&D tax incentives in that they provide undertakings with a supplementary incentive for the commercialisation of innovation, rather than for just the conduct of research[17].

It may be argued that IP boxes provide only limited incentives for undertakings to conduct additional research. IP boxes indeed are not primarily targeted at research but at the income that normally results a certain number of years after the discovery of a commercially valuable technology[18]. In this regard, it is essential to acknowledge that especially the granting of a patent or another relevant IP right is designed to ensure that undertakings may capture the returns to a successful innovation. The effect of IP boxes improves output activities aimed at commercialising and creating additional income from the innovation. This underlying tax policy, however, is subject to criticism to the extent that IP boxes entail reducing the tax rate for activity that anyway would have occurred in the absence of government intervention[19].

4. Compensation of market failures

While there may generally be a preference for neutral tax systems that do not distort investment decisions[20], numerous economists advocate tax incentives for R&D. This is because they can demonstrate that undertakings never capture all the benefits from their research. Despite the protection of IP rights, undertakings often have difficulty realising the full commercial benefits of innovation because some of the value flows to other undertakings and to society as a whole through spillovers or positive externalities respectively. Spillovers are favourable for

---

16 Economiesuisse, Steuerstandort Schweiz, p. 26, 27; Shanahan, Incentives Group, Merrill/Shanahan/Tomé Gómez/Glon/Grocott/Lamers/MacDougall/Macovei/ Montredon/Vanwelkenhuyzen/Cernat/Merriman/Moore/Muresan/Van Den Berghe/ Linczer, p. 1666; p. 6; Müller/Wenger/Linder, Steuerliche Förderung, p. 846; Shanahan, Patent Box, p. 4; Atkinson/Andes, p. 1, 3; HM Treasury/ HM Revenue & Customs, Consultation, p. 3; Keuschnigg/Ribi, p. 2; Müller/Gramigna/Linder, p. 804.

17 Atkinson/Andes, p. 3; Commission, Framework for State Aid, p. 4.

18 Griffith/Miller/O'Connell, Effect of Patent Boxes, p. 14.

19 Bal/Offermanns, p. 168; Griffith/Miller/O'Connell, Effect of Patent Boxes, p. 14.

20 Griffith/Miller/O'Connell, Effect of Patent Boxes, p. 2.

society because they raise the societal, as opposed to private, rate of return from innovation. The benefits of R&D investment are thus usually higher for the general public than for the economic operator investing, which may result in an unattractive rate of return from a private perspective. This implies that there may be much less incentive for undertakings to invest in innovation than is socially desirable or optimal. To make innovation more economical, many jurisdictions offer a range of subsidy programmes for projects in the common interest or make specific tax investments schemes, such as IP boxes, available[21].

It can be argued that IP boxes work in a similar manner like R&D tax credit incentives. Instead of reducing the cost of R&D they increase the benefits of subsequent commercial success. IP boxes to some extent thus facilitate to overcome the market failure of too little private-sector innovation relative to the societally optimal rate[22].

5. Competitiveness

Holding IP obviously is more attractive in jurisdictions with IP boxes. Beyond that, IP boxes encourage technical and scientific innovation and prevent movement of intangibles to more competitive jurisdictions by economic operators that otherwise might invest elsewhere, creating high value jobs and support economic activity in a variety of sectors[23]. Consequently, an increasing number of jurisdictions without IP box regimes consider tax policies providing incentives to encourage undertakings to retain intangibles in those jurisdictions once created or developed[24].

Most recent research findings acknowledge that IP boxes stimulate some new innovation and incentivise undertakings to create more patentable technologies[25]. It follows that in the long run reduced taxation of profits from intangibles by means of IP box benefits is likely to inspire undertakings to invest more in R&D. This will lead to a greater number of IP rights and in particular an increase in valuable IP rights, which may produce significant benefits for an economy[26].

---

21 Bal/Offermanns, p. 167; Müller/Wenger/Linder, Steuerliche Förderung, p. 845, 848; Atkinson/Andes, p. 4; Keuschnigg/Ribi, p. 3, 21; Hurter, p. 637; Müller/Wenger/Linder, Tax Incentives, p. 11; Commission Report June 2011, p. 11; Kessler/Eicke, p. 847; Commission, Framework for State Aid, p. 6 recital 1.3.2; See also Harmann, Patente als strategisches Instrument; Kaufer, p. 41 et seq; Nordhaus, p. 86 et seq.

22 Atkinson/Andes, p. 7.

23 HM Treasury/HM Revenue & Customs, Consultation, p. 30 recitals 7.9, 7.10.

24 Shanahan, Patent Box, p. 3.

25 Griffith/Miller/O'Connell, Effect of Patent Boxes, p. 14.

26 Griffith/Miller/O'Connell, Location of Intellectual Property, p. 26.

Even if the outcome of IP boxes were simply to lower taxes on innovative undertakings without directly impacting their decision to invest more in R&D, this would still help the economy. This particularly applies where its corporate income tax rates are high, thereby putting the economy at a major competitive disadvantage[27].

II. Connecting factors of IP boxes to Liechtenstein and Switzerland

Effective 1 January 2011, Liechtenstein introduced a provision granting a tax deduction for income from relevant IP rights. This was the founding date of the Liechtenstein IP box.

In particular for small jurisdictions like Liechtenstein and Switzerland, which are poor in natural resources, it is essential to safeguard the future for the long term through R&D by protecting and realising innovative achievements thereof[28]. To take account of the international trend an IP box regime was introduced, creating a tax incentive intended to keep the business location attractive and competitive[29].

To this point only few detailed academic sources are available on the new Liechtenstein IP box. It thus seems reasonable to comment on the Liechtenstein IP box regime in light of case law, academic literature and legal interpretative materials. To the extent necessary the commentary also covers the current framework of state aid legislation as well as the Code of Conduct for Business Taxation where relevant in the light of IP boxes.

The issue of taxation of income from intangibles is of crucial importance to Switzerland. At the cantonal level in Switzerland so far, the Canton of Nidwalden introduced an IP box on 1 January 2011. Without a doubt, the introduction of an IP box is emerging as a sensible measure at the federal level as well. Not least of all, this is true also with a view to the long-standing dispute with the European Commission and the ongoing talks with the Code of Conduct Group[30].

The European Union ("EU") is of the view that, that certain company tax regimes in Swiss Cantons in favour of holding, mixed and management companies are considered to constitute a form of state aid incompatible with the proper

---

27 Atkinson/Andes, p. 14.

28 See Hurter, p. 637; Müller/Wenger/Linder, Tax Incentives, p. 4; Wanger, Kommentar Steuergesetz, p. 180; See also Pike; Granstrand; Rivette/Kline; Teece; Warshofsky.

29 Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 16; Lehmann/Zanettin, p. 10; Liechtenstein Government, Report and Application No 48/2010, p. 141.

30 See Matteotti/Roth, p. 56 et seq; Economiesuisse, Steuerstandort Schweiz, p. 8 et seq; EFD, Zwischenbericht, p. 8 et seq.

functioning of the EU-Switzerland Free Trade Agreement of 1972[31]. At the centre of attention are schemes providing unfair tax advantages to companies established in Switzerland, for profits generated in the European Union. The Commission thus requests Switzerland to amend these tax schemes[32]. Furthermore, the Code of Conduct Group reiterates that the aim is for Switzerland to apply the principles and criteria of the Code of Conduct. In talks, it calls for the identification of company tax issues that have the potential to distort business operations, including ring-fenced tax regimes. If satisfactory progress in this dialogue is not achieved within a reasonable period of time, the Code of Conduct Group threatened with pursuing alternative approaches, including the unilateral assessment of the Swiss regimes[33].

Due to the increasing political pressure, the Swiss Federal Council approved the mandate for a formal dialogue with the European Union in summer 2012. The aim of the dialogue is the settling the tax dispute and meanwhile negotiations are in progress. Based on the principles and criteria of the Code of Conduct, the European Union not only limits the dialogue to cantonal tax regimes but includes measures such as[34]:

– The taxation arrangements for principal companies;

– The granting of tax reliefs; and

– The rules governing the Swiss participation deduction.

So far negotiations have been kept secret. However, a progress report regarding measures for the strengthening of the tax competitiveness has been published by the Swiss Federal Department of Finance on 17 May 2013[35].

With this in mind, the treatise concludes by recommending a sustainable model

---

31 Agreement between the European Economic Community and the Swiss Confederation 1972; See also section 4 (EU-Switzerland Free Trade Agreement) of Part 2.

32 Matteotti/Roth, p. 56, 57; Economiesuisse, Steuerstandort Schweiz, p. 35; EFD, Zwischenbericht, p. 7, 8; PwC, TAXeNEWS Stand der Dinge; Hinny, Lizenzbox des Kantons Nidwalden, p. 140, 158, 159; European Commission, Press Release February 2007; See also Waldburger, Holding- und Domizilprivileg im Steuerharmonisierungsgesetz.

33 Nouwen, p. 18; Matteotti/Roth, p. 60; Economiesuisse, Steuerstandort Schweiz, p. 35; EFD, Zwischenbericht USTR III, p. 7, 8; PwC, TAXeNEWS Stand der Dinge; Marti/Küttel; Council of the European Union, Code of Conduct Report December 2011, p. 5 recital 20; Kalloe, p. 507; Council of the European Union, Code of Conduct Report November 2011, p. 5 recital 20; Hinny, Lizenzbox des Kantons Nidwalden, p. 140.

34 Nouwen, p. 18; PwC, Stärkung der steuerlichen Wettbewerbsfähigkeit; Marti/Küttel.

35 PwC, Stärkung der steuerlichen Wettbewerbsfähigkeit; EFD, Zwischenbericht USTR III; Marti/Küttel.

largely based on the Liechtenstein IP box regime, which in principle is suitable for introduction at the federal level.

2. Scope of the study

The scope of the study is based on a benchmark study, which contains the IP box regimes of Belgium, the Netherlands and Luxembourg. Only by systematically discussing this extensive basis is it possible in a further step to comment on the Liechtenstein IP box in a manner relevant to practice. It should be noted that the commentary in principle is limited to the Liechtenstein IP box.

The Benelux countries were taken into account, since their IP box regimes served as the actual model for the design of the Liechtenstein IP box. The UK has implemented a detailed IP box regime that entered into force in April 2013[36]. The legislation is partly integrated in the benchmark study as well and particularly useful for interpretative guidance.

Moreover, the study covers issues related to state aid and the Code of Conduct for Business Taxation. Principles of interpretation relevant in law as well as Swiss and European case law in connection with article 23 paragraph (1) subparagraph (iii) of the FTA are thus acknowledged and examined.

The scope of the study further extends to possibilities for improving the current Liechtenstein IP box model even where such improvements are not currently reconcilable with the legal foundations. The analysis in this regard includes recommendations for adjustments to the legislative foundations in order to implement useful improvements.

Transfer pricing plays a key role especially in the determination and documentation of relevant IP profits[37]. Accordingly, this treatise pays proper attention to aspects of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

The contribution of this treatise to the IP box of the Canton of Nidwalden is largely restricted to a discussion of the material foundations of that IP box. Questions regarding the relationship of the Nidwalden IP box with the Tax Harmonisation Act ("FTHL") are not addressed. Shedding light on these com-

---

36 Matteotti/Roth, p. 62; Philipps/Danes, p. 7; HM Treasury, Patent Box; HM Revenue & Customs, Finance Bill 2012, p. 8 recital 1.1, p. 12 recital 1.36.

37 See Hickman/Rockall/Hall, p. 12.

plex and controversial legal questions goes beyond the scope of this contribution and may be subject to a separate treatise[38].

Given that the model for introduction at the federal level proposed in the last part of this treatise is largely based on the Liechtenstein IP box, references can be made to the commentary on the Liechtenstein IP box. This obviates the need for a more detailed commentary on the proposed model itself. A Swiss IP box regime has however to be consistent with fundamental rights. To this end, the scope of the study comprises constitutional issues.

3. Structure of the study

The present study consists of five parts. The first part is dealing with the IP box regimes of Belgium, Luxembourg and the Netherlands. To ensure a systematic discussion of these various systems, a classification based on the UK IP box regime has been chosen. This approach also permits a differentiated comparison of the various IP box systems.

The second part of this treatise focuses on state aid and the Code of Conduct for Business Taxation. In particular, the impact of these two areas of the law on IP box regimes is examined, taking into account decisions by public authorities, selected case law and the EU-Switzerland Free Trade Agreement of 1972.

The third part builds systematically on the first two chapters and includes a commentary on the Liechtenstein IP box. Especially the commentary is of relevance to practice and aims to support legal practitioners in their handling of the regime.

The third part also includes areas for potential improvement that further enhance the sustainability and international competitiveness of the Liechtenstein IP box.

Systematically analogous to the first part, the fourth part of this treatise begins with a material discussion of the Nidwalden IP box. The findings are then applied to the federal level. A Swiss IP box model largely based on the Liechtenstein IP box is proposed, subject to individual adjustments and amendments, for the purpose of potential inclusion in the Direct Tax Act and Tax Harmonisation Act.

---

[38] See for example Yersin, Steuerharmonisierung, p. 97 et seq; Reich, Umsetzung Steuerharmonisierungsgesetz, p. 577 et seq, Vallender, Verfassungsmässiger Rahmen, p. 263 et seq.

Given that a Swiss IP box has to reflect fundamental rights, the analysis in part four pays proper attention to constitutional issues.

Part 1: IP Box Regimes of Selected European Countries

1. Introduction

The IP box legislations of Belgium, Luxembourg and the Netherlands served as the actual model for the design of the Liechtenstein IP box[39]. The commentary on the Liechtenstein IP box in the third part of this treatise will thus be performed on the basis of a thorough benchmark study of the Belgium, Luxembourg and Dutch IP boxes.

For this purpose, the examined IP box regimes are given a uniform classification based on the UK IP box legislation permitting subsequent comparison. Key terms of the examined IP box regimes are also kept as uniform as possible.

It should be noted that the UK IP box is partly integrated in the benchmark study as well. Due to the classification used and the instructive legislative materials available there is no need for an own comprehensive interpretation of the regime in this Part[40].

The wording of any administrative guidelines is followed closely where they are directly related to the IP box legislation in question.

2. Belgium

I. Overview

With effect from 1 January 2008 the Belgian Government implemented the patent income deduction to favour technological investments and innovation by Belgian companies, to stimulate R&D activities in respect of the development of patents, to encourage the ownership of patents and the acquisition of rights for the use with regard to patents. In addition, the manufacturing of products, which

---

39 EFTA Surveillance Authority, OJ C 278, p. 2; Hosp/Langer, Steuerstandort Liechtenstein, p. 115.

40 See Finance (No. 4) Bill; HM Revenue & Customs, Finance Bill 2012.

are produced based on these patents, was a key aspect of the IP box regime as well[41].

The tax measure thus aims attracting R&D and promoting economic operators to develop and exploit their patents from Belgium[42]. A tax-friendly environment attractive to inbound investment is expected to create employment in Belgium[43].

II. Analysis

1. Reduced taxation of profits from relevant IP rights

A) Election for special treatment of profits from relevant IP rights

Introduced in 2007, the Belgian patent income deduction ("IP box") is designed to support R&D related activities[44].

In accordance with articles 205/1 to 205/4 of the Code des impôts sur les revenues 1992 ("ITC"), the IP box regime allows a Belgian company or a Belgian permanent establishment of a foreign company to deduct from its taxable basis an amount equal to 80% of the gross income from relevant IP rights insofar as such gross income reflects the arm's length principle.

Against this backdrop, only 20% of the gross income from relevant IP rights is taxable at the general corporate tax rate of 33.99%, resulting in a maximum effective tax rate of 6.8%. In addition, most expenses with the exception of license fees and amortisation related to acquired IP rights, remain deductible at the general corporate tax rate. The deductibility of most expenses related to relevant IP rights as well as the availability of further tax deductions on the other hand, such as losses carried forward, R&D tax credits, dividend received deduction or notional interest deduction, may lower the effective tax rate to nil[45].

---

41 Warson/Glaes, p. 319; Van den Berghe/Kelley, p. 374; Warson/Foriers, p. 71; Van Stappen, p. 1.

42 Vanhaute, chapter 5, 5.1.5.

43 Lamon, p. 127; Cops/Lemaire, p. 12; Warson/Foriers, p. 71; Van Stappen, p. 1; Cops/De Haen, p. 1.

44 Thanks to Prof. Dr. Malherbe of Liedekerke, Brussels, for his valuable support in the analysis of the Belgian IP box.

45 Offermanns/Michel/Vanhaute, chapter 1, 1.9.7; Bal/Offermanns, p. 171; Warson/Van Ende, p. 1; Shanahan, Patent Box, p. 5; Hendrickx, p. 14; Warson/Glaes, p. 319; Eynatten/Brauns, p. 1; Springael, Revenus, p. 8; Scheunemann/Dennisen, p. 410; Onkelinx/Rens, p. 3; Van den Berghe/Kelley, p. 374; Springael/Van de Velden, p. 2; Cops/Lemaire, p. 13; Van Stappen/Delanoy/De Groote, p. 291; Van Stappen, p. 1; Cops/De Haen, p. 1, 3; Onkelinx/Van den Berg, p. 1.

The IP box regime applies to all resident companies in Belgium that are subject to corporate income tax. It further applies to a Belgian permanent establishment of a non-resident company that is subject to corporate income tax, in respect of relevant IP rights allocated to such permanent establishment. The extension to the Belgian permanent establishment of non-resident companies is provided by article 236bis of the ITC. Yet, the IP box does not apply to individual taxpayers or to non-profit organisations[46].

The IP box regime applies to a variety of sectors and industries. Sectors and industries whose R&D normally constitutes a major pillar of activities and that may rely on relevant IP rights are, for example, the automotive sector, pharmaceuticals, micro-electronics, chemical industry, bioscience, weaving, industrial equipment or aerospace. Moreover, companies in the industrial and consumer goods sector and even companies in the services industry may wish to apply for the IP box regime. While R&D does not need to be a core activity of a company or permanent establishment that considers electing for the IP box, in accordance with article 205/2 paragraph (1) of the ITC it is supposed to develop a relevant IP right itself or, alternatively, to improve an acquired or licensed relevant IP right in a research centre[47].

The IP box regime is optional. In accordance with article 205/4 of the ITC, a taxpayer must claim the IP box in its corporate income tax return and calculate the deduction by using a special statement, form 275 P, which is to be added to the tax return[48]. Since form 275 P is not considered to be an integral part of the corporate income tax return, eligibility to the IP box may also be granted where the competent tax authorities are provided with the form at a later stage[49].

The burden of proof in the first instance lies with the taxpayer in claiming a tax deduction under the IP box regime[50].

The IP box legislation of 27 April 2007 was published in the Belge Moniteur ("Belgian Official Gazette") of 8 May 2007. In accordance with article 93 of the Belgian Official Gazette, the IP box regime applies as of assessment year 2008 to relevant IP income ("RIPI") earned and derived from relevant IP rights that

---

46 Vanhaute, chapter 5, 5.1.5.4; Warson/Van Ende, p. 2; Hendrickx, p. 19; Scheunemann/Dennisen, p. 410; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 374, 378, 380; Warson/Foriers, p. 70; Onkelinx/Van den Berg, p. 3.

47 Warson/Van Ende, p. 1; Warson/Glaes, p. 319; Van den Berghe/Kelley, p. 374; Van Stappen/Delanoy/De Groote, p. 291; Van Stappen/Delanoy/De Groote, p. 291; Van Stappen, p. 1; Onkelinx/Van den Berg, p. 1; See also Offermanns, Draft Law.

48 Warson/Van Ende, p. 2; Cops/Lemaire, p. 14; Van den Berghe/Kelley, p. 381; Warson/Foriers, p. 76.

49 Hendrickx, p. 21; Warson/Glaes, p. 323.

50 Warson/Foriers, p. 73; Onkelinx/Van den Berg, p. 5.

were not used by a company, a permanent establishment, a licensor or related company for sales of products or services prior to 1 January 2007[51].

Where an intangible asset is registered and used in different jurisdictions, the absence of use before 1 January 2007 should be verified for the relevant IP rights of each jurisdiction separately[52].

2. Relevant companies

A) Meaning of relevant company

A Belgian company, or a Belgian permanent establishment of a non-resident company, may only benefit from the IP box where certain conditions are met[53]. A company or permanent establishment is a relevant company or permanent establishment for an accounting period if:

– The company or permanent establishment is subject to the Belgian corporate income tax[54];

– The company or permanent establishment elects for the IP box regime[55];

– The company or permanent establishment is the owner, the usufructuary or the licensor of the relevant IP right. Yet, it is sufficient where the company or permanent establishment is a co-owner, co-usufructuary or has partial license rights on a relevant IP right[56];

– The company or permanent establishment has fully or partly developed or acquired or licensed and improved a relevant IP right by using a research centre located in Belgium or abroad[57];

– The company or permanent establishment has been granted a relevant IP right by the competent authorities[58];

---

51 Offermanns/Michel, chapter 1, 1.7.7; Vanhaute, chapter 5, 5.1.5; Warson/Van Ende, p. 1; Hendrickx, p. 18; Springael/Van de Velden, p. 5; Warson/Glaes, p. 319; Eynatten/Brauns, p. 1, 2; Van den Berghe/Kelley, p. 374, 381; Warson/Foriers, p. 72; Van Stappen/Delanoy/De Groote, p. 291; Van Stappen, p. 1; Cops/De Haen, p. 1, 6; Onkelinx/Van den Berg, p. 5.

52 Van den Berghe/Kelley, p. 381; Van Stappen, p. 2.

53 Hendrickx, p. 19; Van den Berghe/Kelley, p. 378; Warson/Glaes, p. 319; Onkelinx/Van den Berg, p. 3.

54 Hendrickx, p. 19; Warson/Glaes, p. 319; Onkelinx/Van den Berg, p. 3.

55 Bal/Offermanns, p. 172; Hendrickx, p. 15; Warson/Glaes, p. 319; Onkelinx/Van den Berg, p. 1.

56 Idem.

57 Warson/Glaes, p. 320; Springael, Revenus, p. 8; See also Offermanns, Draft Law.

58 Warson/Glaes, p. 320.

The IP box regime applies to relevant IP rights, which is limited to patents and supplementary protection certificates[59].

A Belgian company or permanent establishment acting as a contract researcher on behalf of another company is not eligible for the IP box regime where it is not the full or partial owner, holder of beneficial rights to, usufruct holder or licensor of the relevant IP right[60].

B) Rights to which the IP box applies

The scope of the IP box regime is limited to relevant IP rights, which are patents and supplementary protection certificates[61]. The IP box regime is not restricted to Belgian patents or patent-related IP rights only. European patents, international and foreign patents are eligible for IP box purposes as well[62].

Other IP rights, such as know-how, copyrights, trademarks, designs, models, secret recipes or proceeds, information concerning experience with respect to trade or science or marketing intangibles are not eligible for purposes of the IP box. The tax authorities have indicated, however, that know-how closely associated with patents or supplementary protection certificates may qualify for purposes of the IP box regime as well[63].

In accordance with article 205/2 paragraph (1) subparagraph (1) of the ITC, the IP box applies to relevant IP rights that are[64]:

---

59 Bal/Offermanns, p. 171; Warson/Van Ende, p. 1; Warson/Glaes, p. 320; Warson/Foriers, p. 72; Cops/De Haen, p. 1.

60 Offermanns/Michel, chapter 1, 1.7.7; Offermanns/Michel/Vanhaute, chapter 1.9.7; Bal/Offermanns, p. 171; Warson/Van Ende, p. 2; Hendrickx, p. 19; Warson/Glaes, p. 319; Scheunemann/Dennisen, p. 410; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 376; Van Stappen/Delanoy/De Groote, p. 293; Van Stappen, p. 3; Cops/De Haen, p. 2, 3; Onkelinx/Van den Berg, p. 3.

61 Vanhaute, chapter 5, 5.1.5.1; Bal/Offermanns, p. 171; Warson/Van Ende, p. 1; Hendrickx, p. 14, 15; Warson/Glaes, p. 320, 321; Eynatten/Brauns, p. 1; Warson/Foriers, p. 72; Cops/De Haen, p. 1; Onkelinx/Van den Berg, p. 1.

62 Warson/Van Ende, p. 1; Hendrickx, p. 15; Springael/Van de Velden, p. 3; Van den Berghe/Kelley, p. 375; Warson/Foriers, p. 70; Van Stappen/Delanoy/De Groote, p. 292; Cops/De Haen, p. 1; Onkelinx/Van den Berg, p. 2.

63 Vanhaute, chapter 5, 5.1.5.1; Bal/Offermanns, p. 171; Warson/Van Ende, p. 1; Shanahan, Patent Box, p. 5; Hendrickx, p. 14; Warson/Glaes, p. 320; Eynatten/Brauns, p. 1; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 375; Warson/Foriers, p. 72; Van Stappen/Delanoy/De Groote, p. 292; Cops/De Haen, p. 1; Onkelinx/Van den Berg, p. 1.

64 Warson/Van Ende, p. 1; Hendrickx, p. 15; Warson/Glaes, p. 321; Scheunemann/Dennisen, p. 410; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 374; Warson/Foriers, p. 72, 74; Van Stappen/Delanoy/De Groote, p. 291; Van Stappen, p. 2;

– Fully or partly self-developed by a Belgian company or permanent establishment in a research centre in Belgium or abroad;
– Acquired by a Belgian company or permanent establishment from an affiliated or non-affiliated party, such as via purchase or contribution, provided the Belgian company or permanent establishment further improves the patented products or processes in a research centre in Belgium or abroad, irrespective of whether the improvement led to additional relevant IP rights; or
– Licensed to a Belgian company or permanent establishment by an affiliated or non-affiliated party, provided it further improves the relevant IP rights in a research centre in Belgium or abroad[65].

Bearing this in mind, relevant IP rights acquired by a Belgian company or permanent establishment from an affiliated or non-affiliated party do qualify for the IP box regime, irrespective of how they were acquired, whether by way of sale, contribution or otherwise.

With respect to licenses granted by third parties, no distinction is made between exclusive and non-exclusive licenses. In addition, it is not required that the license be granted for the entire duration of a relevant IP right, nor is it prohibited that the license extends beyond the duration of the relevant IP right where it also relates to other rights, such as for example brands. In addition, the IP box is also available where a Belgian company or permanent establishment is acquiring a relevant IP right which it licensed formerly, in so far as the patented products or processes are further improved in research centres located in Belgium or abroad[66].

Where a relevant IP right has been acquired by a Belgian company or permanent establishment, the benefits of the IP box regime may be claimed immediately on the improvement. In this regard, there is no requirement for a certain period to elapse before being eligible for the IP box regime[67].

The improvement of a relevant IP right acquired is supposed to create added value in respect of the acquired right. As such, it should improve and not necessarily develop an existing IP right. The law does not refer to the development of a relevant IP right into a new relevant IP right. Such improvement process does hence not need to result in an additional relevant IP right, a technical creation or an improvement that is new. As well as that, the improvement does not need to

Cops/De Haen, p. 2; Onkelinx/Van den Berg, p. 2, 4.

65 See Offermanns, Draft Law.

66 Hendrickx, p. 15; Van den Berghe/Kelley, p. 375; See also Offermanns, Draft Law.

67 Warson/Glaes, p. 321.

be an invention. The improvement is supposed to just result in added value by way of the intervention of a research centre[68].

This may imply that a taxpayer must be able to demonstrate that the improvement activities performed in a research centre effectively added value to a relevant IP right. This would apply, for example, where the cost efficiency of a patented process has been improved or the economic value of a patented product or production process has been increased. This additional value may also consist of further know-how that is inherently linked to the patented product or production process. Where it is not entirely clear if the added value meets the improvement condition, an advance ruling may be requested from the competent tax authorities[69].

Pursuant to article 93 of the Belgian Official Gazette, the IP box regime applies as of assessment year 2008 to RIPI earned and derived from relevant IP rights that were not used by a company, a permanent establishment, a licensee or related company for sales of products or services prior to 1 January 2007. Towards that end, the IP box regime is in principle limited to income from products or services that are commercialised as of 1 January 2007, irrespective of the date of registration of the relevant IP right[70].

The requirement that the relevant IP rights must not have been commercialised before 2007 purposes to avoid that older IP rights may be transferred to relevant companies without the possibility of ascertaining that those IP rights have been generated under the conditions as stipulated by the IP box legislation. Considering the objective of legislation, however, new improvements made to relevant IP rights dating from before 2007 are supposed to qualify for the IP box regime, provided they result from genuine research and innovation activities and that all other conditions are met[71].

Where an innovation is registered and used in different jurisdictions, the absence of use before January 2007 should be verified for the IP right of each jurisdiction separately[72].

---

68 Warson/Foriers, p. 74; See also Offermanns, Draft Law.

69 Warson/Glaes, p. 321; Springael/Van de Velden, p. 5; Van den Berghe/Kelley, p. 376.

70 Offermanns/Michel, chapter 1, 1.7.7; Vanhaute, chapter 5, 5.1.5; Warson/Van Ende, p. 1; Hendrickx, p. 18; Springael/Van de Velden, p. 5; Warson/Glaes, p. 319; Eynatten/Brauns, p. 1, 2; Van den Berghe/Kelley, p. 374, 381; Warson/Foriers, p. 72; Van Stappen/Delanoy/De Groote, p. 291; Van Stappen, p. 1; Cops/De Haen, p. 1, 6; Onkelinx/Van den Berg, p. 5.

71 Warson/Van Ende, p. 1.

72 Van den Berghe/Kelley, p. 381; Van Stappen, p. 2.

a) Patents

The Belgian tax legislation does not provide for any definition of a patent[73]. Nonetheless, each jurisdiction has its own definition of patent. In accordance with article 2 of the Law on patents ("IP Law"), the term "patent" is defined as the exclusive and temporary right granted to use any invention that is new, that is based on the inventor's activity and that may be applied in the field of industry. The following subjects or activities are excluded from being regarded as inventions, where the patent application only relates to these subjects or activities[74]:

– Discoveries
– Scientific theories;
– Mathematical methods;
– Aesthetic creations;
– Schemes, rules and methods for performing mental acts;
– Playing games or doing business, as well as computer software; and
– Presentations of data.

Patents are granted for a limited period of time for up to 20 years[75].

A patent application may be requested for legal protection at a Belgian, European or international level. In practice, a Belgian patent may be granted within a minimum of 18 months following the filing request. Belgian patents are usually granted for a period of six to twenty years, depending on whether or not novel research has been undertaken.

Furthermore, an invention as such is not defined by the IP Law. This is why it is not always clear what exactly constitutes an invention. According to jurisprudence, an invention is a technical solution for a problem that can be a product or a process. Also according to jurisprudence, an invention constitutes an addition to what already exists. This presupposes a technical creation that was previously unknown and is not evident[76].

Under article 5 of the IP Law, an invention is considered to be new where it is not part of the state of the art. The state of the art comprises everything made available to the public by means of a written or oral description, by use, or in any other way, or which is already the subject of a pending patent application in

---

73 Hendrickx, p. 15; Springael/Van de Velden, p. 3; Warson/Foriers, p. 70.
74 Hendrickx, p. 15; Van den Berghe/Kelley, p. 374; Warson/Foriers, p. 70; Van Stappen/Delanoy/De Groote, p. 292; Cops/De Haen, p. 1.
75 Van den Berghe/Kelley, p. 374; Onkelinx/Van den Berg, p. 1.
76 Idem, p. 70.

Belgium before the date of the filing of the patent application in question[77]. It follows that the IP box regime may not be a suitable option where discretion is required regarding a new technology[78].

The rights conveyed by a patent also vary from one jurisdiction to another. In accordance with article 27 of the IP Law, the patent holder can exclude third parties from making, offering, putting in the course of trade, using, importing or storing patented products as well as applying patented processes[79].

It may be interesting to note that business methods as such are not patentable in Europe, but might be in the United States. The same applies for software, which is patentable in the United States. Patent shopping is however unlikely to occur as a patent applicable in a certain jurisdiction may only be used in that specific jurisdiction according to the laws of that jurisdiction. A patent or protective measure is therefore not applicable in another jurisdiction[80].

b) Supplementary protection certificates

Apart from patents the IP box also applies to supplementary protection certificates. Supplementary protection certificates are sui generis, patent-like IP rights and exist for medicinal products, such as drugs, as well as for plant protection products, such as insecticides and herbicides. Supplementary protection certificates provide an extension of the patent duration. The supplementary protection certificate for medicinal products was introduced by Council Regulation No 1768/92, and the supplementary protection certificate for plant protection products was introduced by Council Regulation No 1610/96[81].

Prior to the introduction of a new medicine on the market, for illustration, permission necessarily needs to be received. The moment to acquire such permission may extend well into the time for which the patent has already been granted. Towards that end, a supplementary protection certificate may be issued so that the term of protection is extended to allow for time in which the R&D costs may be repaid[82].

C) Development condition

In accordance with article 205/2 paragraph (1) subparagraph (1) indent (1) of the ITC, the IP box is available for relevant IP rights owned by a Belgian company

---

77 Idem, p. 71.

78 Philipps/Danes, p. 9; Warson/Foriers, p. 72.

79 Van den Berghe/Kelley, p. 374, 375.

80 Warson/Foriers, p. 71.

81 Hendrickx, p. 15; Warson/Glaes, p. 320; Van den Berghe/Kelley, p. 375; Warson/Foriers, p. 72; Cops/De Haen, p. 1.

82 Warson/Foriers, p. 72.

or permanent establishment. The relevant IP rights must have been fully or partially developed by the company or permanent establishment in a research centre[83].

In accordance with article 205/2 paragraph (1) subparagraph (1) indent (2) of the ITC, the IP box is available for acquired or licensed relevant IP rights provided that such patented products or processes have been partially or fully improved by the company or permanent establishment in a research centre, irrespective whether or not such improvement has led to additional relevant IP rights[84].

Against this backdrop, a relevant IP right may be acquired from an affiliated or non-affiliated party in full or partial ownership, joint ownership, usufruct, or via license agreement, provided the Belgian company or permanent establishment has further improved the patented products or processes in a research centre located in Belgium or abroad. As mentioned above, it is not required that these improvements led to additional relevant IP rights[85].

Where a relevant IP right has been acquired or licensed by a Belgian company or permanent establishment, the IP box regime may be claimed immediately on the improvement. There is no requirement for a certain period to elapse before a taxpayer may benefit from the IP box regime[86].

In order to be able to effectively prove the improvement and to safeguard the benefits of the IP box regime for an acquired or licensed relevant IP right, the taxpayer may properly document the research conducted on patented products or processes, for instance on the basis of product designs, hours spent by personnel and costs incurred[87].

a) Research centres

The preparatory works to the IP box legislation do not elaborate on the rationale of introducing the requirement of a research centre. In the Finance Committee of the Belgian House of Representatives, the Finance Minister stated that this requirement was introduced to create employment and to ensure that the Belgian taxpayer does not merely serve as a conduit[88].

Similarly, the Belgian Government purposes to promote actual innovation activities. Bearing this in mind, a relevant company or permanent establishment

---

83 Shanahan, Patent Box, p. 5; Hendrickx, p. 18; Eynatten/Brauns, p. 1; Van den Berghe/Kelley, p. 375; Van Stappen/Delanoy/De Groote, p. 292; See also Offermanns, Draft Law.

84 Hendrickx, p. 18; Van den Berghe/Kelley, p. 376; See also Offermanns, Draft Law.

85 Vanhaute, chapter 5, 5.1.5.1; Shanahan, Patent Box, p. 5; Cops/Lemaire, p. 13.

86 Warson/Glaes, p. 321.

87 Van den Berghe/Kelley, p. 376.

88 Hendrickx, p. 17; Van den Berghe/Kelley, p. 375.

needs to develop or improve a relevant IP right in a research centre, either in Belgium or abroad[89]. It should be noted, however, that on 19 April 2013 a bill containing various fiscal and financial measures was presented to the Lower House. The bill inter alia aims abolishing the separate research centre requirement for SMEs[90].

So far, according to a literal reading of article 205/2 paragraph (1) of the ITC the research centre needs to constitute a branch of activity. It is therefore basically supposed to function on a stand-alone basis. It was not the intention of the legislator, however, that such condition would become an insurmountable obstacle[91].

As stated earlier, where a company or permanent establishment has acquired a relevant IP right based on article 205/2 paragraph (1) subparagraph (2) of the ITC, the IP box only applies provided that the patented product or process has been partially or fully improved by the company or permanent establishment in a research centre. It is irrespective whether or not such improvement has led to additional patents. There must however be some form of improvement effected by the research centre. Generally speaking, where there is no research centre, the IP box regime is not available[92].

Moreover, article 205/2 paragraph (1) subparagraph (2) of the ITC reflects that in order to benefit from the IP box regime the research centre must constitute a branch of activity as referred to in article 46 paragraph (1) subparagraph (2) of the ITC. Thereafter, a branch of activity is defined as a division of an enterprise that constitutes, from a technical perspective, an independent business able to work autonomously[93]. Additionally, article 680 of the Code des sociétés ("Company Law") may be consulted in this context, which contains a legal definition of a branch of activity[94].

The research centre condition frequently leads to confusion. It is often assumed that a research centre is required to have its own operational management, resources and employees that are exclusively occupied with research activities[95]. Yet, there is no need for an own operational management and other resources to

89 Warson/Van Ende, p. 1.

90 See Offermanns, Draft Law.

91 Warson/Van Ende, p. 1.

92 Hendrickx, p. 16; Springael, Revenus, p. 8; Scheunemann/Dennisen, p. 410; Warson/Foriers, p. 75; Onkelinx/Van den Berg, p. 2; See also Offermanns, Draft Law.

93 Offermanns/Michel, chapter 1, 1.7.7; Vanhaute, chapter 5, 5.1.5.2; Bal/Offermanns, p. 171; Shanahan, Patent Box, p. 5; Hendrickx, p. 16; Warson/Glaes, p. 320; Springael, Revenus, p. 8; Eynatten/Brauns, p. 2; Van den Berghe/Kelley, p. 375; Scheunemann/Dennisen, p. 410; Warson/Foriers, p. 75; Van Stappen/Delanoy/De Groote, p. 291; Cops/De Haen, p. 2.

94 Hendrickx, p. 17.

95 Warson/Glaes, p. 320.

be fully dedicated to the research activities of a company or permanent establishment[96]. This implies that a research centre does not need to be entirely separate from the rest of the company or permanent establishment. In this regard, the Belgian tax authorities adopted a broad interpretation of the research centre concept and acknowledge that operational management, other resources and employees do not need to be exclusively attached to a branch of activity, but may be used jointly with other parts of the company or permanent establishment without jeopardising compliance with the research centre condition[97].

Moreover, article 205/2 paragraph (1) of the ITC does not specify that a research centre must be owned by the Belgian company or permanent establishment[98]. Nor does it require a research centre to continue to exist throughout the lifetime of a relevant IP right. The involvement of a research centre is only required during the development phase of a relevant IP for the self-developed IP or during the improvement phase of the patented product or process for an acquired or licensed relevant IP right[99].

A research centre may perform different activities and functions, which relate to the full or partial development or improvement relevant IP rights of the company or permanent establishment. For instance, it may assume the risks and ownership of relevant IP rights or encompass a team of qualified engineers that develop or improve relevant IP by using certain facilities or test equipment and other assets. A research centre may further encompass patent attorneys that file or secure the management of relevant IP rights or an administrating and coordinating team that manages the budget and coordinates the development or improvement activities[100].

Where a company or permanent establishment has no activity other than R&D, the IP box regime is likely to apply as well[101].

Apart from the ownership condition in the relevant IP rights, the IP box legislation and the FAQ only refer to the need for a minimum level of economic substance of a research centre in Belgium or abroad. A research centre is further supposed to be continuous regarding its development and improvement activi-

96 Idem.

97 Warson/Van Ende, p. 1; Warson/Glaes, p. 320; Springael, Revenus, p. 9; Van den Berghe/Kelley, p. 375; Warson/Foriers, p. 75.

98 Springael, Revenus, p. 9; Warson/Foriers, p. 75.

99 Van den Berghe/Kelley, p. 375.

100 Warson/Van Ende, p. 1; Springael, Revenus, p. 9; Warson/Foriers, p. 75; See also Offermanns, Draft Law.

101 Van den Berghe/Kelley, p. 375.

ties performed. The number of employees or the amount of resources or assets used is of less importance[102].

By the same token, the minimum substance condition may be helpful in improving the effectiveness of future tax audits carried out to check the actual development and improvement activities performed by the taxpayer[103]. Although the provisions on the IP box do not require the research centre to keep a separate set of accounts, it is useful to have such accounts to be able to document the intervention of the research centre and the costs incurred by it in carrying out the development and improvement activities. The burden of proof regarding applicability of the IP box regime rests with the taxpayer[104].

The IP box regime was never meant to be selective by being restricted to multinational enterprises ("MNE") highly involved in R&D activities. As the IP box legislation only imposes a minimum size or a minimum substance condition with respect to research centres, taxpayers with limited R&D activities and in particular small and medium companies are encouraged to benefit from the IP box as well[105].

Where the tax authorities would try to defend another opinion and ask for basic R&D activity in Belgium, this would raise serious state aid concerns[106]. Moreover, it appears from the case law of the European Court of Justice ("ECJ") that a branch of activity does not need to be independent from the rest of the company. It may therefore be financed and managed centrally[107].

The research centre does not need to be located in Belgium. The substance criterion is met as long as the company or permanent establishment has a research centre, which may be located abroad and even outside the European Union, provided that the research centre belongs to a Belgian legal entity[108].

Where in accordance with article 205/2 paragraph (1) subparagraph (2) of the ITC a relevant IP right has been acquired or licensed, the requirement to improve the relevant IP right based on a research centre is not further specified in

---

102 Hendrickx, p. 14; Warson/Glaes, p. 320; Springael, Revenus, p. 9; Van den Berghe/Kelley, p. 375, 376; Warson/Foriers, p. 75; Van Stappen/Delanoy/De Groote, p. 292; Van Stappen, p. 2; Onkelinx/Van den Berg, p. 2.

103 Van den Berghe/Kelley, p. 376.

104 Idem.

105 Warson/Glaes, p. 320; Van den Berghe/Kelley, p. 376; See also Offermanns, Draft Law.

106 Springael, Revenus, p. 9; Warson/Foriers, p. 75.

107 Van den Berghe/Kelley, p. 375.

108 Bal/Offermanns, p. 171; Shanahan, Patent Box, p. 5; Hendrickx, p. 17; Warson/Glaes, p. 320; Springael, Revenus, p. 9; Scheunemann/Dennisen, p. 410; Van den Berghe/Kelley, p. 375; Cops/De Haen, p. 2; Onkelinx/Van den Berg, p. 2.

the IP box legislation. Such improvement condition may be fulfilled by a company or permanent establishment where added value can be effectively demonstrated in relation to a patented product or process. This would apply, for example, where the cost efficiency of a patented process has been improved or the economic value of a legally protected product or production process has been increased. This additional value may also consist of further know-how that is inherently linked to the patented product or production process. The improvement does, however, not need to result in an additional relevant IP right, a technical creation or an improvement that is new. A case-by-case analysis of the facts needs to be undertaken in order to assess whether or not the improvement condition is met. Where it is not entirely clear if the added value meets the improvement condition, an advance ruling may be requested from the competent tax authorities[109].

By virtue of article 205/2 paragraph (1) of the ITC, the IP box legislation refers to a full or partial development or improvement of relevant IP rights in research centres. This implies that a Belgian company or permanent establishment may outsource or subcontract some or most of its R&D activities to affiliated or non-affiliated contract researchers on account of the Belgian company or permanent establishment[110].

Although the research centre may theoretically outsource most R&D to contract researchers, the role of the research centre of a Belgian company or permanent establishment is supposed at least to consist of supervising the R&D activities carried out by the contract researchers. Where the research centre is unable to perform this supervisory task through its own trained personnel and infrastructure, the requirement of a research centre is likely not to be met and the Belgian company or permanent establishment may thus not be eligible to the IP box regime[111].

A Belgian company acting as contract researcher on behalf of another Belgian company or permanent establishment is not eligible for the IP box regime because it is not the full or partial owner, holder of beneficial rights to, usufruct holder or licensor of the resulting relevant IP right nor does it exploit such relevant IP right[112].

---

109 Warson/Glaes, p. 320, 321; Springael/Van de Velden, p. 5; Van den Berghe/Kelley, p. 376; Warson/Foriers, p. 74; See also Offermanns, Draft Law.

110 Warson/Van Ende, p. 1; Warson/Glaes, p. 320; Springael, Revenus, p. 8, 9; Cops/Lemaire, p. 13; Warson/Foriers, p. 75.

111 Bal/Offermanns, p. 171; Shanahan, Patent Box, p. 5; Springael, Revenus, p. 9; Eynatten/Brauns, p. 2; Scheunemann/Dennisen, p. 410; Van den Berghe/Kelley, p. 376; Cops/De Haen, p. 2; Onkelinx/Van den Berg, p. 2; See also Offermanns, Draft Law.

112 Bal/Offermanns, p. 171; Shanahan, Patent Box, p. 5; Scheunemann/Dennisen, p.

D) Ownership condition

According to the position of the Belgian tax authorities, legal ownership of the relevant IP rights in the hands of the Belgian taxpayer is required to be eligible for the IP box regime[113].

It is however not required that the company or permanent establishment be the sole owner of the relevant IP right. All joint owners qualify for the IP box in respect of their portion of the RIPI. Since the IP box legislation merely refers to "patents" and not to "ownership of patents", the IP box regime is available if the company or permanent establishment has title to the relevant IP right on the basis of other property rights, such as usufruct, as well[114].

3. Relevant IP profits

A) Calculation of relevant IP profits

In accordance with article 205/2 paragraph (2) subparagraph (1) indent (1) of the ITC, income from relevant IP rights qualifies for the IP box regime only to the extent it is included in the Belgian tax base. This requirement also applies to the remuneration from relevant IP rights by virtue of article 205/2 paragraph (2) subparagraph (1) indent (2) of the ITC, which is embedded in the sales price. Thereafter, the IP box legislation refers to license fees that would have been included in the Belgian tax base if the goods or services had been produced by a third party under a license granted by the company or permanent establishment[115].

In accordance with article 205/2 paragraph (2) subparagraph (2) of the ITC, to the extent that the remunerations referred to in article 205/2 paragraph (2) subparagraph (1) of the ITC do not relate exclusively to relevant IP rights or patents respectively, then only the portion that relates to relevant IP rights qualifies for the tax deduction under the IP box regime[116]. It follows that for a Belgian company or permanent establishment, the IP box is not available where the income from a relevant IP right is attributable to a foreign permanent establishment whose profit is exempt under the applicable double taxation agreement. By the same token, for a Belgian permanent establishment of a non-resident company, the IP box regime is not available if the relevant IP right and the income derived

---

410; Cops/Lemaire, p. 13.

113 Eynatten/Brauns, p. 1.

114 Bal/Offermanns, p. 171; Scheunemann/Dennisen, p. 410; Van den Berghe/Kelley, p. 375; Onkelinx/Van den Berg, p. 2.

115 Offermanns/Michel, chapter 1, 1.7.7; Offermanns/Michel/Vanhaute, chapter 1, 1.9.7; Van den Berghe/Kelley, p. 378.

116 Hendrickx, p. 19; Eynatten/Brauns, p. 1; Van den Berghe/Kelley, p. 377; Warson/Foriers, p. 73; Cops/De Haen, p. 3; Onkelinx/Van den Berg, p. 3.

from it is not attributable to the Belgian permanent establishment, but to the non-resident company or permanent establishment outside Belgium[117].

Technically speaking, the IP box allows for an additional tax deduction in the corporate income tax return. Articles 205/1 to 205/4 and 236bis of the ITC allow a Belgian company or a Belgian permanent establishment of a foreign company to deduct from its taxable basis an amount equal to 80% of the gross income from relevant IP rights, insofar as such gross income is in line with the arm's length principle. This is why only 20% of the gross income from relevant IP rights is taxable at the general corporate tax rate of 33.99%, resulting in a maximum effective tax rate of 6.8%. The tax deduction under the IP box regime applies after the dividends received deduction and before the notional interest deduction and can thus be combined with other tax incentives[118].

On the basis of article 205/2 paragraph (2) subparagraph (1) indent (2) of the ITC the IP box applies to payments for patented products manufactured or services supplied by a company, or on behalf of a company, by a third party based on a license granted on relevant IP rights, provided the conditions agreed between the company and the third party are at arm's length[119]. Moreover, under article 205/2 paragraph (1) indent (2) of the ITC the IP box is not limited to patented products but includes processes as well[120].

The IP box is not applicable to relevant IP rights that are pending as well as to cancelled or expired IP rights. As soon as the competent authorities grant a relevant IP right, and as long as the relevant IP right exists, the income from the relevant IP right is eligible for the IP box[121]. Where the relevant IP right is retroactively declared invalid by a court, it legally never existed and the tax authorities may deny the past tax deductions claimed with respect to the invalid IP right, provided the statute of limitations for assessing additional tax has not expired[122].

---

117 Vanhaute, chapter 5, 5.1.5.4; Warson/Van Ende, p. 2; Hendrickx, p. 19; Scheunemann/Dennisen, p. 410; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 374, 378, 380; Onkelinx/Van den Berg, p. 3.

118 Offermanns/Michel, chapter 1, 1.7.4, 1.7.7; Offermanns/Michel/Vanhaute, chapter 1, 1.9.6, 1.9.7; Hendrickx, p. 20; Cops/Lemaire, p. 14, Warson/Foriers, p. 71, 73; Cops/De Haen, p. 3; Van den Berghe/Kelley, p. 380; Onkelinx/Van den Berg, p. 5.

119 Offermanns/Michel, chapter 1, 1.7.7; Offermanns/Michel/Vanhaute, chapter 1, 1.9.7.

120 Warson/Van Ende, p. 1; Warson/Glaes, p. 319.

121 Hendrickx, p. 16; Warson/Glaes, p. 319, 320; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 375; .Onkelinx/Van den Berg, p. 2.

122 Hendrickx, p. 16; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 377.

Depending on whether a company or permanent establishment developed a relevant IP right itself or has made improvements to an acquired or licensed relevant IP right, the tax deduction under the IP box regime is calculated differently[123].

By virtue of article 205/1 of the ITC, for a self-developed relevant IP right the Belgian company or permanent establishment is allowed to deduct from its taxable basis an amount equal to 80% of the gross income from the relevant IP right[124]. Article 205/3 paragraph (1) subparagraph (1) of the ITC stipulates, however, that the income in the course of a tax year from a relevant IP right acquired by the company or permanent establishment via purchase, contribution, usufruct arrangement or a license is to be reduced by[125]:

– Any remuneration for the relevant IP rights made to any other affiliated or non-affiliated party, provided that such remuneration is charged to the taxable result in Belgium in the same tax year; and

– Any amortisation on the acquisition or investment value of the relevant IP rights to the extent that such amortisation is charged to the taxable result in Belgium in the same tax year.

Article 205/3 paragraph (1) subparagraph (2) of the ITC specifies that where the remuneration and the amortisation referred to in article 205/3 paragraph (1) subparagraph (1) of the ITC do not relate exclusively to relevant IP rights or patents respectively, but also to other IP rights, then only the portion that relates to relevant IP rights is to be deducted from the basis for the tax deduction under the IP box regime[126].

In accordance with article 205/3 paragraph (1) subparagraph (3) of the ITC, the reduction referred to in article 205/3 paragraph (1) subparagraph (1) indent (1) of the ITC does not include the contributions paid by the company or permanent establishment to the costs of R&D borne by another affiliated or non-affiliated party.

Furthermore, article 205/3 paragraph (2) of the ITC sets out that where the remuneration for the acquired relevant IP rights made to any other affiliated or non-affiliated party by the Belgian company or permanent establishment would be lower than an arm's length remuneration, notwithstanding article 205/3 paragraph (1) subparagraph (1) indent (1) of the ITC, the basis for the 80% tax de-

123 Warson/Van Ende, p. 2.

124 Eynatten/Brauns, p. 2.

125 Vanhaute, chapter 5, 5.1.5.3; Warson/Van Ende, p. 2; Hendrickx, p. 20; Eynatten/Brauns, p. 2; Cops/Lemaire, p. 14; Van den Berghe/Kelley, p. 379; Onkelinx/Van den Berg, p. 4.

126 Hendrickx, p. 20; Van den Berghe/Kelley, p. 380.

duction under the IP box regime is to be decreased by the amount that equals to an arm's length remuneration[127].

Similarly, according to article 205/3 paragraph (3) of the ITC, where the acquisition value or investment value of the acquired relevant IP rights would be lower than an arm's length acquisition or investment value, the basis for the 80% tax deduction under the IP box regime, notwithstanding article 205/3 paragraph (1) subparagraph (1) indent (2) of the ITC, is to be decreased by the amount of amortisation based on an arm's length acquisition or investment value[128].

The rationale behind article 205/3 of the ITC is to avoid abuse, in particular charging too low of an amount as a remuneration for licenses to the Belgian company or permanent establishment as well as double deductions, and thus to restrict the benefits of the IP box regime to the net income or value added provided by the Belgian company or permanent establishment on the basis of a research centre. Towards that end, the amount of added value must be supported by transfer pricing techniques where transactions among affiliated parties occur[129].

Article 205/3 paragraph (1) subparagraph (1) of the ITC only imposes the reduction in respect of a relevant IP right acquired from third parties that led to income from the relevant IP right during the tax year. Taking a narrow interpretation of the text of the law, a Belgian company or permanent establishment is not required to deduct both the remuneration made and the amortisation on a relevant IP right where no income is realised in respect of that relevant IP right[130].

In the same way, where an acquired IP right is allocated to a company or permanent establishment outside of Belgium, the income derived from that IP right is not subject to Belgian corporate income tax and does hence not qualify for the purposes of the IP box. This is why the license payments and amortisation related to the relevant IP right may be ignored when calculating the tax deduction[131].

It should be emphasised that the reductions under article 205/3 paragraph (1) subparagraph (1) of the ITC merely apply to calculating the basis for the tax deduction under the IP box regime. In particular, it does not affect the full tax deductibility of expenses related to R&D incurred by a taxpayer from its overall taxable base, including expenses for improving a patented product or process in

---

127 Hendrickx, p. 20; Warson/Foriers, p. 74; Cops/De Haen, p. 3.

128 Idem.

129 Warson/Van Ende, p. 2; Hendrickx, p. 20; Eynatten/Brauns, p. 2; Warson/Glaes, p. 323; Cops/Lemaire, p. 14; Van den Berghe/Kelley, p. 380; Warson/Foriers, p. 74; Van Stappen/Delanoy/De Groote, p. 293; Onkelinx/Van den Berg, p. 4.

130 Van den Berghe/Kelley, p. 379.

131 Warson/Van Ende, p. 2¸ Van den Berghe/Kelley, p. 380.

relation to an acquired relevant IP right, license fees and amortisation or depreciation[132].

The costs incurred by the company or permanent establishment to develop a relevant IP right, or to improve an acquired or licensed IP right do not reduce the amount of the tax deduction under the IP box regime and are not subject to a recapture applied on the tax deduction either, provided they are in line with the arm's length principle[133]. In addition, article 205/3 paragraph (1) subparagraph (3) of the ITC specifies that the same is true where a company or permanent establishment shares in the cost of R&D performed by any other affiliated or non-affiliated party, for example by the proprietor or licensor respectively or the transferor of the relevant IP right[134]. The tax deduction under the IP box available for a tax year is however limited to the overall taxable result in that tax year[135].

Furthermore, the reduction by virtue of article 205/3 paragraph (1) of the ITC should be calculated for each relevant IP right separately. This is important where the expenses incurred for license payments made to another party as well as for amortisation relating to a relevant IP right exceed the income for the relevant IP right. If the reduction is calculated for all relevant IP rights as a whole, the excess remuneration and amortisation in respect of one relevant IP right is deducted from the income derived from other relevant IP rights[136].

An example to illustrate the application of article 205/3 paragraph (1) of the ITC is set out below[137]:

Calculation of the partial exemption provided by the IP box and the effective tax rate ("ETR")
Case 1: A company develops a patent for an amount of 1.000. Case 2: A company acquires a patent for the amount of 1.000. The relevant IP income ("RIPI") in both cases is 600. The patent is depreciated over 10 years. The improvement expenses are 10. The general corporate tax rate is 33.99%.

132 Hendrickx, p. 20; Eynatten/Brauns, p. 2; Van den Berghe/Kelley, p. 379.
133 Warson/Van Ende, p. 2; Van den Berghe/Kelley, p. 379, 380.
134 Van den Berghe/Kelley, p. 379, 380.
135 Warson/Van Ende, p. 2.
136 Hendrickx, p. 20; Van den Berghe/Kelley, p. 379; Onkelinx/Van den Berg, p. 4.
137 Eynatten/Brauns, p. 2.

	Case 1	Case 2
RIPI	600	600
Depreciation	-100	-100
Improvement expenses by virtue of article 205/3 ITC	-10	-10
Partial exemption of 80% by virtue of article 205/1 ITC	-480	-400
Taxable basis	10	90

Partial exemption case 1: 600 x 0.80 = 480; ETR (10 x 0.3399) / 600 = 0.5%

Partial exemption case 2: (600 – 100) x 0.80 = 400; ETR (90 x 0.3399) / 600 = 5%

Although the tax deduction under the IP box is calculated as 80% of gross income from relevant IP rights, all business expenses incurred by a Belgian company or permanent establishment in the development and the exploitation of a relevant IP right are normally tax-deductible in accordance with the standard Belgian corporate tax rules. This is why the IP box provides for a tax deduction in addition to the normal tax-deductibility of all the R&D-related and other business expenses. These tax-deductible expenses include, but are not limited to[138]:

- Salary costs;
- Costs of R&D infrastructure;
- Administration costs;
- Registration duties for relevant IP rights;
- Amortisation costs of self-developed relevant IP rights;
- Other operating costs; or
- Finance costs.

[138] Hendrickx, p. 20; Cops/Lemaire, p. 14; Van den Berghe/Kelley, p. 380; Warson/Foriers, p. 73; Van Stappen/Delanoy/De Groote, p. 293; Van Stappen, p. 3; Cops/De Haen, p. 4.

According to article 207 of the ITC, however, the IP box regime does not include abnormal or gratuitous advantages received from affiliated parties, which are not in line with the arm's length principle[139].

The amount of the tax deduction under the IP box regime is limited to the taxable income of the company before utilisation of notional interest deduction and tax losses. Thus, if there is insufficient taxable income left to offset the tax deduction under the IP box, the unused part of the deduction is lost. Any excess deduction for a tax year cannot be carried-forward to subsequent tax years[140].

An example to illustrate the determination of the tax deduction under the IP box with insufficient taxable income is set out below[141]:

Calculation of the tax deduction under the IP box with an excess tax deduction

AP	**1**	**2**	**3**	**4**
1. R&D expenses	-300	-100	0	0
2. Patent income	0	400	2.000	2.000
3. Profit	-300	300	2.000	2.000
4. Tax deduction (80%)	0	* -300	-1.600	-1.600
5. Deduction of losses carried forward	0	0	-300	0
6. Taxable profit	0	0	100	400
7. Corporate tax (33.99%)	0	0	34	136
8. Losses carried forward	-300	-300	0	0
9. ETR	0	0	1.7%	6.8%

* The tax deduction under the IP box, in principle, amounts to 320 (i.e. 80% of 400). However, insufficient profit of 300 is available for applying a full tax deduction. As a result, only 300 can effectively be deducted. The unused portion of 20 cannot be carried forward and will be lost.

139 Van den Berghe/Kelley, p. 381.

140 Offermanns/Michel, chapter 1, 1.7.7; Offermanns/Michel/Vanhaute, chapter 1, 1.9.7; Vanhaute, chapter 5, 5.1.5; Warson/Van Ende, p. 2; Hendrickx, p. 20; Warson/Glaes, p. 323; Eynatten/Brauns, p. 2; Van den Berghe/Kelley, p. 380; Warson/Foriers, p. 71; Van Stappen/Delanoy/De Groote, p. 291; Van Stappen, p. 1; Cops/De Haen, p. 3; Onkelinx/Van den Berg, p. 5.

141 Van den Berghe/Kelley, p. 381.

B) Relevant IP income

RIPI can arise from different ways of exploiting relevant intangible assets. Any non-taxable income cannot, however, be RIPI.

When income is derived from foreign patents, it is important to consider the following guidelines[142]:

– If a company or permanent establishment only has a patent in the jurisdiction where the product is manufactured or the process applied, then the RIPI corresponds to all patent income realised as a result of the commercialisation of the product or process, regardless of the jurisdiction where the products or processes are commercialised and regardless of whether or not a patent has been granted in the country of commercialisation[143]; and

– If a company or permanent establishment only has a patent in the jurisdictions where the product or process is commercialised, then the RIPI corresponds to all patent income realised in the jurisdictions where the products or processes are commercialised, regardless of whether or not a patent has been granted in a country where the products are manufactured[144].

RIPI generally falls within one of the following categories:

a) Sales income

In accordance with article 205/2 paragraph (2) subparagraph (1) indent (2) of the ITC, the IP box regime applies to the income from relevant IP rights embedded in the sales price of products or services[145]. The IP box regime does therefore not discriminate against companies or permanent establishments that manufacture products or render services themselves rather than licensing the relevant IP rights out to third parties[146].

---

142 Warson/Van Ende, p. 1; Hendrickx, p. 15; Warson/Glaes, p. 321; Springael, Protection, p. 7; Springael/Van de Velden, p. 4; Van den Berghe/Kelley, p. 378.

143 For example, a Belgian company that has been granted a French patent with respect to a certain product and has this product manufactured in France by another company on its account, can benefit from the IP box regime with respect to all income realised from the sale of this product, regardless of where these products are sold.

144 For example, a Belgian company that has only requested and received a patent in the United States, since this is the only market where the related products are sold, and that has the legally protected product manufactured by another company in Germany, where no patent has been granted, can benefit from the IP box regime with respect to all patent income realised in the United States.

145 Onkelinx/Rens, p. 3; Van den Berghe/Kelley, p. 374, 375.

146 Van den Berghe/Kelley, p. 377.

For relevant IP rights used by a Belgian company or permanent establishment for the manufacture of products, or where patented machinery is used, the tax deduction under the IP box regime amounts to 80% of the income embedded in the sales price of products that a Belgian company or permanent establishment would have received if it had licensed the relevant IP rights, which are used in the manufacture of products and which it currently exploits itself, to an unrelated party[147].

By the same token, in the case of IP rights used by a Belgian company or permanent establishment for the supply of services, supplied by itself or by a subcontractor on its behalf, the tax deduction under the IP box amounts to 80% of the remuneration embedded in the gross license fee that the Belgian company or permanent establishment would have received if it had licensed the relevant IP rights, which are used in the supply of the services and which it currently exploits itself, to an unrelated party[148].

The fact that the amount of income reflecting the remuneration for a relevant IP right is included in the sales income of products or services asks for transfer pricing analyses. Accordingly, article 205/2 paragraph (2), subparagraph (1) indent (2) of the ITC stipulates that a notional license fee or a hypothetical royalty respectively is to be determined by the taxpayer. The notional license fee is defined as the arm's length remuneration that a third party would pay to the company or permanent establishment if the third party produced the goods on the basis of a license agreement granted by the company or permanent establishment. The IP box legislation does however not contain a specific methodology nor does it provide guidelines in this context. This is why the taxpayer can rely on the general transfer pricing guidelines and select one or more methods that are most appropriate[149]. In addition to that, an advance ruling can be requested on this issue[150].

---

147 Vanhaute, chapter 5, 5.1.5.1, 5.1.5.3; Bal/Offermanns, p. 171; Warson/Van Ende, p. 1; Shanahan, Patent Box, p. 5; Hendrickx, p. 18; Warson/Glaes, p. 322; Springael, Protection, p. 6; Eynatten/Brauns, p. 1; Scheunemann/Dennisen, p. 410; Onkelinx/Rens, p. 3; Springael/Van de Velden, p. 4; Cops/Lemaire, p. 14; Van den Berghe/Kelley, p. 377, 378; Warson/Foriers, p. 73; Van Stappen, p. 1; Cops/De Haen, p. 2, 3; Onkelinx/Van den Berg, p. 3.

148 Vanhaute, chapter 5, 5.1.5.1, 5.1.5.3; Bal/Offermanns, p. 171; Warson/Van Ende, p. 1; Shanahan, Patent Box, p. 5; Hendrickx, p. 18, 19; Warson/Glaes, p. 319, 322; Springael, Protection, p. 6; Eynatten/Brauns, p. 1; Scheunemann/Dennisen, p. 410; Onkelinx/Rens, p. 3; Springael/Van de Velden, p. 4; Cops/Lemaire, p. 14; Van den Berghe/Kelley, p. 377, 378; Warson/Foriers, p. 73; Cops/De Haen, p. 2, 3; Onkelinx/Van den Berg, p. 3.

149 Warson/Van Ende, p. 2; Van den Berghe/Kelley, p. 377.

150 Vanhaute, chapter 5, 5.1.5.3.

Although IP rights other than patents or supplementary protection certificates are in principle not eligible for the IP box regime, that part of the sales price of a product, process or service that relates to IP rights such as trademarks, designs or know-how is also eligible for the IP box provided that such IP right is inherent to the patent or supplementary protection certificate or is inseparable from such right[151].

b) License fees

In accordance with article 205 paragraph (2) subparagraph (1) indent (1) of the ITC, the IP box applies to income derived from the licensing of relevant IP rights[152]. To the extent that the Belgian company or permanent establishment licenses a relevant IP right, the tax deduction under IP box regime is calculated based on the license fees received. The amount of those license fees eligible for the IP box is limited to the amount that is part of the taxable income in Belgium and corresponds to the fee that would have been agreed between unrelated parties[153].

The arm's length requirement purposes to prevent affiliated parties from artificially boosting the basis for the tax deduction under the IP box regime by manipulating the transfer prices[154].

Subject to certain requirements, such as the development or improvement condition respectively, income on sublicenses received by a relevant company or permanent establishment qualifies for the IP box as well[155].

The license income can consist of either a variable remuneration, for instance royalties as a percentage on turnover, as well as fixed and advance remunera-

---

151 Warson/Glaes, p. 322; Springael/Van de Velden, p. 5.

152 Vanhaute, chapter 5, 5.1.5.1; Warson/Van Ende, p. 1; Hendrickx, p. 18; Eynatten/Brauns, p. 1; Warson/Foriers, p. 73; Cops/Lemaire, p. 13; Van Stappen, p. 1; Cops/De Haen, p. 2.

153 Shanahan, Patent Box, p. 5; Warson/Glaes, p. 322; Springael, Protection, p. 6; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 374, 375; Cops/De Haen, p. 2; Onkelinx/Van den Berg, p. 3.

154 Van den Berghe/Kelley, p. 377.

155 Vanhaute, chapter 5, 5.1.5.1; Hendrickx, p. 18; Van den Berghe/Kelley, p. 374; Van Stappen/Delanoy/De Groote, p. 291; Onkelinx/Van den Berg, p. 3.

tion, for instance upfront and milestone payments[156]. It does however not include contributions to the improvement of patented products or processes[157].

Where the license fees are paid separately to different co-owners, the amounts of the income eligible for the IP box are straightforward to determine. However, where a global remuneration is paid by the licensor to the different co-owners, a formula has to be determined in order to allocate the right amount of income to each co-owner[158].

It should be noted that a license agreement may extend beyond the protection period of the relevant IP rights. If so, only a significantly lower license fee may be charged for other IP rights that are still be subject to the license agreement, such as trademarks, designs or know-how. Obviously, such income derived from non-relevant IP rights does not qualify for IP box purposes [159].

c) Proceeds of sale

The IP box regime does not apply to capital gains realised upon the disposal or transfer of a relevant IP right[160].

It may however be possible to grant a license in respect of a relevant IP right under such conditions that the economic consequences thereof approximate the consequences of transferring the relevant IP right, while the legal right to benefit from the IP box remains in the hands of the Belgian company or permanent establishment who grants the license[161].

d) Damages for infringement

Damages for infringement in respect of patent protection qualify as RIPI[162].

---

156 Vanhaute, chapter 5, 5.1.5.3; Bal/Offermanns, p. 171; Warson/Van Ende, p. 2; Hendrickx, p. 18; Scheunemann/Dennisen, p. 410; Warson/Glaes, p. 322; Onkelinx/Rens, p. 3; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 377; Warson/Foriers, p. 73; Van Stappen/Delanoy/De Groote, p. 292; Van Stappen, p. 2; Cops/De Haen, p. 2; Onkelinx/Van den Berg, p. 3.

157 Vanhaute, chapter 5, 5.1.5.3; Warson/Glaes, p. 322.

158 Warson/Glaes, p. 322.

159 Van den Berghe/Kelley, p. 377.

160 Bal/Offermanns, p. 171; Warson/Van Ende, p. 2; Shanahan, Patent Box, p. 5; Hendrickx, p. 18; Eynatten/Brauns, p. 1; Scheunemann/Dennisen, p. 410; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 376; Warson/Glaes, p. 319; Onkelinx/Van den Berg, p. 3.

161 Hendrickx, p. 18; Warson/Glaes, p. 319; Van den Berghe/Kelley, p. 376.

162 Hendrickx, p. 19; Warson/Foriers, p. 74.

e) Other compensation

The range of RIPI in respect of income from relevant IP rights is, as yet, not entirely clear[163]. It is unclear if other compensation in respect of a relevant IP rights results in RIPI.

C) Notional royalty

The principle purpose of notional royalty provisions is to deliver IP box benefits to a company or permanent establishment using its relevant IP rights in a way that does not generate RIPI but does enable the company or permanent establishment deriving income and profits or IP-derived income respectively. In particular this is expected to cover relevant IP rights used in processes that create non-protected products or to provide services[164].

Such income generated is referred to as IP-derived income and treated as RIPI. It is an amount equal to the royalty or license fee that would be paid to an independent owner of a relevant IP right for the use of the right by the company or permanent establishment to generate the IP-derived income[165]. Excluded income or income which is not subject to Belgian corporate income tax does however not qualify as IP-derived income[166].

Although the Belgian IP box legislation does not directly refer to the concept of notional royalty, it does indirectly. In accordance with articles 205/1 and 205/2 paragraph (2) subparagraph (2) indent (2) of the ITC, for a relevant IP right used by a Belgian company or permanent establishment for the manufacture of patented products or the supply of services, manufactured or rendered by itself or by a subcontractor on its behalf, the tax deduction under the IP box regime is 80% of the license fee that the Belgian company would have received had it licensed the relevant IP right used in the manufacturing process or the supply of services to an unrelated party[167].

---

163 Idem.

164 See HM Revenue & Customs, Finance Bill 2012, p. 39 recital 3.55; HM Revenue & Customs, Draft Legislation, p. 23 recital 3.39; HM Treasury/HM Revenue & Customs, Consultation, p. 14 recitals 3.8, 3.9, 3.10.

165 See HM Revenue & Customs, Finance Bill 2012, p. 39 recital 3.58; HM Revenue & Customs, Draft Legislation, p. 23 recital 3.41.

166 See Finance (No. 4) Bill, p. 150 at 357CD (9); Consultation draft, p. 11 at 357CC (9).

167 Vanhaute, chapter 5, 5.1.5.1, 5.1.5.3; Bal/Offermanns, p. 171; Warson/Van Ende, p. 1; Shanahan, Patent Box, p. 5; Hendrickx, p. 18; Warson/Glaes, p. 322; Springael, Protection, p. 6; Eynatten/Brauns, p. 1; Scheunemann/Dennisen, p. 410; Onkelinx/Rens, p. 3; Springael/Van de Velden, p. 4; Cops/Lemaire, p. 14; Van den Berghe/Kelley, p. 377, 378; Warson/Foriers, p. 73; Van Stappen, p. 1; Cops/De Haen, p. 2, 3; Onkelinx/Van den Berg, p. 3.

D) Excluded income

Article 205/2 paragraph (2) subparagraph (3) of the ITC specifies that the IP box does not include the contribution received to the costs of R&D borne by a company or permanent establishment.

As a result, income generated by a Belgian company or permanent establishment for R&D activities that it performs as a contract developer or subcontractor, either under a contract development agreement or under a cost sharing agreement, is excluded from the benefits of the IP box. This is because the Belgian company or permanent establishment is not necessarily the full or partial owner, holder of beneficial rights to, usufruct holder or licensor of any so-developed IP right and the income does not result from the exploitation of such IP right[168].

When income is derived from foreign patents, it is important to note that if a company or permanent establishment does not have a relevant IP right in the jurisdiction where the product is manufactured or the process applied, then the regime excludes income from relevant IP rights derived in the jurisdictions where the products or processes are commercialised to the extent that for those jurisdictions no relevant IP right has been granted[169].

As well as that, the IP box does not apply to income derived from an IP right that is attributable to a foreign company or foreign permanent establishment of a Belgian company[170].

Income derived from IP rights such as trademarks, designs, models, know-how, copyrights, secret recipes or proceeds, information concerning experience with respect to trade or science or marketing intangibles are not eligible for purposes of the IP box. The tax authorities however have indicated that income from know-how closely associated with relevant IP rights may qualify for purposes of the IP box regime as well[171].

---

168 Offermanns/Michel, chapter 1, 1.7.7; Offermanns/Michel/Vanhaute, chapter 1.9.7; Bal/Offermanns, p. 171; Warson/Van Ende, p. 2; Hendrickx, p. 19; Warson/Glaes, p. 319; Scheunemann/Dennisen, p. 410; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 376; Van Stappen/Delanoy/De Groote, p. 293; Van Stappen, p. 3; Cops/De Haen, p. 2, 3; Onkelinx/Van den Berg, p. 3.

169 Warson/Van Ende, p. 1; Hendrickx, p. 15; Warson/Glaes, p. 321; Springael, Protection, p. 7; Springael/Van de Velden, p. 4; Van den Berghe/Kelley, p. 378.

170 Vanhaute, chapter 5, 5.1.5.4; Warson/Van Ende, p. 2; Hendrickx, p. 19; Scheunemann/Dennisen, p. 410; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 374, 378, 380; Onkelinx/Van den Berg, p. 3.

171 Vanhaute, chapter 5, 5.1.5.1; Bal/Offermanns, p. 171; Warson/Van Ende, p. 1; Shanahan, Patent Box, p. 5; Hendrickx, p. 14; Warson/Glaes, p. 320; Eynatten/Brauns, p. 1; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 375; Warson/Foriers, p. 72; Van Stappen/Delanoy/De Groote, p. 292; Cops/De Haen, p. 1;

E) Mixed sources of income

In practice, innovations are generally protected by a variety of relevant and other IP rights[172].

Article 205/2 paragraph (2) subparagraph (2) of the ITC sets out that to the extent that the remunerations referred to in article 205/2 paragraph (2) subparagraph (1) of the ITC do not relate exclusively to relevant IP rights, then only the portion that relates to relevant IP rights qualifies for the IP box tax deduction[173].

In this regard, the situation may become complex when a single product or service requires several patented technologies, some of which qualify for the IP box regime while others do not. In such a case the question to answer is how to divide the income between the relevant IP rights, such as a patent, and other IP rights, such as trademarks, designs or know-how, given that there is only one global payment. The Belgian Ruling Commission has addressed this specific issue and ruled that a breakdown can be produced in function of the relative contribution of research staff[174].

It should further be emphasised that in accordance with article 205/3 paragraph (1) subparagraph (2) of the ITC, to the extent the license payments and the amortisation referred to in article 205/3 paragraph (1) subparagraph (1) of the ITC do not relate exclusively to relevant IP rights, but also to other IP rights, then only the portion that relates to relevant IP rights is to be deducted from the basis for the tax deduction under the IP box regime[175].

F) Profits arising before grant of a right

The IP box is restricted the relevant IP rights that have been granted. This implies that the regime is not available for patents pending for approval[176].

The Belgian tax authorities, however, may allow a retroactive application of the tax deduction under the IP box regime back to the first day of the tax year during which the relevant IP right was obtained. For instance, for a company or perma-

---

Onkelinx/Van den Berg, p. 1.

172 Warson/Foriers, p. 73.

173 Hendrickx, p. 19; Eynatten/Brauns, p. 1; Van den Berghe/Kelley, p. 377; Warson/Foriers, p. 73; Cops/De Haen, p. 3; Onkelinx/Van den Berg, p. 3.

174 Onkelinx/Rens, p. 3; Eynatten/Brauns, p. 2.

175 Hendrickx, p. 20; Van den Berghe/Kelley, p. 380.

176 Warson/Van Ende, p. 1; Hendrickx, p. 15; Warson/Glaes, p. 320; Eynatten/Brauns, p. 1; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 375, 377; Onkelinx/Van den Berg, p. 2.

nent establishment closing its accounting year on 31 December 2012, a patent granted on 30 December 2012 can qualify for the IP box as of 1 January 2012[177].

Where a product or production process is protected by several relevant IP rights, and not all requested IP rights are granted prior to commercialising the product or production process, the income realised in relation to the relevant IP rights that were granted is eligible for the IP box. It has to be determined on a case-by-case basis whether or not the fact that not all relevant IP rights have been granted has an impact on the amount of RIPI[178].

4. Anti-avoidance

The anti-avoidance provision by virtue of article 205/3 of the ITC does not apply to self-developed relevant IP rights[179].

In order to prevent abuse as well as double deductions in relation to relevant IP rights acquired by the company or permanent establishment via purchase, contribution, usufruct arrangement or a license, article 205/3 paragraph (1) of the ITC specifies that the gross income in the course of a tax year from relevant IP rights earned by the company or permanent establishment is to be reduced by the following items when calculating the basis for the 80% tax deduction[180]:

– Any remuneration for the relevant IP rights made to any other affiliated or non-affiliated party, provided that such payments are charged to the taxable result in Belgium in the same tax year; and

– Any amortisation on the acquisition or investment value of the relevant IP rights to the extent that such amortisation is charged to the taxable result in Belgium in the same tax year.

Article 205/3 paragraph (2) of the ITC stipulates that where the remuneration for the acquired relevant IP rights made to any other affiliated or non-affiliated party by the Belgian company or permanent establishment would be lower than an arm's length remuneration, notwithstanding article 205/3 paragraph (1) subparagraph (1) indent (1) of the ITC the basis for the tax deduction under the IP box regime is to be decreased by the amount that equals an arm's length remuneration[181].

---

177 Idem.

178 Warson/Van Ende, p. 1; Hendrickx, p. 16; Warson/Glaes, p. 320.

179 Hendrickx, p. 20; Van den Berghe/Kelley, p. 379; Onkelinx/Van den Berg, p. 4.

180 Vanhaute, chapter 5, 5.1.5.3; Warson/Van Ende, p. 2; Hendrickx, p. 20; Eynatten/Brauns, p. 2; Cops/Lemaire, p. 14; Van den Berghe/Kelley, p. 379; Warson/Foriers, p. 74; Van Stappen/Delanoy/De Groote, p. 293; Van Stappen, p. 2; 3; Cops/De Haen, p. 3; Onkelinx/Van den Berg, p. 4.

181 Hendrickx, p. 20; Warson/Foriers, p. 74; Cops/De Haen, p. 3.

In accordance with article 205/3 paragraph (3) of the ITC, where the acquisition value or investment value of the acquired relevant IP rights would be lower than an arm's length acquisition or investment value, the basis for the tax deduction under the IP box regime, notwithstanding article 205/3 paragraph (1) subparagraph (1) indent (2) of the ITC, is to be decreased by the amount of amortisation based on an arm's length acquisition or investment value[182].

As a result, for relevant IP rights acquired or licensed by a Belgian company or permanent establishment the IP box regime applies to net income or added value only. It thus applies to the gross income from relevant IP rights less remuneration for the relevant IP rights made to third parties and amortisation. The tax deduction based on article 205/1 of the ITC is thus not taken in full at each stage, but for each party only the margin it realises is eligible for the tax deduction under the IP box regime[183].

5. Supplementary

A) Application of the IP box in relation to partnerships

The IP box regime does not apply to individual taxpayers[184]. It is restricted to companies and permanent establishments and does not cover partnerships.

B) Application of the IP box to cost sharing arrangements

Article 205/2 paragraph (1) subparagraph (1) of the ITC refers to relevant IP rights that are "fully or partly" developed or improved by a Belgian company or permanent establishment. This wording implies that the IP box regime, in principle, is available in cases where relevant IP rights are co-developed by the company or permanent establishment and a third party, be it affiliated or not. The co-development thus allows a company or permanent establishment being the sole or joint owner of a relevant IP right or, alternatively, being the licensor of such relevant IP right[185].

Multinational and other enterprises conducting their R&D operations on the basis of cost sharing or cost contribution arrangements, under which a Belgian participant possesses legal ownership in a relevant IP right, is therefore eligible IP box purposes, provided that the relevant IP right is exploited by a Belgian company or permanent establishment. Considering the factual situation, one will

---

182 Hendrickx, p. 20; Warson/Foriers, p. 74; Cops/De Haen, p. 3.

183 Hendrickx, p. 20; Van den Berghe/Kelley, p. 379; Warson/Foriers, p. 74; Van Stappen/Delanoy/De Groote, p. 293; Cops/De Haen, p. 3.

184 Vanhaute, chapter 5, 5.1.5.4; Warson/Van Ende, p. 2; Hendrickx, p. 19; Scheunemann/Dennisen, p. 410; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 374, 378, 380; Warson/Foriers, p. 70; Onkelinx/Van den Berg, p. 3.

185 Van den Berghe/Kelley, p. 376; Onkelinx/Van den Berg, p. 2.

have to determine the RIPI attributable to the respective participating company or permanent establishment that possesses economic ownership in the relevant IP right as well[186].

It should be emphasised, however, that in accordance with article 205/2 paragraph (2) subparagraph (3) of the ITC the IP box regime does not include the contribution received to the costs of R&D borne by a company or permanent establishment. Consequently, income received by a Belgian company or permanent establishment for R&D activities performed under a cost sharing agreement is excluded from the benefits delivered by the IP box where the company or permanent establishment is not the full or partial owner, holder of beneficial rights to, usufruct holder or licensor of any so developed IP right and the income received does not result from the exploitation of such IP right[187].

C) Transfer pricing

Article 205 paragraph (2) subparagraph (1) indent (1) of the ITC is dealing with income derived from the licensing of relevant IP rights[188]. In order to be eligible for the IP box, the amount of those license fees is limited to the amount that corresponds to the fee that would have been agreed to between unrelated parties[189].

Similarly, article 205/2 paragraph (2), subparagraph (1) indent (2) of the ITC is dealing with income from relevant IP rights embedded in the sales price of products or services[190]. In this regard, a notional license fee or hypothetical royalty respectively is to be determined, which is defined as the arm's length remuneration that a third party would pay to a company or permanent establishment if the third party manufactured the product or provided the service on the basis of a license granted by the company or permanent establishment[191].

---

186 Van Stappen/Delanoy/De Groote, p. 292; Van Stappen, p. 2.

187 Offermanns/Michel, chapter 1, 1.7.7; Offermanns/Michel/Vanhaute, chapter 1.9.7; Bal/Offermanns, p. 171; Warson/Van Ende, p. 2; Hendrickx, p. 19; Warson/Glaes, p. 319; Scheunemann/Dennisen, p. 410; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 376; Van Stappen/Delanoy/De Groote, p. 293; Van Stappen, p. 3; Cops/De Haen, p. 2, 3; Onkelinx/Van den Berg, p. 3.

188 See Vanhaute, chapter 5, 5.1.5.1; Warson/Van Ende, p. 1; Hendrickx, p. 18; Eynatten/Brauns, p. 1; Warson/Foriers, p. 73; Cops/Lemaire, p. 13; Van Stappen, p. 1; Cops/De Haen, p. 2.

189 See Shanahan, Patent Box, p. 5; Warson/Glaes, p. 322; Springael, Protection, p. 6; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 374, 375; Cops/De Haen, p. 2; Onkelinx/Van den Berg, p. 3.

190 See Onkelinx/Rens, p. 3; Van den Berghe/Kelley, p. 374, 375.

191 See Warson/Van Ende, p. 2; Van den Berghe/Kelley, p. 377.

In the context of article 205/2 paragraph (2) subparagraph (1) of the ITC, the arm's length requirement purposes to prevent affiliated parties from artificially boosting the basis for the tax deduction under the IP box regime by manipulating the transfer prices[192]. To the extent that based on article 205/2 paragraph (2) subparagraph (1) indent (1) of the ITC a company or permanent establishment licenses a relevant IP right to a non-affiliated party, the third party price may possibly serve as a basis in determining an arm's length income. Otherwise, a more in-depth transfer pricing analysis is required[193].

The exercise for determining the RIPI may prove to be complex where, by virtue of article 205/2 paragraph (2) subparagraph (1) indent (2) of the ITC, a Belgian company or permanent establishment uses relevant IP rights in the manufacture of products or supply of services. The RIPI is then assumed to be included in the remuneration to the Belgian company or permanent establishment. The income derived from a relevant IP right equals the remuneration that the Belgian company or permanent establishment would have received if a license were granted to an independent party[194]. It should be emphasised that proper transfer pricing analyses may be critical to supporting the tax deduction under the IP box regime[195].

Moreover, article 205/3 paragraph (1) subparagraph (1) of the ITC is referring to income from relevant IP rights acquired or licensed by a company or permanent establishment, which has to be reduced by any remuneration for the relevant IP rights and amortisation[196]. All the factors in calculating the tax deduction are covered by specific arm's length provisions[197]:

– Pursuant to article 205/3 paragraph (2) of the ITC, where the remuneration for the acquired relevant IP rights made to any other affiliated or non-affiliated party by the Belgian company or permanent establishment would be lower than an arm's length remuneration, notwithstanding article 205/3 paragraph (1) subparagraph (1) indent (1) of the ITC, the basis for the tax deduction under the IP box regime is to be decreased by the amount that equals to an arm's length remuneration[198].

– Pursuant to article 205/3 paragraph (3) of the ITC, where the acquisition

192 Van den Berghe/Kelley, p. 377.

193 Hendrickx, p. 19; Onkelinx/Rens, p. 3; Warson/Foriers, p. 77; Van Stappen/Delanoy/De Groote, p. 293; Van Stappen, p. 3; Onkelinx/Van den Berg, p. 3.

194 Warson/Foriers, p. 77; Van Stappen/Delanoy/De Groote, p. 293; Van Stappen, p. 3.

195 Warson/Foriers, p. 77.

196 See Vanhaute, chapter 5, 5.1.5.3; Warson/Van Ende, p. 2; Hendrickx, p. 20; Eynatten/Brauns, p. 2; Cops/Lemaire, p. 14; Van den Berghe/Kelley, p. 379; Onkelinx/Van den Berg, p. 4.

197 Van den Berghe/Kelley, p. 381.

198 Hendrickx, p. 20; Warson/Foriers, p. 74; Cops/De Haen, p. 3.

> value or investment value of the acquired relevant IP rights would be lower than an arm's length acquisition or investment value, the basis for the tax deduction under the IP box, notwithstanding article 205/3 paragraph (1) subparagraph (1) indent (2) of the ITC, is to be decreased by the amount of amortisation based on an arm's length acquisition or investment value[199].

The rationale behind article 205/3 of the ITC is to avoid abuse, in particular charging too low of an amount as a remuneration for licenses to the Belgian company or permanent establishment as well as double deductions, and thus to restrict the benefits of the IP box to the net income or value added provided by the Belgian company or permanent establishment on the basis of a research centre. Towards that end, the amount of added value must be supported by transfer pricing techniques where transactions among affiliated parties occur[200].

Article 236bis of the ITC extends the arm's length principle in all aspects on Belgian permanent establishments.

Under Belgian tax law, various methods can be applied to ensure that licenses between affiliated parties comply with the arm's length principle. The tax authorities have not issued guidelines in this regard, nor do safe harbour rules on license fees apply. Remunerations determined on the basis of internationally accepted methods, such as set out in the OECD Transfer Pricing Guidelines, are thus supposed to be suitable[201].

It should be added that in practice the residual profit split method is often used to determine the hypothetical license fee. Thereafter, the profit realised by a company or permanent establishment is split in its different routine activities and functions, each of which is allocated by an arm's length remuneration. After the other activities and functions, such as sales, installation, logistics etc, have received their fair share of the profits, the remaining non-routine profit may be considered the remuneration for the relevant IP right. Many of the decisions that are published by the advance ruling service also make reference to this method[202].

---

199 Idem.

200 Warson/Van Ende, p. 2; Hendrickx, p. 20; Eynatten/Brauns, p. 2; Warson/Glaes, p. 323; Cops/Lemaire, p. 14; Van den Berghe/Kelley, p. 380; Warson/Foriers, p. 74; Van Stappen/Delanoy/De Groote, p. 293; Onkelinx/Van den Berg, p. 4.

201 Van den Berghe/Kelley, p. 381; Van Stappen/Delanoy/De Groote, p. 293; Van Stappen, p. 3.

202 Warson/Van Ende, p. 2; Hendrickx, p. 19; Springael, Protection, p. 7; Onkelinx/Rens, p. 4.

D) Double taxation relief

Income from license fees received for the use of a relevant IP right may be subject to foreign withholding tax. In Belgium, these foreign withholding taxes are fully or partly creditable and may even result in a higher credit than the actual foreign withholding taxes[203].

Article 286 of the ITC stipulates that the foreign tax credit for royalty income equals 15/85ths of the income from relevant IP rights net of foreign withholding tax. Where the foreign withholding tax effectively paid is less than 15% there is hence an additional benefit, as the taxpayer is granted a higher credit in Belgium than the amount of the foreign withholding tax effectively paid. Excess credits, however, are not reimbursable and cannot be carried forward[204].

Article 286 of the ITC further states that from assessment year 2008, in respect of royalty income eligible for the IP box, the foreign tax credit is determined on the basis of a fraction whereby the numerator is the actual foreign withholding tax as a percentage of the income but not exceeding 15% and the denominator is 100 less the numerator. For purposes of the IP box the additional benefit is therefore no longer available. Moreover, the foreign tax credit can only be set off against the tax on income from relevant IP rights. This is why the foreign tax credit cannot exceed the Belgian corporate income tax on the RIPI, which is taxed at an effective tax rate of 6.8%. The denominator eventually is equal to 100 if the debtor of the income paid the foreign withholding taxes on the royalties on behalf of the beneficiary. For other income than RIPI the regular lump-sum credit applies[205].

E) Notional interest deduction

The notional interest deduction is a general tax measure that intends strengthening the equity capital of companies by reducing the discrimination between equity and debt financing[206].

Resident companies whose financial year equals the calendar year may deduct a notional interest expense from their taxable profits based on articles 205bis to 205novies of the ITC. In addition, the notional interest deduction is granted to non-resident companies that are subject to income tax in respect of their Belgian permanent establishment or immovable property, or rights thereon, located in Belgium[207].

---

203 Warson/Foriers, p. 76.

204 Cops/Lemaire, p. 17; Warson/Foriers, p. 76; Cops/De Haen, p. 5.

205 Warson/Van Ende, p. 2; Warson/Foriers, p. 76 Cops/Lemaire, p. 16, 17.

206 Cops/Lemaire, p. 16; Van Stappen/Delanoy/De Groote, p. 296; Van Stappen, p. 4.

207 Offermanns/Michel, chapter 1, 1.7.4; Offermanns/Michel/Vanhaute, chapter 1,

In accordance with article 205ter of the ITC, the tax deduction is based on the company's equity and thus on its share capital, which is subject to certain adjustments, and retained earnings at the end of the preceding financial year[208].

The deduction is calculated by multiplying the adjusted equity by a fixed percentage determined by the Government on the basis of the interest rate on 10-year linear government bonds. The rate is determined based on the average monthly reference index for such bonds. The annual notional interest deduction rate increase or decrease is capped at 1%, while the maximum base rate is capped at 6.5%[209].

For the tax year 2012 or the assessment year 2013 respectively the rate for the notional interest deduction is fixed at 3%. For small and medium companies the base rate is increased by 0.5%[210].

The notional interest deduction may for instance be optimised by contributing IP rights that do not qualify for the IP box into share capital of the company, thus increasing the calculation basis of the notional interest deduction. With respect to the taxation of RIPI, this may result in an effective tax rate lower than 6.8%[211].

III. Critical acclaim

1. Rights to which the IP box applies

A) Catalogue of relevant IP rights

Some observers believe that there is room for improvement of the Belgium IP box[212]. It is inter alia criticised that the regime is limited to patents and supplementary protection certificates[213].

B) Research centres

The Belgian IP box may be improved by abolishing the research centre requirement. A research centre is seen as a major obstacle for small and medium companies. They risk to be excluded from the tax incentive because their research

1.9.6.

208 Offermanns/Michel, chapter 1, 1.7.4; Offermanns/Michel/Vanhaute, chapter 1, 1.9.6; Van Stappen/Delanoy/De Groote, p. 296; Van Stappen, p. 4.

209 Offermanns/Michel, chapter 1, 1.7.4; Offermanns/Michel/Vanhaute, chapter 1, 1.9.6.

210 Idem.

211 Warson/Van Ende, p. 3, Van Stappen/Delanoy/De Groote, p. 296; Van Stappen, p. 3.

212 Eynatten/Brauns, p. 2.

213 Hendrickx, p. 21; Eynatten/Brauns, p. 5, 6.

centre does not constitute a branch of activity or because they contract out their R&D to third party research centres or universities. In addition, small and medium companies often do not have the personnel needed for a research centre[214].

To make the patent deduction more accessible for these companies, on 19 April 2013, bill nos. 53 2756 and 2757 of 17 April 2014, containing various fiscal and financial measures, were presented to the Lower House. The Bill abolishes the separate research centre requirement for SMEs[215].

2. Relevant IP profits

A) Proceeds of sales

A disadvantage is also recognised in the fact that the Belgian IP box does not apply to capital gains on relevant IP rights[216].

B) Carry-forward of excess PID

To render the IP box more effective, an excess tax deduction under the regime should be allowed to be carried forward[217]. In particular, start-up companies may be affected by this circumstance and other companies that do not generate profits in their first years of operation[218].

C) Profits arising before grant of a right

The Belgian IP box is generally seen as too restrictive in respect of profits arising before the grant of a relevant IP right. Eligibility for the IP box regime should be given as soon as a patent application is filed with the competent authorities and thus extend to the pending period[219].

Some authors however think that in practice, this deficiency may not be a significant limitation, as income is normally generated some years after the filing of the relevant IP right[220].

---

214 Van den Berghe/Kelley, p. 376; Springael/Van de Velden, p. 7; Springael, Revenus, p. 9; Springael, Revenus, p. 8; Eynatten/Brauns, p. 5.

215 Offermanns, Draft Law.

216 Hendrickx, p. 18; Eynatten/Brauns, p. 5, 6; Warson/Foriers, p. 77.

217 Hendrickx, p. 20; Eynatten/Brauns, p. 5, 6, 21.

218 Hendrickx, p. 21.

219 Hendrickx, p. 15, 16; Eynatten/Brauns, p. 5, 6; Springael/Van de Velden, p. 7.

220 Warson/Foriers, p. 72.

3. Supplementary

A) Missing notification

Compliance with EU rules is seen as valuable attribute, especially where the European Commission is intensifying its efforts against selective tax incentives[221]. The Belgian legislator decided, however, not to notify the introduction of its IP box to the Commission[222].

It is assumed that the Belgian IP box does not constitute state aid within the meaning of article 107 of the Treaty on the Functioning of the European Union ("TFEU"). In essence, the regime is in principle applicable to all Belgian companies and permanent establishments without any selectivity in respect of[223]:

- The size of the company or permanent establishment;
- The size of the activities;
- The nationality or residence of the shareholder of the Belgian company or permanent establishment;
- The source of the income, which may be of domestic or foreign nature;
- The nature of the transaction, which may take place among affiliated or non-affiliated parties.

In addition, there is no requirement on the location where the R&D activities are to be performed. This may happen in Belgium or abroad[224].

B) Estimation of future success

The IP box regime is one of the few essential rewards that the Belgium may offer to foreign investors. It has however only been somewhat successful so far since many companies seem not to appreciate the conditions which make the regime available or simply ignore its existence[225]. Nonetheless, the tax deductions under the IP box are steadily increasing in volume[226].

---

221 Cops/De Haen, p. 6.

222 Muntendam/Chiarella, p. 231.

223 Van den Berghe/Kelley, p. 382; Warson/Foriers, p. 76; Van Stappen/Delanoy/De Groote, p. 296; Van Stappen, p. 4, 5; Cops/De Haen, p. 6.

224 Van den Berghe/Kelley, p. 382; Van Stappen/Delanoy/De Groote, p. 296; Van Stappen, p. 4; Cops/De Haen, p. 6; Onkelinx/Van den Berg, p. 5.

225 Hendrickx, p. 21.

226 Springael, Protection, p. 9.

Most of authors believe the tax measure combined with a professional attitude of the Service for Advanced Decisions, which is the competent tax authority for advance rulings, is creating a tax friendly and competitive environment for the commercialisation of relevant IP rights in Belgium. It complements a series of other tax incentives, such as the investment deduction for R&D, the tax credit for R&D, specific payroll tax cuts for scientific personnel or the notional interest deduction[227].

3. Luxembourg

I. Overview

Based on the strategies and objectives that emerged from the EU summits taking place in Lisbon in 2000 and Barcelona in 2002, the Luxembourg Government gave R&D a priority. Aiming to further diversify its economy, an IP box regime was implemented to promote Luxembourg as an attractive jurisdiction for carrying out R&D activities as well as managing and holding IP rights[228]. Furthermore, the IP box provides an alternative to the 1929 holding company regime, which was sometimes used for the management of patents and trademarks and meanwhile has been abolished[229].

The tax incentive, which combines features of the Belgium and Dutch IP boxes, was introduced into law in December 2007 and entered into force on 1 January 2008. It is available to relevant IP rights created or acquired after 31 December 2007[230].

The IP box legislation was completed by the law of 19 December 2008, which provided for a full net worth tax exemption on relevant IP rights held by Luxembourg taxpayers from 1 January 2009 onwards and for the extension of the list of relevant IP rights to domain names with effect from 1 January 2008[231].

---

227 Warson/Van Ende, p. 3; Cops/Lemaire, p. 12; Van den Berghe/Kelley, p. 374; Eynatten/Brauns, p. 5; Warson/Foriers, p. 77; Cops/De Haen, p. 6.

228 Schaffner/Manhaeve/Trouille, p. 381; Muntendam/Chiarella, p. 223 et seq.

229 Schaffner/Manhaeve/Trouille, p. 381.

230 O'Neal/Molitor, chapter 1.7.1; Bardini/Lambion, chapter 1.2.3; Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Eynatten/Brauns, p. 4; Schaffner/Manhaeve/Trouille, p. 381; Loyens & Loeff, p. 1; O'Neal/Macovei-Grencon/Van Eysinga, p. 2, 13; Administration des contributions directes, Circulaire, p. 2, 15; Muntendam/Chiarella, p. 223.

231 Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Schaffner/Manhaeve/Trouille,

II. Analysis

1. Reduced taxation of profits from relevant IP rights

A) Election for special treatment of profits from relevant IP rights

Article 50bis of the Income Tax Act ("ITA") establishes a partial exemption of 80% of the relevant IP profit ("RP") derived by income and capital gains from the use and the right to use of certain types of self-developed or acquired IP rights[232].

Against this backdrop, only 20% of the RP is taxable at the standard combined corporate tax rate[233]. Distinguishing the following rates, a maximum effective tax rate of 5.84% applies to the RP based on the IP box regime[234]:

Total rate on corporate tax income (%)	
Municipal business tax (basic rate)	3.00
Municipal business tax (effective rate; city of Luxembourg)	6.75
Corporate income tax (basic rate)	21.00
Effective corporate income tax (including surcharge of 7%)	22.47
Total tax on income (6.75% + 21% + 1.47%)	29.22
20% of total tax on income	5.84

p. 381; Loyens & Loeff, p. 1; O'Neal/Macovei-Grencon/Van Eysinga, p. 3; Administration des contributions directes, Circulaire, p. 3.

232 Thanks to Mrs. Schwarz, PhD student in the field of IP taxation in Europe at the University of Luxembourg, for her valuable support in the analysis of the Luxembourg IP box; O'Neal/Molitor, chapter 1.7.1; Bardini/Lambion, chapter 1.2.3; Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Eynatten/Brauns, p. 4; O'Neal/Macovei-Grencon/Van Eysinga, p. 2; Administration des contributions directes, Circulaire, p. 2; Muntendam/Chiarella, p. 223.

233 Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Schaffner/Manhaeve/Trouille, p. 381.

234 Administration des contributions directes, Charge fiscale; Bardini/Lambion, chapter 1.10.1; Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Schaffner/Manhaeve/Trouille, p. 381.

Article 50bis of the ITA provides guiding principles with respect to the determination of the overall taxable business profit. Articles 64 and 93 paragraph (1) of the ITA specify, however, that the provisions of article 50bis of the ITA do not only apply to the determination of the business profit, but also to the determination of the agricultural and forestry profit. They further apply to the profit arising from the exercise of a liberal profession. IP rights belonging to the private wealth of the taxpayer do however not fall within the scope of article 50bis of the ITA[235].

Notwithstanding the absence of an express provision in article 50bis of the ITA, the IP box is optional for taxpayers engaged in activities related to the commercialisation of relevant IP rights[236].

The term "taxpayer" means fully taxable resident and non-resident individuals carrying on a business in Luxembourg as well as resident corporate entities and local permanent establishments of non-resident companies[237].

The 80% exemption by virtue of article 50bis paragraphs (1) and (3) of the ITA applies to the RP, meaning gross revenue from relevant IP rights less directly associated R&D expenses, interest charges, amortisations and deductions for depreciation[238]. In addition, the eligibility to the IP box is not subject to a development condition or registration of the relevant IP rights in- or outside of Luxembourg[239].

Article 50bis paragraph (4) subparagraph (2) of the ITA sets out that expenses, amortisations and write-downs relating to the development of relevant IP rights are to be capitalised in the assets of the balance sheet and included in the profit and loss statement of the first financial year for which article 50bis of the ITA is to apply[240].

Furthermore, pursuant to section 170 et seq. of the General Tax Act[241] in conjunction with article 59 of the Rules of Procedure before Administrative Courts[242] it is up to the taxpayer to prove eligibility to the partial exemption

---

235 O'Neal/Macovei-Grencon/Van Eysinga, p. 2.

236 Muntendam/Chiarella, p. 225.

237 Bal/Offermanns, p. 172; Schaffner/Manhaeve/Trouille, p. 381; Muntendam/Chiarella, p. 223.

238 O'Neal/Molitor, chapter 1.7.1; Shanahan, Patent Box, p. 7; Muntendam/Chiarella, p. 225.

239 Bal/Offermanns, p. 172.

240 Legitech, p. 83; Eynatten/Brauns, p. 4; O'Neal/Macovei-Grencon/Van Eysinga, p. 15; Administration des contributions directes, Circulaire, p. 18.

241 See General Tax Code.

242 See Rules of Procedure before Administrative Courts.

under the IP box regime. The proof of the fulfilment whether article 50bis of the ITA will be applicable is thus incumbent on the taxpayer[243].

The IP box applies from 1 January 2008 to relevant IP rights developed or acquired after 31 December 2007[244].

2. Relevant taxpayers

A) Meaning of relevant taxpayer

In principle, based on article 50bis of the ITA a taxpayer qualifies for the IP box where the following requirements are met[245]:

– The IP rights must have been developed or acquired after 31 December 2007;

– All expenses relating to the relevant IP rights must be activated in the balance sheet of the taxpayer and included in the profit and loss account of the first fiscal year for which an RP in respect of the relevant IP rights is realised; and

– The relevant IP rights must not have been acquired from an affiliated company.

B) Rights to which the IP box applies

Article 50bis paragraphs (1) and (3) of the ITA, as amended, includes relevant IP rights such as patents, trademarks, designs, domain names, models and software copyrights[246].

The circular letter regarding the partial tax exemption on income derived by certain IP rights ("IP circular") specifies that the definition of the relevant IP rights under article 50bis paragraphs (1) and (3) of the ITA to a large extent corresponds to the definition of IP rights in accordance with[247]:

– Article 98 paragraph (1) subparagraph (3) of the ITA; and

---

243 O'Neal/Macovei-Grencon/Van Eysinga, p. 12; Administration des contributions directes, Circulaire, p. 15.

244 O'Neal/Molitor, chapter 1.7.1; Bardini/Lambion, chapter 1.2.3; Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Eynatten/Brauns, p. 4; Schaffner/Manhaeve/Trouille, p. 381; Loyens & Loeff, p. 1; O'Neal/Macovei-Grencon/Van Eysinga, p. 2, 13; Administration des contributions directes, Circulaire, p. 2, 15; Muntendam/Chiarella, p. 223.

245 Schaffner/Manhaeve/Trouille, p. 382; Loyens & Loeff, p. 2.

246 Shanahan, Patent Box, p. 7; Eynatten/Brauns, p. 4; O'Neal/Macovei-Grencon/Van Eysinga, p. 2, 3; Administration des contributions directes, Circulaire, p. 3.

247 O'Neal/Macovei-Grencon/Van Eysinga, p. 3; Administration des contributions directes, Circulaire, p. 3.

– Article 12 paragraph (2) of the OECD Model Convention with respect to Taxes on Income and on Capital ("OECD MC").

In order to be eligible for the IP box, article 50bis of the ITA holds that an item of income must be a royalty in the sense of article 12 paragraph (2) of the OECD MC. Towards that end, the commentary on article 12 paragraph (2) of the OECD MC is a valid source of guidance in determining whether an item of income qualifies for IP box purposes or not[248].

Not all categories of royalties mentioned in article 12 paragraph (2) of the OECD MC are part of article 50bis paragraphs (1) and (3) of the ITA. The scope of article 50bis of the ITA is narrower, as with the exception of computer software it does not include copyrights on plans, client lists, know-how, information regarding industrial, commercial or scientific experience, secret formulas, secret processes and on other similar rights. Rental or leasing income derived from industrial, commercial or scientific equipment is excluded as well[249].

In fact, income arising from the rent or lease of industrial, commercial or scientific equipment was included within the definition of royalties in article 12 paragraph (2) of the OECD MC, until it was deleted in the 1992 version[250].

Article 12 paragraph (2) of the OECD MC as well as article 98 paragraph (1) subparagraph (3) of the ITA, which is shaped on the basis of article 12 paragraph (2) of the OECD MC, largely list the IP rights the income of which falls within the scope of those articles, without providing an autonomous definition of the said IP rights[251]. Similarly, article 50bis paragraphs (1) and (3) of the ITA lists the relevant IP rights but offers no autonomous definition of these IP rights. Although the IP circular does not provide such definition either, it identifies a common element in respect of the relevant IP rights. Thereafter, a relevant IP right covered by article 50bis paragraphs (1) and (3) of the ITA confers to its holder the exclusive right to use a monopoly, which disallows a third party to use any such rights on legally protected territory. The holder of a relevant IP right may decide to exploit the right himself, whether exclusively or not, or to use the relevant IP right by either transferring or licensing it to one or several licensees[252].

---

248 Loyens & Loeff, p. 1.

249 Shanahan, Patent Box, p. 7; Schaffner/Manhaeve/Trouille, p. 381; Loyens & Loeff, p. 1; O'Neal/Macovei-Grencon/Van Eysinga, p. 3; Administration des contributions directes, Circulaire, p. 3; Muntendam/Chiarella, p. 224.

250 Muntendam/Chiarella, p. 224.

251 O'Neal/Macovei-Grencon/Van Eysinga, p. 3; Administration des contributions directes, Circulaire, p. 4.

252 Loyens & Loeff, p. 1; O'Neal/Macovei-Grencon/Van Eysinga, p. 11; Administration des contributions directes, Circulaire, p. 14.

Where a limited liability company has acquired an IP right from one of its individual shareholders, the RP deriving from this IP right may benefit from the partial exemption delivered by the IP box based on article 50bis ITA, regardless of the level of participation held by the individual[253].

Article 50bis paragraph (4) subparagraph (1) of the ITA specifies that the right must have been established or acquired after 31 December 2007[254]. In this regard, the fact that with respect to the IP right the taxpayer conducted development activity prior to 31 December 2007 has no significance[255].

Against this backdrop, the date where an IP right has been developed or acquired by the taxpayer is instrumental in determining whether the IP right falls within the scope of article 50bis of the ITA[256]. Article 22 paragraph (5) of the ITA specifies that a transfer of an asset basically equals a sale of the asset and thus the realisation of a capital gain. Where certain requirements are met, however, articles 59, 59bis, 170, 170bis and 170ter of the ITA foresee that the transfer of an asset may be deemed as a tax-neutral transaction. One of these requirements is that the entity that receives an asset must capitalise the asset received at book value. The date of acquisition of an asset received as part of a tax-neutral exchange is however the date registered with the person who contributes that asset[257].

Furthermore, the IP circular specifies that a tax-exempt collective entity does not transform into another collective entity by simply waive its tax-exempt status. The collective entity retains its legal personality both from a commercial and tax perspective. It will however be subject to unrestricted tax liability and be required to prepare a balance sheet for tax purposes showing the operating value of its net tangible and intangible assets. Such revaluation has no impact however on both the actual price of acquisition and the date of acquisition of those assets[258].

---

253 Schaffner/Manhaeve/Trouille, p. 382; O'Neal/Macovei-Grencon/Van Eysinga, p. 16; Administration des contributions directes, Circulaire, p. 20.

254 O'Neal/Molitor, chapter 1.7.1; Bardini/Lambion, chapter 1.2.3; Legitech, p. 83; Schaffner/Manhaeve/Trouille, p. 381; Loyens & Loeff, p. 1; O'Neal/Macovei-Grencon/Van Eysinga, p. 2, 13; Administration des contributions directes, Circulaire, p. 2, 15; Muntendam/Chiarella, p. 223.

255 O'Neal/Macovei-Grencon/Van Eysinga, p. 13; Administration des contributions directes, Circulaire, p. 16.

256 Loyens & Loeff, p. 2; O'Neal/Macovei-Grencon/Van Eysinga, p. 13; Administration des contributions directes, Circulaire, p. 16.

257 Idem.

258 Idem.

The same principle applies where an asset is shifted to a domestic permanent establishment by a collective entity or a non-resident collective entity becomes a Luxembourg resident for tax purposes[259].

Article 50bis paragraph (5) of the ITA sets out that the IP box only applies where the relevant IP rights have not been acquired from an associated company. A company is considered as being directly related where[260]:

– The company holds a direct participation of at least 10% in the share capital of the company receiving the RIPI;
– The share capital of the company is held directly, of at least 10%, by the company receiving the RIPI; or
– The share capital of the company is held directly, of at least 10%, by a third company receiving the RIPI.

Article 50bis of the ITA does not specify which date is decisive for determining whether an IP right is acquired from a related party. The IP circular specifies that the moment the IP right is acquired is decisive. In case of contribution of the IP right to a company in exchange for shares, the determination of whether the contributor and the contributee are related parties is to take place immediately before the moment of the exchange[261].

a) Patents

In accordance with article 50bis paragraphs (1) and (3) of the ITA the IP box regime applies to patents[262] [263].

Under Luxembourg law a patent is defined in the Patents Act as an industrial property entitlement, granting to its owner or to his successors in title an exclusive right to exploit the invention described in the patent. Only new inventions

---

259 Idem.

260 O'Neal/Molitor, chapter 1.7.1; Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Loyens & Loeff, p. 2; Schaffner/Manhaeve/Trouille, p. 382; Clifford Chance, p. 2; O'Neal/Macovei-Grencon/Van Eysinga, p. 16; Administration des contributions directes, Circulaire, p. 19; Muntendam/Chiarella, p. 227.

261 Loyens & Loeff, p. 3.

262 O'Neal/Molitor, chapter 1.7.1; Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Schaffner/Manhaeve/Trouille, p. 381; Loyens & Loeff, p. 1; O'Neal/Macovei-Grencon/Van Eysinga, p. 3; Administration des contributions directes, Circulaire, p. 3; Muntendam/Chiarella, p. 223.

263 Letters (a) to (f) closely follow the circular letter of the director of the tax office regarding the partial tax exemption on income derived by certain intellectual property rights (IP circular).

that involve an inventive step and are capable of industrial application are patentable. Not being eligible for patent protection is the following[264]:

– Discoveries;
– Scientific theories;
– Mathematical methods;
– Aesthetic creations;
– Schemes, rules and methods for performing mental acts;
– Playing games or doing business, and computer programs; and
– Presentations of information.

The protection of an invention by a patent may be obtained by means of the following distinct administrative procedures[265]:

– The Luxembourg national patent delivered by the Ministry of Economy and Foreign Trade, Intellectual property Head Office (Direction de la Propriété Intelectuelle);
– The European patent referring to Luxembourg, delivered by the European Patent Office ("EPO") according to the provisions of the European Patent Convention of 5 October 1973; and
– An international request for a patent, which is subject to the Patents Cooperation Treaty of 9 June 1970 and dealt with by the World Intellectual Property Organization ("WIPO"), which leads to obtaining either a Luxembourg national patent or a European patent.

The protection granted by the three administrative procedures is the same and based on Luxembourg legislation only the granting procedures differ among each other. The main difference between the European procedure and the Luxembourg procedure may be seen in the examination of the requests[266].

A Luxembourg patent is granted after a purely formal examination of the request, which does not evaluate the patentability of the invention. An optional research report contains information on the technique used and allows the depositor and the public to assess the innovative character of the invention. A Luxembourg patent is thus merely a simple deposit certificate that cannot lead to the conclusion that the invention satisfies the patentability conditions. Those condi-

264 Muntendam/Chiarella, p. 224.
265 O'Neal/Macovei-Grencon/Van Eysinga, p. 5; Administration des contributions directes, Circulaire, p. 6.
266 Idem.

tions are evaluated only by the courts in the event of litigation. A Luxembourg patent is generally delivered 18 months after filing[267].

Conversely, a request for a European patent is examined and denied if the patentability conditions are not met. Moreover, a European patent is subject to an opposition procedure after its issuance that permits third parties to challenge it before the EPO. A European patent which has been granted thus presents a strong assumption of validity. The granting procedure for a European patent takes on average three years[268].

On the condition that the patent has been granted and the patent holder pays a renewal fee every year, the protection of the invention lasts for twenty years as from the date of filing. The patents for which no research report has been issued expire after six years.[269]. With respect to patents, the date of creation corresponds to the date on which the patent application was filed[270].

Similarly to patents, the IP box applies to utility models as well. Utility models are sometimes referred to as "small patents", "certificates of utility" or "Gebrauchsmuster". The definitions adopted in the relevant jurisdictions that have this title of protection are not identical, but assimilate this title of protection to a patent. Usually, the utility model differs from the patent of invention in the following main respects[271]:

– The requirements for obtaining the utility model are less stringent than for patents;
– The qualified national patent office does not carry out an examination on the content before registration of the utility model;
– The granted protection period for a utility model is shorter than that of a patent; and
– The registration and maintenance fees for the utility model are lower.

In fact the utility model is used to ensure the protection of improvements or minor adaptions made to existing products. Considering its similarity with the patent, the utility model is to be compared to the patent for the application of

267 Idem.
268 O'Neal/Macovei-Grencon/Van Eysinga, p. 6; Administration des contributions directes, Circulaire, p. 7.
269 Idem.
270 Schaffner/Manhaeve/Trouille, p. 382; O'Neal/Macovei-Grencon/Van Eysinga, p. 14; Administration des contributions directes, Circulaire, p. 17.
271 O'Neal/Macovei-Grencon/Van Eysinga, p. 6; Administration des contributions directes, Circulaire, p. 7.

article 50bis of the ITA[272]. With respect to utility models the date of development corresponds to the date on which the utility model application was filed[273].

b) Supplementary protection certificats

In accordance with article 50bis paragraphs (1) and (3) of the ITA the IP box applies to supplementary protection certificates[274].

Under Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products as well as under Regulation (EC) No 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products, the protection period connected to the rights of the patent holder on certain products that are subject to a marketing authorisation may be extended by way of granting supplementary protection certificates. They compensate the loss of protection period due to the impossibility of using the patent before having obtained the marketing authorisation. Currently, supplementary protection certificates are used for the two categories of medicinal products and plant-based medicinal products. The supplementary protection certificate is a national title granted by the National Patent Office, which is effective at the end of the 20 year protection period conferred by the patent. Its period of validity can vary from 1 day to 5 years. A six months additional prolongation period is provided for paediatric medicines[275].

Similar to a patent, a supplementary protection certificate must also be maintained in force by paying an annual fee. Since a supplementary protection certificate does nothing but extend the protection granted by a patent it is to be compared to a patent regarding the application of article 50bis ITA[276].

With respect to supplementary protection certificates the date of development corresponds to the date on which the patent application was filed[277].

---

272 Idem.

273 Schaffner/Manhaeve/Trouille, p. 382; O'Neal/Macovei-Grencon/Van Eysinga, p. 14; Administration des contributions directes, Circulaire, p. 17.

274 Schaffner/Manhaeve/Trouille, p. 381; O'Neal/Macovei-Grencon/Van Eysinga, p. 6; Administration des contributions directes, Circulaire, p. 8.

275 O'Neal/Macovei-Grencon/Van Eysinga, p. 6; Administration des contributions directes, Circulaire, p. 7.

276 O'Neal/Macovei-Grencon/Van Eysinga, p. 6; Administration des contributions directes, Circulaire, p. 8.

277 Schaffner/Manhaeve/Trouille, p. 382; O'Neal/Macovei-Grencon/Van Eysinga, p. 14; Administration des contributions directes, Circulaire, p. 17.

c) Trademarks

In accordance with article 50bis paragraphs (1) and (3) of the ITA the IP box regime applies to trademarks[278].

Under the Benelux Convention on Intellectual Property (Trademarks and Designs) of 25 February 2005 ("Benelux Convention"), the exclusive right to the Benelux trademark is acquired by first registration. The Benelux Office of Intellectual Property ("BOIP"), which is in charge of the Benelux trademarks, verifies if the registration request meets the formal requirements and if the trademark as submitted is likely to constitute a trademark. If so, a filing date is established and the registration published. As from the publication, an opposition may be introduced within a period of two months as from the first day of the month following the publication. The BOIP also carries out a substantive examination of the trademark. Where the registration of the trademark meets all the legal requirements, the BOIP carries out the registration of the trademark and derives a registration certificate to the owner of the trademark. Normally, the registration procedure takes approximately four months[279].

The registration of the Benelux trademark lasts ten years and is renewable after every new period of ten years. In addition, the registration grants a protection of the trademark on the territory of Belgium, the Netherlands and Luxembourg. The registration of a Benelux trademark and its renewal are subjected to the payment of a registration or renewal fee respectively[280].

The Benelux Convention applies to both trademarks and service marks. Both trademarks referring to products and service marks referring to services are IP rights that fall within the scope of article 50bis paragraphs (1) and (3) of the ITA[281].

Any individual regardless of his or her notoriety may have a trademark registered under its name as well. For example, a well-known athlete commercialises clothes and sport articles under its own trademark represented by its name or even by its image. Where the athlete grants a license for the use of his trademark to a manufacturer of sport articles, the royalties received are likely to fall within

---

278 O'Neal/Molitor, chapter 1.7.1; Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Schaffner/Manhaeve/Trouille, p. 381; Loyens & Loeff, p. 1; O'Neal/Macovei-Grencon/Van Eysinga, p. 3; Administration des contributions directes, Circulaire, p. 3; Muntendam/Chiarella, p. 223.

279 O'Neal/Macovei-Grencon/Van Eysinga, p. 7.

280 O'Neal/Macovei-Grencon/Van Eysinga, p. 7; Administration des contributions directes, Circulaire, p. 9.

281 Schaffner/Manhaeve/Trouille, p. 381; Loyens & Loeff, p. 2; O'Neal/Macovei-Grencon/Van Eysinga, p. 7; Administration des contributions directes, Circulaire, p. 9; Muntendam/Chiarella, p. 223.

the scope of article 50bis of the ITA. Where the athlete however only grants a non-revelant right to the mere use his image, meaning that one or more persons are allowed to reproduce his image against compensation, such compensation is outside the scope of article 50bis of the ITA[282].

Moreover, the Benelux Convention differentiates between individual ("marques individuelles") and collective trademarks ("marques collectives").

In accordance with article 2.1 (Signs capable of constituting Benelux trademarks) paragraph (1) of the Benelux Convention, names, designs, stamps, seals, letters, figures, shapes of products or packaging and all other signs able to be represented graphically and used to distinguish the goods or services of a company may be regarded as individual trademarks.

Article 2.34 (Collective marks) paragraphs (1) and (2) of the Benelux Convention specifies that collective trademarks are all signs which are designated accordingly at the time of filing and which are used to distinguish one or more common features of goods or services originating from different companies using the trademark under the control of the owner. The owner of a collective trademark may not use it for goods or services originating from its company or from a company in whose management or supervision it is directly or indirectly involved[283]. By virtue of article 2.34 paragraph (3) of the Benelux Convention, any signs designated accordingly at the time of filing and used to designate the geographical origin of goods or services in business may also be regarded as collective marks.

Trademarks or trade names are generally registered in specific registries as soon as they are created to prevent anyone else from using them. The date on which the application for registration was filed corresponds to the date of development of the IP right. Where a taxpayer only registers its trademark after having already marketed the product or service, then the date of development of the IP right corresponds to the date on which the application for registration was filed[284]. In addition, to determine which trademark was first, the prior registration date prevails[285].

---

282 Schaffner/Manhaeve/Trouille, p. 381; Loyens & Loeff, p. 2; O'Neal/Macovei-Grencon/Van Eysinga, p. 8; Administration des contributions directes, Circulaire, p. 9.

283 Muntendam/Chiarella, p. 224.

284 Schaffner/Manhaeve/Trouille, p. 382; Loyens & Loeff, p. 2; O'Neal/Macovei-Grencon/Van Eysinga, p. 14; Administration des contributions directes, Circulaire, p. 17.

285 O'Neal/Macovei-Grencon/Van Eysinga, p. 7; Administration des contributions directes, Circulaire, p. 9.

Not all taxpayers may want to register their trademarks. Despite of this fact article 6bis (Marks: Well-Known marks) of the Paris Convention for the Protection of Industrial Property ("Paris Convention") protects unregistered marks that qualify as "well-known" within a jurisdiction which is a party to the said convention. Countries that are party to the Paris Convention are obliged to refuse to register, or to cancel if already registered, and prohibit the use within their territory, of marks liable to create confusion with another trademark already well-known in that country for identical or similar goods. Because the well-known mark has already acquired goodwill in the subject country, allowing the registration or use of a confusingly similar mark constitutes an act of unfair competition and misleads the public. Whether a mark is well-known is determined by the applicable domestic law, although a trademark need not have been used in the country to be well-known there[286].

In addition to the legal protection provided by the Benelux and the Paris Conventions there is a European protection of trademarks governed by the Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark with EEA relevance. It is an autonomous system of registrations which confers a uniform protection all over the territory of the EEA. The registration of Community trademarks is managed by the Office for Harmonisation in the Internal Market ("OHIM") in Alicante[287].

Similarly to patents, an international registration of trademarks allows obtaining legal protection within the territory of the participating States[288].

d) Designs and models

In accordance with article 50bis paragraphs (1) and (3) of the ITA the IP box regime applies to designs and models[289].

Apart from trademarks the Benelux Convention provides for the definition of designs and models[290]. Designs and models are defined therein as the aspect or appearance of a product or a part thereof that is new and has a specific character. The aspect or appearance depends in particular on the features of the lines, con-

---

286 Reiss, p. 8; O'Neal/Macovei-Grencon/Van Eysinga, p. 14; Administration des contributions directes, Circulaire, p. 17.

287 O'Neal/Macovei-Grencon/Van Eysinga, p. 8; Administration des contributions directes, Circulaire, p. 10.

288 Idem.

289 O'Neal/Molitor, chapter 1.7.1; Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Schaffner/Manhaeve/Trouille, p. 381; Loyens & Loeff, p. 1; O'Neal/Macovei-Grencon/Van Eysinga, p. 3; Administration des contributions directes, Circulaire, p. 3; Muntendam/Chiarella, p. 223.

290 O'Neal/Macovei-Grencon/Van Eysinga, p. 8; Administration des contributions directes, Circulaire, p. 10.

tours, colours, shapes, textures or the materials of the product itself. For such purposes a product is understood as any industrial or handicraft item[291].

Similarly to trademarks, designs and models are generally registered in specific registries as soon as they are developed to prevent anyone else from using them. The date on which the application for registration was filed corresponds to the date of development of the IP right[292]. It should be emphasised however that for a taxpayer that has been using a non-registered design or model in order to market its products or services for a certain amount of time already, it is not possible to claim that the date on which the application for registration was filed corresponds to the date on which such IP right was developed[293].

In the event of a dispute it is the registration date which is taken into consideration to determine which design or model has precedence. The BOIP carries out the registration of the designs and models, which are published in the International Designs Bulletin ("Bulletin des dessins et modèles internationaux"). The registration of a design or a model, which lasts five years, is renewable for four successive periods of five years and grants protection of the IP right within the territory of the Benelux States. Following the example of the registration of a Benelux trademark, the registration and the renewal of a Benelux design or model is subject to the payment of a registration or renewal fee respectively [294].

Similarly to trademarks, in addition to the legal protection provided by the Benelux Convention there is a European protection of designs and models governed by the Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs. It is an autonomous system of registrations which confers a uniform protection throughout the entire territory of the Community. The registration of Community designs and models is managed by the OHIM in Alicante[295]. Similarly to patents and trademarks, an international registration of designs and models allows obtaining legal protection within the territory of the participating States[296].

---

291 Muntendam/Chiarella, p. 224.

292 Schaffner/Manhaeve/Trouille, p. 382; Loyens & Loeff, p. 2; O'Neal/Macovei-Grencon/Van Eysinga, p. 8, 14; Administration des contributions directes, Circulaire, p. 10, 17.

293 O'Neal/Macovei-Grencon/Van Eysinga, p. 14; Administration des contributions directes, Circulaire, p. 17.

294 O'Neal/Macovei-Grencon/Van Eysinga, p. 8; Administration des contributions directes, Circulaire, p. 10.

295 Idem.

296 Idem.

With respect to designs, the date of creation corresponds to the date on which the design application was filed[297].

e) Domain names

In accordance with article 50bis paragraphs (1) and (3) of the ITA the IP box regime applies to domain names[298].

The IP circular provides that contrary to copyrights, patents, trademarks, designs and models, domain names are not explicitly addressed in the Luxembourg law. It specifies that a domain name is a personalised electronic address that is used to locate a website in the virtual world and thus enables its owner or operator to notify its presence to other users and to demonstrate the goods and services it offers. Every computer connected to a computer network using the internet protocol, for example the internet, has an internet protocol address. This unique address composed of a series of numbers in order to be processed more easily by a machine identifies a resource on the internet. The domain name system ("DNS") is the global address system. The DNS has been set up to convert numerical IP addresses into intelligible names that are easier to remember. These names are referred to as domain names[299].

Broadly speaking, domain names are managed by a system of hierarchical and decentralised databases. According to the IP circular there are currently 21 generically coded top-level domain names such as ".com", ".net" or ".org". Generic names composed of three letters or more are thematic and not linked to a specific geographical location. Geographical domain names consist of country codes of two letters such as ".lu" for Luxembourg and ".eu" for the European Union, which serve as a means of identifying countries or geographical areas[300].

Domain names are registered on a first come first served basis and without prior verification of whether any third party rights are infringed. The applicant who may be either an individual or a legal person is required declare that the registration does not infringe the rights of any third party. In general, the registration of domain names that are defamatory, racist or constitute a breach of public policy is not permitted. Certain domain names may be reserved to a specific category

---

297 Schaffner/Manhaeve/Trouille, p. 382; O'Neal/Macovei-Grencon/Van Eysinga, p. 14; Administration des contributions directes, Circulaire, p. 17.

298 O'Neal/Molitor, chapter 1.7.1; Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Schaffner/Manhaeve/Trouille, p. 381; Loyens & Loeff, p. 1; O'Neal/Macovei-Grencon/Van Eysinga, p. 3; Administration des contributions directes, Circulaire, p. 3; Muntendam/Chiarella, p. 223.

299 O'Neal/Macovei-Grencon/Van Eysinga, p. 9; Administration des contributions directes, Circulaire, p. 11; Muntendam/Chiarella, p. 223.

300 O'Neal/Macovei-Grencon/Van Eysinga, p. 9; Administration des contributions directes, Circulaire, p. 11, 12.

of applicants or the register themselves. The registration of a domain name, its maintenance in the registry, its elimination from the registry or its transfer are dealt with in a contract entered into between the owner of the domain name and the registry or registrar, which is governed by public nature. The registration of a domain name and its maintenance in the registry are subject to the payment of duties[301].

The date of creation of a domain name for the purposes of article 50bis of the ITA corresponds to the date of filing the application for registration with the registry in charge. It is up to the taxpayer to proof when the application was filed[302].

f) Software

In accordance with article 50bis paragraphs (1) and (3) of the ITA the IP box regime applies to software copyrights[303].

Copyright on computer software in Luxembourg is governed by the Law on Copyrights, Neigbouring Rights and Databases of 18 April 2001 ("Copyright Act"). While article 1 paragraph (1) of the Copyright Act defines in a general way literary and artistic works protected by copyrights, article 31 of the Copyright Act provides further information concerning the protection of computer programmes. For a literary and artistic work, such as computer programmes, to be protected by copyright it must be an original work. This means that it has to consist of an own intellectual work developed by the author and must have taken a perceivable form. In principle, the assessment of the originality of software is done by a source code analysis and thus a set of written instructions in a data-processing computer programming language, which is understood by humans and which allows obtaining a program from a computer. Adaptations and amendments to software do not give rise to a new copyright[304].

The copyright is generated simply by the development of the work. The proof of the development date of the software can be provided by any means and in particular by online filing to the BOIP. Online filing only enables to record the date

---

301 O'Neal/Macovei-Grencon/Van Eysinga, p. 10; Administration des contributions directes, Circulaire, p. 12.

302 Schaffner/Manhaeve/Trouille, p. 382; O'Neal/Macovei-Grencon/Van Eysinga, p. 14; Administration des contributions directes, Circulaire, p. 18.

303 O'Neal/Molitor, chapter 1.7.1; Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Schaffner/Manhaeve/Trouille, p. 381; Loyens & Loeff, p. 1; O'Neal/Macovei-Grencon/Van Eysinga, p. 3; Administration des contributions directes, Circulaire, p. 3; Muntendam/Chiarella, p. 223.

304 See Copyright Act; Schaffner/Manhaeve/Trouille, p. 381; O'Neal/Macovei-Grencon/Van Eysinga, p. 4; Administration des contributions directes, Circulaire, p. 4; Muntendam/Chiarella, p. 224.

of registration of physical or computer system documents. Online filing does not create an autonomous IP right. The registration certificate of online filing does not provide information on the content and does not constitute evidence that the depositor is the author or that the content is protected by copyright. Only the delivery of an online filing copy allows verifying the existence of the content on the filing date[305].

Copyrights are divided into moral rights and patrimonial rights. Moral rights aim at protecting the interests of the author, as a person, while the patrimonial rights aim at protecting the rights pertaining to the exploitation of the work. Software is protected throughout the life of its author and for 70 years after his death for the benefit of its heirs and legal beneficiaries. Where software is created by an employee within the framework of his functions or under the instructions of his employer, only the employer is entitled to exercise all the patrimonial rights pertaining to the software that has been developed, unless any contractual provisions provide otherwise. Patrimonial rights include in particular reproduction rights, adaptation rights and distribution rights to the public[306].

Luxembourg is a member of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"). By virtue of the Berne Convention the author of an original work is protected from the moment the work has been developed, without any other formality, in the member states of the Berne Convention. No recording system is envisaged[307]. Online filing or other official filings are thus regarded as optional evidence[308].

With respect to copyrights the date at which the software was created refers to the point in time on which all work has been completed and the software is ready to be marketed. Since copyrights are not registered it is up to the taxpayer to provide evidence of when the copyright has been created[309].

C) Development condition

Only income generated from the commercial use of an intangible asset is in principle eligible for IP box purposes. In practice, the owner of the intangible asset is not required to be the inventor, the developer or the initial applicant in order to be an eligible person under article 50bis paragraphs (1) or (3) of the

---

305 O'Neal/Macovei-Grencon/Van Eysinga, p. 4; Administration des contributions directes, Circulaire, p. 5.

306 Idem.

307 Idem.

308 O'Neal/Macovei-Grencon/Van Eysinga, p. 5; Administration des contributions directes, Circulaire, p. 5.

309 Schaffner/Manhaeve/Trouille, p. 382; O'Neal/Macovei-Grencon/Van Eysinga, p. 14; Administration des contributions directes, Circulaire, p. 17.

ITA[310]. Based on article 50bis paragraph (2) of the ITA, however, the taxpayer may be required to develop a relevant IP right itself where the IP right is used by the taxpayer for own purposes[311].

D) Ownership condition

The legal owner of a good and its economic owner are normally the same person. For intangible assets, if the economic and the legal owner are not identical, then for purposes of article 50bis of the ITA the economic ownership prevails[312]. This circumstance thus emphasises the predominance of economic analysis over legal analysis[313].

3. Relevant IP profits

A) Calculation of relevant IP profits

The 80% exemption by virtue of article 50bis paragraphs (1) and (3) of the ITA applies to the RP, meaning gross income from relevant IP rights less expenses that are directly related economically to such income, including interest charges, annual amortisation and, if applicable, a deduction taken in connection with a write-down[314].

Article 50bis paragraph (4) subparagraph (2) of the ITA ensures that all the related expenses incurred are taken into consideration for determining the RP and avoids that the RP subject to the IP box differs due to the accounting method applied by the taxpayer. Thereafter, the R&D expenses, amortisations and deductions for depreciation relating to relevant IP rights must be reported as assets in the balance sheet and be included in the profit and loss statement of the accounting period when the IP box applies for the first time, provided that for the given accounting period the expenses exceed the income deriving from the same right. The capitalised expenses are then to be depreciated over the useful life of the relevant IP rights[315]. The tax payer has the burden of proof that this condition is met[316].

---

310 Bal/Offermanns, p. 172; O'Neal/Macovei-Grencon/Van Eysinga, p. 11; Administration des contributions directes, Circulaire, p. 14.

311 Loyens & Loeff, p. 2.

312 Eynatten/Brauns, p. 4; Loyens & Loeff, p. 2; O'Neal/Macovei-Grencon/Van Eysinga, p. 11; Administration des contributions directes, Circulaire, p. 14.

313 Schaffner/Manhaeve/Trouille, p. 381.

314 O'Neal/Molitor, chapter 1.7.1; Legitech (Ed.), Luxembourgh Business Law Book (2012), p. 83; Shanahan, Patent Box, p. 7; Muntendam/Chiarella, p. 225.

315 O'Neal/Molitor, chapter 1.7.1; Legitech, p. 83; Shanahan, Patent Box, p. 7; Eynatten/Brauns, p. 4; Schaffner/Manhaeve/Trouille, p. 382; Loyens & Loeff, p. 2; O'Neal/Macovei-Grencon/Van Eysinga, p. 15; Administration des contributions di-

Capitalised R&D expenses of a taxpayer notably include the price of acquisition, the cost of materials and supplies used in the development of the relevant IP right, salaries of employees that were engaged in developing the IP right, the share of overhead relating to the development of the IP right, including the amortisation of the IP right as part of the development process and the parts of interest incurred to finance the development of the IP right. Subsidies received for the development of the IP right are to be deducted from R&D expenses. Similarly, expenses incurred as part of fundamental research conducted by the taxpayer are not taken into account when determined the amount of R&D expenses to be capitalised[317].

Article 50bis paragraph (6) of the ITA allows a taxpayer to use all general methods recognised at an international level for the evaluation of a relevant IP right. The burden of proof for demonstrating evidence whether the method applied is internationally recognised is incumbent on the taxpayer[318].

Referring to article 27 paragraph (2) of the ITA, which provides for the definition of the estimated realisation value, article 50bis paragraph (6) of the ITA specifies that where a relevant IP right is sold the determination of the realisation value has to be done by following the general rules applicable with respect to the arm's length principle[319]. Particular attention to the application of these rules is required since the parties may also be related although there is no direct relationship as formulated in the related party rule under article 50bis paragraph (5) of the ITA[320].

The valuation of relevant IP rights according to generally accepted valuation methods may be complex, time consuming and expensive, for which reason article 50bis paragraph (6) of the ITA holds that small and medium companies are allowed to apply a safe harbour rule, which is 110% of the aggregate of expenses that have reduced the taxable base of the seller in the year of alienation and prior years as well. Small and medium companies are defined as enterprises that employ less than 250 people, the turnover of which does not exceed EUR 50 million and the balance sheet total does not exceed EUR 43 million[321].

---

rectes, Circulaire, p. 18.

316 Loyens & Loeff, p. 2.

317 Schaffner/Manhaeve/Trouille, p. 382; O'Neal/Macovei-Grencon/Van Eysinga, p. 15; Administration des contributions directes, Circulaire, p. 18.

318 Loyens & Loeff, p. 3; O'Neal/Macovei-Grencon/Van Eysinga, p. 19; Administration des contributions directes, Circulaire, p. 23.

319 O'Neal/Macovei-Grencon/Van Eysinga, p. 19; Administration des contributions directes, Circulaire, p. 23.

320 Idem.

321 Loyens & Loeff, p. 3; O'Neal/Macovei-Grencon/Van Eysinga, p. 19, 20; Administration des contributions directes, Circulaire, p. 23, 24.

It should be emphasised that the amount of R&D expenses, amortisations and deductions to be capitalised in accordance with article 50bis paragraph (4) subparagraph (2) of the ITA does not necessarily correspond with the amount of R&D expenses, amortisations and deductions relating to article 50 bis paragraph (6) of the ITA. This is because R&D expenses, amortisations and deductions for a given accounting period are only to be capitalised as far as these expenses do not exceed the RIPI[322].

An example to illustrate the determination of the RP is set out below[323]:

Calculation of the contribution of the IP box to the overall taxable business profit of a taxpayer ("contribution")

A taxpayer that has recorded R&D expenses in AP 1 of 4.000 in connection with an IP right that is ready to be economically used at the end of the year. At the beginning of AP 2, the taxpayer opts to benefit from the IP box. It thus capitalises in the balance sheet the development costs of the intangible asset of prior years, which has a useful life of four years and licenses to a third party the relevant IP right in return for an annual fee of 1.500.

The corporate income tax consequences are set out below:

AP	**1**	**2**	**3**	**4**
Development costs	-4.000			
Capitalisation of IP right		4.000		
Amortisation of IP right		-1.000	-1.000	-1.000
License fees received		1.500	1.500	1.500
Total		4.500	500	500
Relevant IP profit ("RP")		100	100	100
Retained tax losses	-4.000			
Profits chargeable to corporation tax	-4.000	4.100	100	100

In AP 1 the taxpayer deducts the R&D expenses of 4.000 for corporate income tax purposes. In AP 2 the resulting profit of 4.000 from capitalising the intangible asset is fully offset with the retained tax loss. Consequently, in AP 2 to AP 4 an amount of 100 is taxed at 29% (approximately).

322 O'Neal/Macovei-Grencon/Van Eysinga, p. 19; Administration des contributions directes, Circulaire, p. 23.

323 Muntendam/Chiarella, p. 225.

Electing for the IP box results in a tax saving of 348 (435 – 87) or 80%.

In principle it is beneficial to the taxpayer to opt for the application of the IP box from the moment relevant IP income ("RIPI") is derived.

B) Relevant IP income

Articles 50bis paragraphs (1) and (3) of the ITA, as amended, are dealing with RIPI received as a remuneration for the use, or right to use, any patent, trademark or trade name, design, model, domain names and software copyrights[324].

RIPI can arise from different ways of exploiting IP rights and generally falls within one of the following categories:

a) Sales income

Based on article 50bis paragraph (2) of the ITA, the IP box includes income from the sale of any products incorporating at least one self-developed patented invention.

Patentable inventions must be developed by the taxpayer. Sales income derived from the use of a patent acquired from a third party or any other IP right do not fall within the scope of article 50bis paragraph (2) of the ITA[325]

b) License fees

Article 50bis paragraph (1) of the ITA stipulates that income received by way of remuneration for the use or license of the use of a relevant IP right is exempt at the rate of 80% of such net income[326]. The IP box thus applies to income generated from the use or licensing for use of relevant IP rights[327].

Income received by a licensee of a relevant IP right, however, who in turn grants a sublicense appears to be excluded from the IP box regime[328]. Similarly, there is a lack of clarity regarding the treatment of capital gains derived from the disposal of a license to use an IP right for consideration[329].

---

324 Shanahan, Patent Box, p. 7; O'Neal/Macovei-Grencon/Van Eysinga, p. 2, 3; Administration des contributions directes, Circulaire, p. 2, 3.

325 See Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Eynatten/Brauns, p. 4; Loyens & Loeff, p. 2; Clifford Chance, p. 2; O'Neal/Macovei-Grencon/Van Eysinga, p. 12; Administration des contributions directes, Circulaire, p. 15; Muntendam/Chiarella, p. 223, 226, 227.

326 Legitech, p. 83.

327 Schaffner/Manhaeve/Trouille, p. 381.

328 Idem, p. 382.

329 Muntendam/Chiarella, p. 229.

c) Proceeds of sale

Article 50bis paragraph (3) of the ITA sets out that the gain resulting from the sale of a software copyright, patent, trademark or trade name, domain name, design or model is exempt at the rate of 80%. The amount exempted by the preceding sentence is decreased by the arithmetic sum of 80% of the net loss arising from such right during the year in which the sale occurs or during prior years, provided such net losses were not offset pursuant to the provisions of article 50bis paragraph (4) subparagraph (2) of the ITA[330].

Article 50bis paragraph (3) of the ITA further states that the exemption of 80% referred to above is also to be denied to the extent the purchase price of the rights taken into account in the determination of the sales income has been reduced by the transfer of a gain pursuant to articles 53 and 54 of the ITA[331].

Article 50bis paragraph (3) of the ITA thus provides for partial exemption on capital gains derived from the sale of relevant IP rights[332].

d) Damages for infringement and other compensation

RIPI also includes damages for infringement of IP rights[333].

The legislation does not reflect whether RIPI includes other compensation, including damages, insurance proceeds and compensation for lost income that would have been RIPI. It is likely, however, that RIPI also includes other compensation.

C) Notional royalty

Article 50bis paragraph (2) of the ITA provides for a specific provision for taxpayers who created a patentable invention that they use for their own exploitation[334]. Accordingly, a taxpayer that has obtained a patent that is used in a taxpayer's business is entitled to a deduction equal to 80% of the net income the taxpayer would have received had the taxpayer given the use of such right to a third party. For the purposes of article 50bis paragraph (2) of the ITA net income means the theoretical remuneration less expenses directly related econom-

330 Legitech, p. 83.

331 Idem.

332 Shanahan, Patent Box, p. 7; Schaffner/Manhaeve/Trouille, p. 381; O'Neal/Macovei-Grencon/Van Eysinga, p. 2, 12, Administration des contributions directes, Circulaire, p. 2, 14; Muntendam/Chiarella, p. 223.

333 O'Neal/Macovei-Grencon/Van Eysinga, p. 12; Administration des contributions directes, Circulaire, p. 15.

334 O'Neal/Macovei-Grencon/Van Eysinga, p. 2; Administration des contributions directes, Circulaire, p. 3.

ically to such income, including annual amortisation and, if applicable, a deduction taken in connection with a write-down[335].

Article 50bis paragraph (2) of the ITA further states that the deduction is granted starting from the date on which the patent application was filed. If the patent application is rejected, the deduction previously taken must be added to taxable income for the financial year in which the taxpayer was notified of the rejection[336].

The IP circular specifies that where a taxpayer uses his own patentable invention, based on an arm's length approach the taxpayer is entitled to a deduction corresponding to 80% of the RP that would have derived had the patented invention been licensed to a third party by the taxpayer. As the case may be, article 50bis paragraph (2) of the ITA applies from the date on which the patent application was filed. Although the taxpayer is not required to wait for the patent to be granted, the patentable invention must be developed by the taxpayer. This implies that the profits derived from the use of a patent acquired from a third party does not fall within the scope of article 50bis paragraph (2) of the ITA[337].

An example to illustrate the determination of the RP, where a taxpayer is using a self-developed IP right for its own activities, is set out below[338]:

Determination of the RP in relation with notional royalties
A taxpayer incurs R&D expenses of 2.000 in AP 1 in respect of a specific patent that is still being developed. An application is filed with the competent authorities at the beginning of AP 2, requesting the corresponding patent protection. The taxpayer decides to benefit from the IP box. This is why it capitalises in the balance sheet the amount of expenses in prior years in conjunction with the relevant IP right, which has a useful life of four years. The patent is used by the taypayer in its own trade and is thus not licensed to third parties. If licensed to a third party on arm's length terms, the taxpayer would charge an annual fee of 1.500. The taxpayer obtains steady operational income of 700 per year. The corporate income tax consequences are set out below:

335 Legitech, p. 83.

336 Idem.

337 Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Eynatten/Brauns, p. 4; Loyens & Loeff, p. 2; Clifford Chance, p. 2; O'Neal/Macovei-Grencon/Van Eysinga, p. 12; Administration des contributions directes, Circulaire, p. 15; Muntendam/Chiarella, p. 223, 226, 227.

338 Muntendam/Chiarella, p. 226.

AP	**1**	**2**	**3**	**4**
Development costs	-2.000			
Filing for patent registration, capitalisation of IP right		2.000		
Operational profit	700	700	700	700
Notional royalty		1.500	1.500	1.500
Amortisation of IP right		-1.000	-1.000	-1.000
Total	-1.300	3.200	1.200	1.200
Relevant IP profit ("RP")		100	100	100
Retained tax losses	-1.300			
Profits chargeable to corporation tax	-1.300	1.500	800	800

In AP 1 the taxpayer deducts the R&D expenses of 2.000 for corporate income tax purposes. In AP 2 an amount of 1.500 (2.000 + 700 + 0.2 x 500 – 1.300) and in AP3 and AP 4an amount of 800 (700 + 0.2 x 500) is taxed at 29% (approximately).

Electing for the IP box results in a tax saving of 725 (1.247 – 522) or 58%.

Again, it is beneficial to the taxpayer to opt for the regime from the moment relevant IP income ("RIPI") is produced.

D) Excluded income

Income most notably from copyrights, other than those on software, is not eligible for the IP box. The same goes for income from plans, secret formulas or processes and information concerning industrial, commercial or scientific experience[339].

339 Loyens & Loeff, p. 1; Muntendam/Chiarella, p. 224.

E) Mixed sources of income

If income from a relevant IP right also includes non-relevant income, then the income is to be split in order to determine the proportion of RP that falls within the scope of article 50bis of the ITA[340].

F) Profits arising before grant of a right

Article 50bis paragraph (2) of the ITA lays down that the RP arising from a specific invention of the taxpayer falls within the scope of the IP box after a formal patent application is filed with the competent authorities. If a patent application is denied, the expenses initially deducted by the taxpayer must be included in the income of the accounting period, in which the patent application was denied[341].

4. Relevant IP losses

A relevant loss in respect of a relevant IP right ("RL") is fully tax deductible and may create a tax loss that can be offset against other types of income streams. In order to counteract double benefits, article 50bis paragraph (3) and paragraph (4) subparagraph (2) of the ITA imply that such RL is to be recaptured in the accounting period in which the benefit of the IP box is claimed following the disposal of the IP right[342].

In this regard, the reduced taxable basis of 20% for the determination of the capital gain will be increased by 80% of the RL derived from the relevant IP right that incurred in any prior accounting period up to and including the one in which the relevant IP right is disposed of and the capital gain realised[343].

5. Anti-avoidance

Article 50bis paragraph (5) of the ITA stipulates that the IP box only applies where the relevant IP rights have not been acquired from an affiliated company or an affiliated undertaking of collective nature. The objective of this measure is to prevent a relevant IP right from being acquired within the same group and thus benefiting more than once from the partial exemption based on article 50bis paragraphs (1) and (3) of the ITA. Towards that end, an entity is considered as being directly affiliated where[344]:

---

340 O'Neal/Macovei-Grencon/Van Eysinga, p. 12; Administration des contributions directes, Circulaire, p. 13.

341 Muntendam/Chiarella, p. 226.

342 Clifford Chance, p. 2; Muntendam/Chiarella, p. 226.

343 Idem.

344 O'Neal/Molitor, chapter 1.7.1; Shanahan, Patent Box, p. 7; Eynatten/Brauns, p. 4; Loyens & Loeff, p. 2; Schaffner/Manhaeve/Trouille, p. 382; Clifford Chance, p. 2;

– The company holds a direct participation of at least 10% in the share capital of the company receiving the RIPI;
– The share capital of the company is held directly, of at least 10%, by the company receiving the RIPI; or
– The share capital of the company is held directly, of at least 10%, by a third company receiving the RIPI.

In other words, the IP box does not apply with respect to IP rights acquired from an affiliated company. A company is deemed to be affiliated where the acquiring company holds an interest of at least 10% in the company that developed the IP, or the other way around. Furthermore, a company is deemed to be affiliated where a common parent company holds an interest of 10% or more in both companies[345].

Transactions with other indirectly affiliated companies may not be covered by the underlying anti-avoidance condition. For example, where a subsidiary acquires a relevant IP right from its grandparent company, the former may not be deemed as acquiring the IP right from an associated company according to the wording of the law[346].

The IP circular specifies that the taxpayer has the burden of proof that this anti-avoidance condition is not met[347].

6. Supplementary

A) Application of the IP box in relation to partnerships

As article 50bis of the ITA supplements guiding principles governing business profits, in accordance with articles 64 and 93 paragraph (1) of the ITA the IP box also applies to the determination of profits arising from the exercise of a liberal profession. As opposed to that, relevant IP rights belonging to the private wealth of the taxpayer do not fall within the scope of article 50bis of the ITA[348].

Against this backdrop, it may be assumed that the IP box also applies to partnerships.

O'Neal/Macovei-Grencon/Van Eysinga, p. 16; Administration des contributions directes, Circulaire, p. 19; Muntendam/Chiarella, p. 227.

345 Bal/Offermanns, p. 172; Muntendam/Chiarella, p. 227.

346 Muntendam/Chiarella, p. 227.

347 Loyens & Loeff, p. 2; O'Neal/Macovei-Grencon/Van Eysinga, p. 16; Administration des contributions directes, Circulaire, p. 19.

348 O'Neal/Macovei-Grencon/Van Eysinga, p. 2; Administration des contributions directes, Circulaire, p. 2.

B) Application of the IP box to cost sharing arrangements

The IP box is likely to apply to joint venture and cost sharing arrangements as well.

C) Meaning of affiliated companies

Article 50bis paragraph (5) of the ITA lays down that the application of article 50bis paragraphs (1) and (3) of the ITA are subject to the additional condition that the relevant IP right was not acquired by a person having the status of an affiliated company. A company is to be deemed an affiliated company for the purposes of article 50bis paragraph (5) of the ITA, where[349]:

– The company holds a direct participation of at least 10% in the capital of the company earning the income;

– At least 10% of its capital is held directly by the company earning the income; or

– At least 10% of its capital is held directly by a third company and such company holds a direct participation of at least 10% in the capital of the company earning the income.

Article 50bis of the ITA is silent with respect to the legal form of an affiliated company. The IP circular however specifies that an affiliated company is required to be a company or an undertaking of a collective nature, which have a distinct judicial personality within the meaning of the Luxembourg tax legislation. Besides, the holding of participations by a resident or non-resident transparent entity intermediary, within the meaning of the Luxembourg tax legislation and as defined in article 175 paragraph (1) of the ITA, is to be considered as a direct holding of participations in proportion to the fraction held in the net assets of that intermediary entity[350].

The fiscally transparent entities are defined in article 175 paragraph (1) of the ITA. It concerns general partnerships, limited partnerships, economic interest groups, European economic interest groups and civil companies, with the exception of those undertakings, which are non-resident by virtue of article 2 of the Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, as amended, or by virtue of article 3 of the Council Directive

---

349 O'Neal/Molitor, chapter 1.7.1; Legitech, p. 83; Loyens & Loeff, p. 2, 3; O'Neal/Macovei-Grencon/Van Eysinga, p. 15; Administration des contributions directes, Circulaire, p. 20; Muntendam/Chiarella, p. 227.

350 Schaffner/Manhaeve/Trouille, p. 382; Loyens & Loeff, p. 3; O'Neal/Macovei-Grencon/Van Eysinga, p. 16; Administration des contributions directes, Circulaire, p. 19, 20.

90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, division, transfer of assets and exchanges of shares concerning companies of different Member States[351].

Where a company or an undertaking of a collective nature acquires a relevant IP right from one of its shareholders, which is a physical person, independently of its level of participation the RP derived from that IP right can benefit from the partial exemption provided by article 50bis ITA[352].

The IP circular further specifies that article 50bis paragraphs (1) and (3) of the ITA apply as well where a taxpayer receives RIPI from another affiliated company, provided that the taxpayer developed the IP right himself or otherwise acquired that IP right from a person that does not qualify as an affiliated company. The agreed remunerations between the taxpayer and the affiliated company have to respect the arm's length principle as applied between independent third parties[353].

For the application of the arm's length principle, an entity may also be deemed to be affiliated where there is no direct participation as outlined in article 50bis paragraph (5) of the ITA[354].

Article 50bis paragraph (5) of the ITA does not specify which moment is decisive for determining whether a relevant IP right is acquired from an affiliated company or an affiliated undertaking of a collective nature, in order to determine whether the income generated may benefit from the partial exemption based on article 50bis of the ITA. In this regard, the IP circular clarifies that the moment the relevant IP right is transferred is decisive. Accordingly, where a relevant IP right is contributed to a company or an undertaking of a collective nature against the attribution of shares in the company or undertaking benefiting from the attribution, the analysis of the parental relationship between the contributor and the company or undertaking benefiting is to be done immediately before the contribution. As a result, on the incorporation of a Luxembourg company or undertaking of a collective nature by way of contribution of a relevant IP right, the newly incorporated entity and the contributing entity are not considered to be affiliated companies or affiliated undertakings of a collective nature[355].

---

351 O'Neal/Macovei-Grencon/Van Eysinga, p. 16; Administration des contributions directes, Circulaire, p. 20.

352 Idem.

353 Loyens & Loeff, p. 3; O'Neal/Macovei-Grencon/Van Eysinga, p. 17; Administration des contributions directes, Circulaire, p. 20.

354 Loyens & Loeff, p. 3.

355 Schaffner/Manhaeve/Trouille, p. 382; Loyens & Loeff, p. 3; O'Neal/Macovei-Grencon/Van Eysinga, p. 17; Administration des contributions directes, Circulaire,

D) Transfer pricing

There are only a limited number of tax provisions dealing with transfer pricing in Luxembourg. For example, qualifying a transaction as a constructive dividend may result in adjustments by the tax authorities by virtue of articles 56 and 164 of the ITA, leading to additional income and the levy of a potential dividend withholding tax. As Member State of the OECD, Luxembourg adheres to the OECD Transfer Pricing Guidelines.

Nonetheless, no express provisions specifying documentation requirements or any other type of obligations in conjunction with this issue have so far been introduced. From a practical viewpoint, corporate taxpayers should keep records of policies and methodologies evidencing that the prices agreed in transactions with affiliated entities follow the arm's length principle. Besides, advance pricing agreements ("APA") may be concluded with the Luxembourg tax authorities on an individual basis[356].

E) Double taxation relief

Due to the fact that the Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States applies, as well as the wide network of tax treaties currently in force, the exposure to withholding taxes on royalties paid by foreign licensees to companies resident in Luxembourg are supposed to be minimal. Royalties however may still suffer from withholding tax in certain countries. It is thus necessary to take into account the tax credit system in force in Luxembourg[357].

Companies resident in Luxembourg are taxable on a universal basis and therefore on their worldwide income. Under Luxembourg domestic tax law, as well as under tax treaties, juridical double taxation of income derived by resident companies is reduced by means of the credit or the exemption method. According to the credit method, a company can credit the foreign tax against its corporate income tax, up to an amount equivalent to the Luxembourg corporate income tax computed on the foreign net income, i.e. foreign income after deducting all expenses incurred in connection thereto. The domestic relief, however, is not extended to municipal business tax. The excess foreign withholding tax that cannot be credited in Luxembourg can be deducted as an operating expense. In addition, with respect to the application of the domestic tax credit, only foreign taxes that have been assessed and paid are considered being offsetable[358].

---

p. 20.

356 Muntendam/Chiarella, p. 227.

357 Idem, p. 228.

358 Eynatten/Brauns, p. 4; Muntendam/Chiarella, p. 228.

Under Luxembourg tax law there are two methods available for computing the foreign tax credit, the per-country method and the overall method. Where a company does not opt for the overall method, the per-country method applies. Under the per-country method foreign taxes paid abroad are only creditable against Luxembourg corporate income tax computed on the relevant income received from a given jurisdiction. This implies that all income from a particular foreign jurisdiction is considered together. As a result, there is no set-off for tax suffered on income from one jurisdiction against income from another jurisdiction[359].

Under the overall method, taxes effectively paid abroad may be credited against Luxembourg corporate income tax computed on a global basis on the relevant income derived from the relevant jurisdictions. This method, however, is only available upon request and merely applies for dividend and interest type of income. This is why the overall method does not apply to royalty income[360].

According to the IP circular, articles 13, 134bis and 134ter of the ITA and the grand-ducal regulations of 26 May 1979 put in place in relation with these articles allow the determination of the fraction of foreign tax to be credited on domestic taxes. If the foreign tax exceeds the fraction of the foreign tax charge, such excess is in principle deductible as running or procurement costs in the different categories of net revenues.

The IP circular further specifies that the formula derving from the grand-ducal regulations supporting the execution of article 13 paragraph (2) of the ITA is to be applied. Thereafter, the fraction of deductible foreign tax is to be entirely taken into consideration for the determination of the net foreign income. Where the net foreign income is negative, the fraction of deductible foreign tax is deducted at a rate of 100%, whereas if the foreign net income is positive, the partial exemption under the IP box leads to only 20% of the foreign tax fraction being deductible and are deducted from the taxable base[361].

In this context, domestic net income is constituted by gross income minus expenses which are directly and economically related to such income, including the annual amortisation, or any foreign withholding tax that may have been deducted in a source state. As outlined above, the remaining portion of the foreign withholding tax, which is not creditable against the Luxembourg tax charge, may be deducted as an operating expense. However, since only 20% of the in-

359 Muntendam/Chiarella, p. 228.

360 Idem.

361 O'Neal/Macovei-Grencon/Van Eysinga, p. 17; Administration des contributions directes, Circulaire, p. 20.

come derived from relevant IP rights is taxable, only 20% of the foreign withholding tax is taken into account for tax credit computation[362].

F) Valuation of IP rights and net worth tax

a) Valuation of IP rights

Under the IP box regime, when dealing with transactions between related parties, the corresponding consideration must be agreed to following the arm's length principle[363].

Against this backdrop, article 50bis paragraph (6) of the ITA holds that the taxpayer may use any valuation method generally used for the valuation of IP. For the purposes of application of article 50bis paragraph (3) of the ITA, the estimated realisable value of the right sold must be established in accordance with article 27 paragraph (2) of the ITA. However, undertakings that are micro-, small- or medium-sized undertakings may establish the estimated realisable value of a right described in article 50bis paragraph (3) of the ITA at 110% of the arithmetic sum of the expenses that have decreased the tax basis of the seller in the year of the sale and in prior years. For the purposes of article 50bis paragraph (6) of the ITA, micro-, small- or medium-sized undertakings are those that satisfy the criteria established by grand-ducal regulation[364].

Pursuant to article 3 of the grand-ducal regulation of 16 March 2005, as referred to in article 50bis paragraph (6) of the ITA, a micro-, small- and medium-sized company in Luxembourg must have less than 250 employees and a turnover not exceeding EUR 50 million or a total balance sheet not exceeding EUR 43 million. Furthermore, a small company is one with less than 50 employees and a turnover not exceeding EUR 10 million or a total balance sheet not exceeding EUR 10 million. A micro company is one with less than 10 employees and a turnover or a balance sheet total not exceeding EUR 2 million[365].

Referring to the provision set out in article 27 paragraph (2) of the ITA, which provides the definition of the estimated realisation value, article 50bis paragraph (6) of the ITA highlights that the determination of sales price of an IP right has to be done by following the general rules applicable with regards to the arm's length principle. Under the terms of article 27 paragraph (2) of the ITA, the estimated realisation value corresponds to the price, which would be obtained

---

362 Clifford Chance, p. 2; Loyens & Loeff, p. 3.

363 Muntendam/Chiarella, p. 227.

364 Legitech, p. 83; Muntendam/Chiarella, p. 227.

365 O'Neal/Macovei-Grencon/Van Eysinga, p. 20; Administration des contributions directes, Circulaire, p. 24; Muntendam/Chiarella, p. 227.

following a normal sale and without any constraints on the contemplated good, taking into account all abnormal and personal circumstances and conditions[366].

With respect to the arm's length principle, particular attention is reserved to cases of sales of relevant IP rights, which involve acquirers, be it natural or legal persons, having a special relationship with the seller, even where it does not qualify as affiliated company under the meaning of article 50bis paragraph (5) of the ITA[367].

Yet, due to the fact that the formal evaluation of an IP right may prove to be rather long and expensive, article 50 paragraph (6) foresees a safe harbour rule in the form of a fixed method of calculation for micro-, small- and medium companies. Thereafter, the estimated realisation value of an IP right may be fixed at 110% of the algebraic sum of the expenses, which have reduced the taxable base of the seller for the year of the sale and prior years[368].

The fixed method of calculation deals with the expenses, which are in direct economic relation with the development of the IP right, such as specified in article 50bis paragraphs (1) and (2) of the ITA. The expenses, amortisations and deductions for the depreciation in relation to a relevant IP right is to be activated within the first year that the taxpayer wishes to request the application of article 50bis paragraphs (1) and (3) of the ITA. Due to the fact that the expenses, amortisations and deductions are only to be activated in as far as, for a given year, these expenses do not exceed the related income, the amount to activate does therefor not necessarily correspond with the algebraic sum of expenses under the meaing of article 50bis paragraph (6) of the ITA[369].

Whether or not applying the fixed method of calculation is an option for micro-, small- and medium companies. This is why they can as well have recourse to all other methods of evaluation recognised on an international level. Where the option provided under article 50bis paragraph (6) of the ITA is exercised, it falls to the taxpayer to prove that the used evaluation method fulfils all the criteria required by the grand-ducal regulation referred to in article 50bis paragraph (6) of the ITA. By the same token, the burden of proof lies with the taxpayer for providing evidence with respect to the method applied being internationally recognised[370].

366 O'Neal/Macovei-Grencon/Van Eysinga, p. 19; Administration des contributions directes, Circulaire, p. 23.

367 Idem.

368 Idem.

369 Idem.

370 O'Neal/Macovei-Grencon/Van Eysinga, p. 19; Administration des contributions directes, Circulaire, p. 23, 24.

b) Net worth tax

Due to an amendment of article 50 paragraph (3) of the ITA on 19 December 2008 as well as by inserting the new paragraph 60bis in the law of 16 October 1934 on the assessment of properties and values ("Valuation Act")[371], as amended, relevant IP rights subject to article 50bis of the ITA do no form part of the taxable assets and are therefore exempt from the net worth tax when during the fiscal year preceding the key-date establishing the unit value of the exploitation asset, the requirements set out in article 50bis paragraphs (4) and (5) of the ITA are met. This provision applies from 2009 and thus to taxable bases established on and after 1 January 2009[372].

III. Critical acclaim

1. Relevant IP rights

The report from the Finance and Budget Commission of the Luxembourg House of Representatives makes reference to the fact that service marks and domain names also fall within the scope of article 50bis paragraphs (1) and (3) of the ITA. With respect to service marks, the authors believe that the reference seems unnecessary as, in essence, they should be viewed as an integral part of a trademark[373].

When it comes to domain names, despite of the illustrative IP circular some commentators consider the situation to remain somewhat unclear. According to their opinion, the IP circular seems to exclude income received for services, such as making a website available[374] or providing hosting services from the benefits of the IP box regime[375].

Moreover, it is put forward that article 50bis of the ITA does not contain any provision with respect to RP resulting from bundled license agreements, covering both rights included as well as rights excluded from the scope of the IP box at the same time. They elaborate that taxpayers will constantly be confronted with mixed sources of income due to the fact that in practice an IP license agreement typically pertains to rights both included as well as rights excluded

371 See Valuation Act.

372 Bal/Offermanns, p. 172; Shanahan, Patent Box, p. 7; Schaffner/Manhaeve/Trouille, p. 381; Loyens & Loeff, p. 1; O'Neal/Macovei-Grencon/Van Eysinga, p. 3; Administration des contributions directes, Circulaire, p. 3; Muntendam/Chiarella, p. 228.

373 Muntendam/Chiarella, p. 224.

374 For example, a website that aims establishing contact between buyers and sellers of certain products.

375 Schaffner/Manhaeve/Trouille, p. 381.

under article 50bis paragraphs (1) and (3) of the ITA[376]. If so, where most of the value of such a license agreement may be allocated to relevant IP rights covered by the IP box, they argue that all income received from a bundled license should be eligible for the tax measure[377].

In this regard, the IP circular specifies that where income from an IP right also includes non-relevant income, then the income is to be split in order to determine the proportion of RP that falls within the scope of article 50bis of the ITA[378]. It is argued that such solution is likely to cause practical difficulties for taxpayers, as income from mixed sources has to be properly allocated for purposes of the IP box regime[379].

Emphasis is put on the benefits of the IP box, such as the wide catalogue of relevant IP rights and the exemption of capital gains on disposal of relevant IP rights. In addition, some authors take up the position that there is no need to further enlarge the scope of relevant IP rights[380].

2. Supplementary

A) Lack of clarity

The IP box legislation is not very detailed and according to some observers leaves a number of questions unanswered. For example, the treatment of capital gains derived from the disposal of a license to use an IP right for consideration is still unclear[381].

Based on the manner in which article 50bis paragraph (3) of the ITA is drafted it can be interpreted that the provision only covers capital gains arising from the disposal of relevant IP rights that are owned by the transferor. It is unclear though how capital gains derived from the disposal of a license are dealt with, if the license holder does not own the IP right as such[382].

B) Missing notification

The IP box is similar in scope compared to the IP boxes of Spain and the Netherlands. Its benefits are open to all undertakings without restricting the location

---

376 For example, included IP rights may be software, trademarks, designs, patents or patent applications, and excluded IP rights include all copyrights other than software, certain know-how such as processes, trade secrets or plans.

377 Muntendam/Chiarella, p. 229.

378 O'Neal/Macovei-Grencon/Van Eysinga, p. 12; Administration des contributions directes, Circulaire, p. 13.

379 Muntendam/Chiarella, p. 229.

380 Eynatten/Brauns, p. 5.

381 Muntendam/Chiarella, p. 229.

382 Idem, p. 226.

of the eligible activities. In addition, the Luxembourg tax authority has no discretion in applying the tax measure because the criteria are objective and defined in the law[383]. This is why the position is taken that the regime should not be construed as illegal state aid within the meaning of article 107 of the TFEU[384].

4. Netherlands

I. Overview

The Netherlands was the first Benelux country to introduce an IP box regime. It became effective on 1 January 2007 and applies for relevant IP created by taxpayers on or after that same date[385]. The IP box was introduced as part of several changes to the Corporate Income Tax Act ("CITA") in order to stimulate the investment climate in the Netherlands[386]. It relies on the Lisbon treaty in which the EU Member States agreed that one of the objectives of the European Union should be the development of a coordinated research area and the allocation of 3% of its GDP for this purpose[387].

Under the initial IP box regime, relevant IP profits ("RP") from relevant IP was taxed at an effective rate of 10% and subject to certain limitations in respect of the amount of income that could be taxed in the IP box. In 2008 the measure was extended to R&D IP that results from activities for which an R&D declaration was obtained. As income from R&D IP could only benefit from the IP box up to an amount of EUR 400.000, this extension predominantly addressed to smaller companies aiming to encourage their innovation activities.

As practice demonstrated that the original measure was quite complicated and not very efficient, with effect from 1 January 2010 the limitations of maximising the amount of income that could be taxed in the IP box were abolished and the effective tax rate was reduced to 5%. Notably, abolishing the maximum of EUR 400.000 for R&D IP derived from innovative activities, for which an R&D declaration was obtained, made the regime attractive and accessible to a much larg-

383 Muntendam/Chiarella, p. 231.

384 Treaty on the Functioning of the EU, See also Muntendam/Chiarella, p. 231.

385 Schellekens, p. 525; Shanahan, Patent Box, p. 6; Atkinson/Andes, p. 3; Sunderman, p. 227; Eynatten/Brauns, p. 2; Sporken/Gommers, The Patents Box, p. 198.

386 Baaijens/Breuer, p. 2932; Sunderman, p. 227; Smit/Strien/Valkenburg, p. 513; Munting/Brassem, p. 1482 et seq; Groot, p. 39; Dikmans, p. 161.

387 Bal, p. 573, 574; Sporken/Gommers, Transfer Pricing Implication, p. 266.

er number of relevant companies. At the same time, the IP box was referred to as the "innovation box"[388].

The IP box allows companies to tax RP, which are attributed to relevant IP, at an effective tax rate of 5%. As from the year 2010, relevant IP includes IP that is patented, IP that is derived from activities for which an R&D declaration is obtained and plant variety rights[389].

It is thus important to note that the concept of the Dutch IP box regime is based on RP allocated to relevant IP rather than on RP allocated to relevant IP rights. The business asset that forms the relevant IP is generally wider in scope than the patent over it, or it may not be exclusively derived from activities for which an R&D declaration was obtained. In order to restrict the availability of the IP box for certain IP linked to any patent or R&D activity, the regime contains substance tests. This means that IP is excluded where the patent is of insignificant value to the overall IP or where the activities for which the R&D declaration was obtained were of a secondary nature.

II. Analysis

1. Reduced corporation tax rate for profits from relevant IP

A) Election for special treatment of profits from relevant IP

Article 12b paragraph (1) of the CITA stipulates that where the taxpayer developed an intangible asset with regard to which it has been granted a patent ("patented IP") or developed an intangible asset which arose from R&D activities for which it has been granted an R&D declaration as referred to in the Reduction Wage Tax Act ("R&D IP"), then, if the taxpayer opts for such treatment in a tax return for a year, as of the beginning of that year and having regard to the threshold by virtue of article 12b paragraph (5) of the CITA, the benefits from that asset are only taken into account for a part of 5 / H. H refers to the percentage of the highest tax rate in accordance with article 22 of the CITA, which is applicable to the year in which the benefit is received[390].

---

388 Bal/Offermanns, p. 170; Atkinson/Andes, p. 3; Shanahan, Patent Box, p. 6; Munting/Brassem, p. 1482 et seq; Baaijens/Breuer, p. 2932; Groot, p. 39; Eynatten/Brauns, p. 3; Krever, p. 756; Ministry of Finance; Dikmans, p. 161.

389 The terms "relevant IP" and "relevant intangible asset" are used synonymously.

390 Thanks to Mr. Hiemstra of PwC, Amsterdam, for his valuable support in the analysis of the Dutch IP box.

The IP box is thus optional and applies to taxable profit where the taxpayer has elected to apply for the regime[391]. The option whether to apply for the regime can first be exercised in the year where the relevant IP first becomes a business asset. Provided that the relevant IP forms a business asset, a taxpayer can also opt to first apply for the IP box in subsequent years. It is thus up to the taxpayer when to apply for the IP box regime[392].

The wording of article 12b CITA uses the term "taxpayer" when describing the various rules[393]. Since the IP box is part of the general rules for calculating taxable profits, it is applicable to Dutch resident taxpayers and permanent establishments belonging to resident and non-resident taxpayers. Both resident and non-resident taxpayers can therefore benefit from the tax measure[394].

Due to the fact that the IP box is part of the CITA, however, only legal entities that are subject to corporate income tax may benefit from the regime. Partnerships and self-employed persons are subject to personal income tax and are thus not eligible to the IP box regime[395].

The election for the application of the IP box is made with the filing of a corporate income tax return[396]. The taxpayer may elect whether to apply the benefits of the IP box on a per-relevant-IP basis. It is thus possible that the IP box can be applied to one relevant IP, whereas another relevant IP remains outside the scope of the regime. Such option may be important because the cost-benefit pattern can deviate from the exploitation of one intangible asset to the other and the relative impact of the recapture of development costs may differ accordingly[397].

Once the IP box applies to a relevant IP due to a prior option, the regime continues to apply to that relevant IP in the following years. It is generally not possible to revoke the application to the IP box for a relevant IP once it has been brought into its scope[398].

The IP box provides for taxation of RP at an effective tax rate of 5% instead of currently up to 25%[399].

---

391 Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7; Sunderman, p. 227; Groot, p. 39; Sporken/Gommers, The Patents Box, p. 199.

392 Prokisch, p. 222; Paardekooper/Brassem/Gommers, p. 5.

393 Paardekooper/Brassem/Gommers, p. 4.

394 Idem, p. 2.

395 Prokisch, p. 218.

396 Shanahan, Patent Box, p. 6; Sunderman, p. 228, 229; Sporken/Gommers, The Patents Box, p. 199; Dikmans, p. 162; Müller, Chapter 11, 11.2.

397 Paardekooper/Brassem/Gommers, p. 4.

398 Baaijens/Breuer, p. 2936.

399 Offermanns, Netherlands Country Analysis; Shanahan, Patent Box, p. 6; Sunder-

Accordingly, the contribution of the IP box to the taxable profits of a taxpayer is:

CB = (RP – C) x 5 / H

where:

– CB is the contribution of the IP box to taxable profits;

– RP is the relevant IP profit;

– C is the correction from previous tax years; and

– H is the highest tax rate pursuant to article 22 of the CITA.

It should be noted that C generally equals the relevant IP losses of previous tax years that so far have not been offset with RP. This means that the effective tax rate of 5% is achieved by taking into account for the determination of the taxable base or profits respectively only a fraction of 5 / H of the RP[400].

As outlined above, H refers to the percentage of the highest tax rate held in article 22 of the CITA, which is applicable to the year in which the benefit is received. The remaining fraction of 20 / H of the RP will not be taken into account for the determination of the taxable profits[401].

Technically speaking, the concept results in a reduction of the taxable overall profits as only 20% of the RP is subject to the regular corporate tax rate[402].

An example to illustrate the contribution of the IP box to the overall taxable profit of a taxpayer is set out below[403]:

Contribution of the IP box to the overall taxable profit of a taxpayer ("contribution")	
It is assumed that there is no threshold issue to be considered. The general corporate income tax rate is 25%.	
Income from elected relevant IP	2.000
Amortisation for tax purposes	400
Attributable interest expense and other cost	200

man, p. 227; Baaijens/Breuer, p. 2936; Dikmans, p. 161; Sporken/Gommers, The Patents Box, p. 199, 200; Relevant profits ("RP") is relevant IP income ("RIPI") less attributable R&D expenses such as costs for personnel, interests, depreciation or subcontracting R&D activities.

400 Offermanns, Netherlands, Corporate Taxation, Country Analyses, 1. Corporate Income Tax, IBFD Tax Research Platform, chapter 1, 1.9.7.

401 Baaijens/Breuer, p. 2936.

402 Prokisch, p. 218; Scheunemann/Dennisen, p. 410.

403 Paardekooper/Brassem/Gommers, p. 3.

RP	1.400
Contribution: (5 / 25) x 1.400 = 280	
Corporate income tax on contribution: 280 x 0.25 = 70. ETR is 70 / 1.400 = 5%	

The IP box only applies for relevant IP created by taxpayers that formed a business asset after the regime entered into force. Depending on the type of IP, this may be on or after 1 January 2007 with respect to patented IP and on or after 1 January 2008 with respect to R&D IP[404].

Article 12b paragraph (8) of the CITA specifies that additional measures can be introduced by or via royal decree, including further conditions for the application of article 12b of the CITA. This includes provisions for determining the level of benefits arising from the intangibles assets as referred to in article 12b paragraph (1) of the CITA and provisions in respect of the credit of taxes levied by another state on the benefits falling under article 12 of the CITA.

It should be noted that so far no royal decrees have been issued.

2. Relevant taxpayers

A) Meaning of relevant taxpayer

In principle, a taxpayer qualifies for the IP box where the following requirements are met[405]:

- The income or gain is generated by an intangible asset created by the taxpayer;
- The intangible asset is:
  - Protected by one or more patents ("Patented IP"), which have been granted to the taxpayer; or
  - Derived from activities for which an R&D declaration has been granted to the taxpayer ("R&D IP");
- The income of patented IP expectedly generated to a significant extent is attributable to the patent and thus meets the substance test; and
- The taxpayer has elected for the IP box.

404 Shanahan, Patent Box, p. 6; Atkinson/Andes, p. 3; Sunderman, p. 227; Baaijens/Breuer, p. 2933; Sporken/Gommers, The Patents Box, p. 198; Dikmans, p. 158.

405 Sunderman, p. 227; Groot, p. 39; see also Munting/Brassem, p. 1482 et seq.

B) IP to which the IP box applies

The Dutch Government has early considered that in practice a significant part of the profit of a company may be connected to one or more types of IP rights. The objective of the IP box is to strengthen the commercialisation of IP protected by relevant IP rights in the field of technology and science, but not in the area of marketing[406].

The IP box applies to IP protected by the following IP rights:

a) Patents and R&D declarations

Article 12b paragraph (1) of the CITA specifies that the taxpayer is eligible to the IP box where it developed an intangible asset with regard to which it has been granted a patent ("patented IP") or developed an intangible asset which arose from R&D activities for which it has been granted an R&D declaration as referred to in the Reduction Wage Tax Act ("R&D IP").

Interestingly, the term "intangible asset" is not defined in the CITA[407]. During the parliamentary process it was merely suggested that the meaning of this term follows article 33 of the CITA. The term, however, remains unclear since article 33 of the CITA does not provide a comprehensive definition of an intangible asset either. For this reason, article 2:365 of the Dutch Civil Code ("Burgerlijk Wetboek") is generally referenced. This provision enumerates a list of costs that arise in the development of an intangible asset and permits the intangible asset to be derived from the cost reason. Accordingly, an intangible asset as referred to in article 12b paragraph (1) of the CITA means a value that arises through R&D expenditure or through the acquisition of IP licenses and rights[408].

aa) Patents

The IP box applies to IP in respect of which a patent has been granted to the taxpayer[409]. In this regard, it is in principle irrelevant whether the patent is granted under Dutch or foreign law as long as the requirements for obtaining the patent under foreign law are compatible to those under Dutch law[410].

Problems may arise because some countries protect intangible assets through non-relevant IP rights such as copyrights, while others protect intangible assets through relevant IP rights such as patents. Software, which is largely not patent-

406 Paardekooper/Brassem/Gommers, p. 5.

407 Schellekens, p. 526; Munting/Brassem, p. 1482 et seq; Paardekooper/Brassem/Gommers, p. 2, 5.

408 Prokisch, p. 220.

409 Schellekens, p. 526; Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7.

410 Sunderman, p. 228; Munting/Brassem, p. 1482 et seq; Baaijens/Breuer, p. 2936; Paardekooper/Brassem/Gommers, p. 5.

able under European law, may be one example of such an intangible asset. Where contrary to Dutch law a foreign IP right would protect an intangible asset, the intangible asset may not qualify under the Dutch IP box regime[411].

A patent is an invention in the field of technology that is new, is based on inventive activities and can be used commercially. The law does not differentiate between the invention of objects, such as agricultural machines or tools, and processes, such as production processes, formulas or methods. The following are not considered inventions and are thus not patentable[412]:

– Discoveries;
– Scientific theories and mathematical methods;
– Aesthetic shaping or designs;
– Systems, rules, and methods for the performance of intellectual work, games, or business management;
– Computer programmes; and
– Presentations of fact.

An invention is considered new if the technical application is not part of the technological standard at the time the patent is applied for[413].

bb) R&D declarations

The IP box also applies to intangible assets in respect of which no patent is granted. Instead, the intangible assets may result from R&D activities for which an R&D declaration has been obtained[414].

Companies with employees who carry out qualifying R&D activities can apply for an R&D declaration at the Agentschap NL. The Agentschap NL is an agency of the Dutch Ministry of Economic Affairs. R&D declarations allow for partial reimbursement of labour costs arising within the framework of R&D in the form of a reduction of the wage tax and social insurance contributions to be paid. Against this backdrop, R&D declarations are associated with subsidy provisions that do already exist for many years, and which in principle are independent of the IP box regime. It is thus possible to make use of the subsidy provisions without applying the IP box[415].

411 Paardekooper/Brassem/Gommers, p. 5.
412 Baaijens/Breuer, p. 2933.
413 Idem, p. 2934.
414 Schellekens, p. 526; Shanahan, Incentives Group, p. 6; Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7; Hendrickx, p. 14.
415 Van Eck/Schreuders; Baaijens/Breuer, p. 2934.

An R&D declaration demonstrates the technical and innovative character of the development or the invention[416]. This implies that the IP box may be used by taxpayers that do not intend to apply for patents for the products of their R&D efforts[417]. By the same token, it promotes smaller R&D projects and activities allowing a greater number of companies to qualify for the IP box[418].

In order to receive an R&D declaration it is not required that the R&D results in a new technical product or a new technical production process[419]. R&D declarations are issued for technology-related scientific know-how, feasibility studies regarding the development of products or production processes or trade secrets. Furthermore, significant development of already existing products and production processes may qualify for an R&D declaration as well[420].

Generally speaking, software cannot be patented in the Netherlands because software developed in the Netherlands is principally protected by copyright. In other countries, such as the United States, software by comparison is patentable. While the requirements for patents in the United States are comparable with those in the Netherlands, the specific requirements for software are not. The question therefore is whether software developed at the risk and expense of a Dutch company and patented abroad qualifies as an intangible asset that is eligible for the IP box[421].

During parliamentary proceedings on the IP box it has been confirmed by the Under Minister of Finance that certain software assets also qualify for the regime[422]. Despite of the fact that software is generally not patentable under Dutch law, the IP box benefits in respect of software may still be available based on R&D declarations[423].

Thereafter, the development of software qualifies for IP box purposes if the R&D activity leads to a new technology for the company. The IP box is further available where the R&D activity leads to the development of existing technology or the development of a solution for special IT problems[424]. The aim of such R&D activity is the improvement of a software or production process within the company. Excluded, however, are R&D activities such as the maintenance of

---

416 Prokisch, p. 219.
417 Shanahan, Patent Box, p. 6; Hendrickx, p. 14.
418 Barten.
419 Baaijens/Breuer, p. 2935.
420 Baaijens/Breuer, p. 2933; Prokisch, p. 221; Groot, p. 39; Sporken/Gommers, The Patents Box, p. 200.
421 Sporken/Gommers, The Patents Box, p. 200.
422 Groot, p. 39.
423 Shanahan, Patent Box, p. 6; Prokisch, p. 221.
424 Baaijens/Breuer, p. 2934.

software, making certain hardware or software compatible with other platforms or the simple adjustment of the scope or design of software[425].

b) Plant protection products

Article 12b paragraph (3) of the CITA specifies that plant variety rights qualify for the purposes of the IP box. The inclusion of plant breeders' rights extends the regime to breeders of fruit, vegetables, flowers and similar agricultural products[426].

Apart from that, article 12b of the CITA does not prescribe at what moment in time an intangible asset is deemed to be developed. Guidance in this context can be found in the legislative history, namely that an intangible asset generally is deemed to be created where the R&D expenditure can be capitalised as an asset in the commercial accounts of the taxpayer by virtue of IAS 38. Further guidance can be derived from existing Dutch case law[427].

The IP box only applies to intangible assets to the extent such assets are part of the business assets after 31 December 2006[428]. Where the taxpayer does not dispose of a patented IP but an R&D declaration, the IP box applies to the extent that such assets are part of the business assets after 31 December 2007[429]. There are hence timing restrictions to be considered[430].

By virtue of article 12b paragraph (4) of the CITA the IP box is finally not applicable to trademarks, logos and similar intangible assets developed by the taxpayer[431].

C) Development condition

To be eligible for the IP box an intangible asset must be developed by the taxpayer[432]. Such condition is generally met where the taxpayer has itself an R&D department that develops the intangible asset under an R&D declaration or where a patent for the intangible asset has been granted under Dutch or foreign law[433]. Furthermore, the condition is likely to be met where an intangible asset is

425 Idem, p. 2935.
426 Sporken/Gommers, The Patents Box, p. 198.
427 Sunderman, p. 227, 228.
428 Shanahan, Patent Box, p. 6; Atkinson/Andes, p. 3; Sunderman, p. 227; Baaijens/Breuer, p. 2933; Sporken/Gommers, The Patents Box, p. 198; Dikmans, p. 158.
429 Baaijens/Breuer, p. 2933.
430 Sporken/Gommers, The Patents Box, p. 200.
431 Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7; Sunderman, p. 228; Sporken/Gommers, The Patents Box, p. 198; Dikmans, p. 162; Müller, Chapter 11, 11.2.3.
432 Baaijens/Breuer, p. 2933; Paardekooper/Brassem/Gommers, p. 5.
433 Sunderman, p. 228; Baaijens/Breuer, p. 2933; Dikmans, p. 162.

developed in a Dutch or foreign permanent establishment. If so, the development activity is performed for the risk and account of the taxpayer. It should be emphasised that for IP box purposes a patent or an R&D declaration must exist. The latter is possible only if at least part of the work is carried out by employees in the Netherlands, since an R&D declaration is issued only in relation to employees for whom the company is required to withhold the Dutch wage tax[434].

Interestingly, the term "development" is not defined in the CITA. In the parliamentary records the Government takes the position that at the time a taxpayer lists a self-developed asset in the annual financial statements, which are in compliance with IAS 38, the development condition under the IP box is met. It must be provided, however, that either a patent has been granted for the intangible asset or an R&D declaration has been issued for the development activity[435].

The IP box is not available where a completed intangible asset is acquired by the taxpayer from an affiliated or non-affiliated person through a purchase and then put into use[436]. There is, however, some room for flexibility in practice. Mitigation from this effect can be achieved due to the fact that the IP box applies to milestone and buy-in payments. An acquired intangible asset, such as a pipeline product of a pharma and life sciences company, can be further developed and incorporated into a greater whole by the taxpayer. Alternatively, where an intangible asset is acquired through a tax neutral reorganisation the intangible asset can be eligible for the IP box as well[437].

In the event of further development of an acquired intangible asset, the development activity is required to be of a certain importance in respect of the already existing intangible asset. If the further development of an acquired intangible asset results in a new intangible asset for which a patent or an R&D declaration has been obtained, the IP box is available as well. It is a precondition, however, that the development activity contributed significantly to the emergence of the new intangible asset[438].

Apart from that, it is fairly common for MNE to commission a Dutch or foreign group company or a third party service provider to execute a certain R&D project in the technological or pharmaceutical area[439]. Article 12b paragraph (1) of the CITA creates flexibility by allowing the use of contract R&D arrangements on the condition that the taxpayer owns the intangible assets uninterruptedly

---

434 Baaijens/Breuer, p. 2936.

435 Paardekooper/Brassem/Gommers, p. 5.

436 Idem.

437 Van Eck/Schreuders; Prokisch, p. 220; Sporken/Gommers, The Patents Box, p. 200.

438 Baaijens/Breuer, p. 2933.

439 Baaijens/Breuer, p. 2936; Eynatten/Brauns, p. 3; Paardekooper/Brassem/Gommers, p. 7.

during and after the R&D process[440]. Contract R&D involves a principal and a subcontractor. The principal bears the risk and expense of the R&D activities and enjoys the benefits. In addition, the principal is deemed to manage and control the contracted or other R&D activities and to apply for the relevant IP right when the R&D activities are successful. The subcontractor does the actual R&D and receives a fee for its development work.[441].

Whether or not the intangible asset was produced in the Netherlands is in principle irrelevant, although in some cases careful planning may be needed to ensure the IP box benefits are retained where development takes place outside the Netherlands[442]. While for patented IP the R&D should be developed for the risk and account of the Dutch taxpayer, the R&D may not necessarily be performed in the Netherlands. With respect to development activity for which an R&D declaration has been obtained, however, the R&D should at least for 50% be performed by the Dutch taxpayer. This 50% condition is of qualitative nature, meaning that R&D activities performed by the Dutch taxpayer include a decisive managing and controlling role with respect to the assigned tasks performed by a subcontractor[443].

Provided that the conditions referred to above are met, it is irrelevant whether the location of the R&D centre that developed the intangible asset was in the Netherlands or abroad or whether the providers of the contract R&D were affiliated or non-affiliated persons[444]. For IP box purposes it is assumed that the qualifying development activity has been performed by the taxpayer itself or for the risk and account of the taxpayer respectively.

An intangible asset is further deemed as being developed by the taxpayer where it is subject to a transfer in the context of a tax neutral reorganisation. In this regard, the intangible asset developed by the legal predecessor is acquired based on a merger, spin-off, division or transfer[445].

---

440 Sunderman, p. 228; Baaijens/Breuer, p. 2933; Groot, p. 39; Paardekooper/Brassem/Gommers, p. 5, 7.

441 Sporken/Gommers, Transfer Pricing Implication, p. 267; Paardekooper/Brassem/Gommers, p. 7.

442 Sporken/Gommers, The Patents Box, p. 199.

443 Sunderman, p. 228; Shanahan, Patent Box, p. 6; Baaijens/Breuer, p. 2933.

444 Paardekooper/Brassem/Gommers, p. 6.

445 Baaijens/Breuer, p. 2933; Prokisch, p. 220; Sporken/Gommers, The Patents Box, p. 200; For example, where an intangible asset has been developed by a group company whose purpose is to conduct R&D activities, by division of that company the intangible asset may be brought into a new company. On the basis of the invention, the new group company may then apply for a patent. After granting the patent, income derived from it will qualify for purposes of the IP box.

D) Ownership condition

As outlined above, the language of article 12b paragraph (1) of the CITA implies that an intangible asset resulting from a successful contract R&D arrangement belongs to the principal and not to the subcontractor. Accordingly, the subcontractor is not a relevant taxpayer for IP box purposes and thus not eligible for the regime[446].

In order to fulfil the role of principal under a contract R&D arrangement, a company must have available adequate expertise, qualified personnel to manage the contractually assigned tasks and sufficient equity to bear the contractually assigned risks[447]. In accordance with Dutch regulations, a principal that manages and controls the R&D activities must consider the following elements[448]:

– The decision-making process;
– Planning;
– Budgeting;
– Measuring performance;
– Determining the commercially valuable areas of current and future research; and
– Determining the chances that the research will be successful or unsuccessful.

Another issue is that some MNE centralise legal title ownership of a number of IP rights in a single group company in order to streamline managing their defence against infringements of IP rights. Where legal title ownership is centralised, but where beneficial ownership is elsewhere, a patent may no longer be issued in the name of the taxpayer earning the IP-derived income. Access to the IP box may thus be declined[449].

Buy-in and farm-in arrangements should further be carefully analysed because the terms thereof may have an impact on both the active ownership aspects and on the application of the cost allocation rules[450].

---

446 Paardekooper/Brassem/Gommers, p. 5.
447 Paardekooper/Brassem/Gommers, p. 7; Sporken/Gommers, Transfer Pricing Implication, p. 267.
448 Baaijens/Breuer, p. 2933; Prokisch, p. 220; Sporken/Gommers, Transfer Pricing Implication, p. 267.
449 Paardekooper/Brassem/Gommers, p. 7.
450 Idem, p. 7.

3. Relevant IP profits

A) Calculation of relevant IP profits

Before 1 January 2010 for patented IP the maximum amount of income that could benefit from the reduced rate was four times the development costs. With respect to income from intangible assets for which an R&D declaration has been granted that amount was limited to a specific maximum of EUR 400.000. Such upper threshold however, both the general limitation of four times the development costs for patented IP as well as the special limitation of EUR 400.000 for R&D IP, has been abolished by the Dutch legislator. Under the regime as in force as of 1 January 2010 there is no more maximum amount of income that can benefit from the lower effective tax rate[451].

After 1 January 2010 there is however still one lower expenses threshold to be met, since the reduced effective tax rate of 5% only applies to the portion of the RP that exceeds the development costs of the relevant intangible assets[452].

a) Lower threshold

Article 12b paragraph (5) of the CITA lays down that paragraph (1) of the said article applies where the total of the benefits incurred from intangible assets in a year exceeds the threshold. The threshold is equal to:

– The balance of development costs to be recaptured, as referred to in article 12b paragraph (6) of the CITA, at the end of the prior year; increased with

– The development costs of patented IP and R&D IP for which the taxpayer has elected to apply article 12b of the CITA; increased with

– The amount equal to the balance of benefits, as referred to in article 12b paragraph (1) first sentence of the CITA, in the event this balance is negative; and decreased with

– The benefits from patented IP, as referred to under article 12b paragraph (5) letter (b) of the CITA, incurred in the period starting in the year of patent application up to and including the year prior to the year of granting the patent, to the extent these benefits do not exceed the addition of the amounts referred to under article 12b paragraph (5) letters (a) to (c) of the CITA.

---

451 Schellekens, p. 525; Atkinson/Andes, p. 4; Shanahan, Patent Box, p. 6; Groot, p. 39; Ministry of Finance.

452 Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7; Sunderman, p. 227; Van Eck/Schreuders; Munting/Brassem, p. 1482 et seq; Baaijens/Breuer, p. 2936; Groot, p. 39; Sporken/Gommers, The Patents Box, p. 199.

In other words, the threshold based on article 12b paragraph (5) of the CITA is that the RP derived from relevant intangible assets must exceed the total amount of the development costs still to be recaptured at the end of the previous year, plus the development costs of the relevant intangible assets for which the taxpayer has opted for application during the year. The effect of this is that only the RP exceeding the development costs qualifies for the lower effective tax rate of 5%. Where the IP box applies to more than one intangible asset, the threshold is applied for all intangible assets together and not on a per-intangible asset basis. This implies that where a new intangible asset is brought into the IP box, in that tax year the threshold is increased by the amount of the development cost of that asset. Moreover, as set out below the threshold also applies to costs resulting from contract R&D that is conducted for the risk and account of the taxpayer or expenses incurred under a cost sharing agreement[453].

b) Development costs

The development costs in principle cover all expenses incurred for the development of an innovation regardless of the operational function[454]. According to statements made during parliamentary debates on the proposals, costs charged by a subcontractor for contract R&D arrangements are also included in the development costs if the contract R&D is for the risk and account of the Dutch principal and if it is the owner of the intangible assets[455].

The parliamentary debate further suggests that the same group of relevant costs that is taken into account for depreciation purposes determines the development costs and thus the threshold for IP box purposes. Towards that end, the term "development costs" can be construed in accordance with the case law interpreting section 3.30 of the Personal Income Tax Act ("PITA")[456]. Case law indicates that subsidies reduce development costs, and that interest on loans related to development activity of intangible assets can be included in these costs[457]. By virtue of Dutch case law it can be further argued that fixed overhead costs attributable to the development of intangible assets are included in the development cost[458].

In addition to first implementing the IP box with effect from 1 January 2007, article 3.30 (3) of the PITA has been introduced, which is applicable to the CITA as well. This provision allows the deduction of the development costs of

---

453 Dikmans, p. 162; Paardekooper/Brassem/Gommers, p. 3; Müller, Chapter 11, 11.2.1.

454 Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7.

455 Sporken/Gommers, The Patents Box, p. 200.

456 Idem, p. 199.

457 Idem.

458 Idem.

an intangible asset in the year of development and may apply rather than having to activate such costs and subsequently depreciate them on an annual basis[459]. It is thus not required to capitalise R&D expenses for tax purposes even where such expenses result in the recognition of an intangible asset in the commercial accounts[460]. Costs that are deducted at once from taxable profits before an IP box election is made for the relevant IP must however first be recaptured at the general rate of currently 25% before the lower effective tax rate applies[461].

It should be emphasised that costs of fundamental or general research respectively do not qualify as development costs to the extent that these costs are not directly linked to a specific intangible asset[462].

Article 12b paragraph (6) of the CITA stipulates that together with determining the assessment for the year, the tax inspector determines in a decision against which a notice of objection can be filed, the total of the development costs which are:

– The amount which has been determined on the basis of article 12b paragraph (6) of the CITA at the end of the prior year, if it has been determined; increased with
– The additions referred to in article 12b paragraph (5) letters (b) and (c) of the CITA; decreased with
– The decrease referred to in article 12b paragraph (5) letter (d) of the CITA; decreased with
– The benefits incurred during the year that do not exceed the threshold of the year.

In other words, the total of the development costs which the tax inspector determines consists of[463]:

– The development costs at the end of the previous year, if they have been determined; increased with
– The development costs of the intangible assets for which the taxpayer has chosen the application of the IP box based on article 12b paragraph (1) of the CITA during the year; decreased with
– The RP generated while a relevant IP was pending in the period starting

459 Sunderman, p. 227; Munting/Brassem, p. 1482 et seq; Baaijens/Breuer, p. 2936; Dikmans, p. 161; Paardekooper/Brassem/Gommers, p. 2.
460 Sunderman, p. 227; Baaijens/Breuer, p. 2936.
461 Shanahan, Patent Box, p. 6; Sunderman, p. 227.
462 Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7; Sporken/Gommers, The Patents Box, p. 199.
463 Paardekooper/Brassem/Gommers, p. 3; Müller, Chapter 11, 11.2.2.

in the year of the application of the IP up to and including the year prior to the year of granting the relevant IP, to the extent these RP do not exceed the threshold of the year; decreased with

– The benefits received during the year, which do not exceed the threshold of the year.

The development costs that still need to be recovered are determined each year by the competent tax authorities when determining the assessment of the taxpayer for the year. A notice of objection can be filed against the determination of the tax authorities[464].

If, in accordance with article 12b paragraph (7) of the CITA, any fact leads the tax inspector to believe that the amount under the article 12b paragraph (6) of the CITA has been set too low, he can revise the decision from that paragraph in a decision against which a notice of objection can be filed. A fact which the inspector was aware of or could have reasonably been aware of cannot justify a revision, except in cases where the taxpayer has not acted in good faith. Article 16 paragraph (3) of the National Tax Act is also applicable. Legal remedies against a decision in regard with article 12b paragraph (6) of the CITA can only concern the increase under letter (b) of the said paragraph and a reduction under letters (c) and (d) of the said paragraph.

Article 16 paragraph (3) of the national Tax Act is dealing with procedural issues.

An example to illustrate the determination of the RP on the basis of one intangible asset is set out below[465]:

464 Sporken/Gommers, The Patents Box, p. 201; Müller, Chapter 11, 11.2.1.

465 Sunderman, p. 227.

Calculation of the contribution of the IP box to the overall taxable profit of a taxpayer ("contribution")

A taxpayer spends 600 on R&D in AP 1, as a result of which a patented IP is created that generates an annual profit of 1.400 as from AP 2. The corporate income tax consequences are set out below:

AP	**1**	**2**	**3**	**4**
R&D income at 25%		600		
Retained loss at 25% / Recapture		-600		
R&D income at 5%		800	1.400	1.400
R&D expenses at 25%	-600			
Total	-600	800	1.400	1.400
RP	0	800	1.400	1.400
Contribution (5 / 25) x RP	0	160	280	280
Profits chargeable to corporation tax	-600	160	280	280

In AP 1 the taxpayer can fully deduct the R&D expenses of 600 for corporate income tax purposes. It is not required to recapture this expense, even though an intangible asset is created and capitalised in the commercial accounts of the taxpayer.

In AP 2 an amount of 600 is offset with the retained loss of 600. At the same time, for IP box purposes the expenses threshold is offset. The excess of 800 is thus effectively taxed at the rate of 5% (160 x 25%).

In AP 3 and AP 4 the full amount of profit of 1.400 is effectively taxed at the rate of 5% (280 x 25%).

Electing for the IP box results in a tax saving of 720 (900 – 180) or 80%.

The threshold does not apply on a per-relevant IP basis, but on an overall basis. As a result, applying for the IP box for additional intangibles would increase the threshold.

A further example to illustrate the determination of the RP based on more than one intangible asset is set out below[466]:

[466] Idem.

Calculation of the contribution of the IP box to the overall taxable profits of a taxpayer ("contribution")

A taxpayer spends 600 on R&D in AP 1, as a result of which a patented IP is created that generates an annual profit of 1.400 as from AP 2. In AP 2 the taxpayer spends another 400, as a result of which it creates a second patented IP that generates an annual profit of 200 as from AP 3.

The corporate income tax consequences are set out below:

AP	**1**	**2**	**3**	**4**
R&D income at 25%		1.000		
Retained loss at 25% / Recapture		-600		
R&D income at 5%		400	1.600	1.600
R&D expenses at 25%	-600	-400		
Total	-600	400	1.600	1.600
RP	0	400	1.600	1.600
Contribution (5 / 25) x RP	0	80	320	320
Profits chargeable to corporation tax	-600	80	320	320

In AP 1 the taxpayer can fully deduct the R&D expenses of 600 for corporate income tax purposes. It is not required to recapture this expense for write-down purposes, even though an intangible asset is created and capitalised in the commercial accounts of the taxpayer.

In AP 2 the taxpayer can fully deduct R&D expense of 400, resulting in a total expenses threshold of 1.000 (600 + 400). Again, it is not required to recapture the expense of 400 for write-down purposes, even though an intangible asset is created and capitalised in the commercial accounts of the taxpayer. Accordingly, in AP 2 600 of income is offset with the retained loss of 600. For IP box purposes, the expenses threshold of 1.000 is offset as well. This is why 400 is effectively taxed at the rate of 5% (80 x 25%).

In AP 3 and AP 4 the full amount of income of 1.600 is effectively taxed at the rate of 5% (320 x 25%).

Electing for the IP box regime in a tax saving of 720 (900 – 180) or 80%.

The threshold does not apply on a per-relevant IP basis, but on an overall basis. As a result, applying for the IP box for additional intangibles increases the threshold.

As the recapture process begins only once an election for the IP box has been made, in order to benefit most from the IP box it is sensible to make the election on a timely basis[467].

c) Transitory provision regarding upper threshold

In order to manage the exposure to the national budget, the Dutch Government has initially placed certain limitations in form of upper thresholds on the maximum amount of income derived from elected relevant intangible assets[468]. After 1 January 2010, all limitations on the granting of relief were abolished. The legislator had recognised that these limits were too restrictive in most cases to produce a real impact on the national economy[469].

It should be noted that a transitional regime applies for income derived from R&D IP becoming business assets after 31 December 2007 but before 1 January 2010. For each of these R&D IP income up to a maximum of only EUR 400.000, also if part of that income is earned after 1 January 2010, may be subject to the IP box and thus to an effective tax rate of 5%. Any excess income of such R&D IP, however, is taxed at the regular rate[470].

For patented IP becoming business assets before 1 January 2010 all limitations in respect of the upper treshold were abolished[471].

d) Practical implications

aa) Methods of profit attribution

With respect to the practical application of the IP box, the question arises how profits must be determined to which the IP box applies. The text of the law assumes that the profits will be attributed to the individual intangible assets. In practice, however, this can hardly be implemented as it is rarely clear at the outset what can be defined as an independent intangible asset and what turnover

---

467 Sporken/Gommers, The Patents Box, p. 199.

468 Bal/Offermanns, p. 169; Baaijens/Breuer, p. 2937; Paardekooper/Brassem/Gommers, p. 4; Müller, Chapter 11, 11.2.1; For example, where over 10 years a taxpayer has spent 100 in development costs of relevant intangible assets and has earned an RP of 650 from those intangible assets, then the first 100 were excluded from the IP box as part of the lower IP box threshold and were taxed at the general tax rate. The next 400 before 1 January 2010 were taxed under the IP box at a rate of 10% and the last 150 were again taxed at the general rate, since that amount exceeded the upper IP box threshold.

469 Prokisch, p. 219.

470 Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7; Bal/Offermanns, p. 170.

471 Idem.

or costs can be attributed to it. This information can be derived from bookkeeping only in very exceptional cases[472].

Against this backdrop, it is commendable that the Dutch tax authorities become actively involved upon request in the practical application of the IP box. According to the instructions that the legislator provided in its explanation of the law, the methods applied in practice to determine profits start with the customary transfer pricing systems. Since the legislative materials hardly contain any indications of the method to be applied, the taxpayer has a certain leeway in declaring the profits that fall within the scope of application of the IP box. In many cases, it will be an obvious and practical solution to follow a method for determining transfer prices, but this may certainly not be the only proper solution in all cases[473].

The most frequently applied method for attributing profit for purposes of the IP box is the profit split method. On the basis of a functional analysis, first the core functions of the enterprise are identified. In a second step, the EBIT according to the balance sheet is split among these core functions[474].

For this purpose, the company's EBIT according to the balance sheet is reduced by remuneration of those functions within the company that are not core functions, for example on the basis on a cost-plus method, and the remaining part of the EBIT is attributed to the core functions according to a distribution key, for example on the basis of a full time equivalent method. The part of the EBIT according to the balance sheet that is attributable to the core function "R&D" constitutes, in principle, the profit qualifying for the IP box. Evidently, the time at which the intangible asset was completed, the development costs, and the transitional regime must be taken into account as well[475].

Another method used in practice is the cost-plus method. This method is used in cases where the development activity cannot be considered a core function of the taxpayer anymore, but rather a supporting function[476].

bb) Advance ruling

The method of profit attribution is frequently discussed in advance with the Dutch tax authorities, and the result is set out in an advance ruling. This ruling also governs the material and formal conditions relating to the IP box, the justification of the use of the specific method of profit attribution, the application of the transitional regime or the period for which the ruling is to apply. Generally,

472 Baaijens/Breuer, p. 2937.
473 Idem, p. 2938.
474 Idem.
475 Idem.
476 Idem.

the advance ruling also includes the calculations on the basis of the elected method of profit attribution[477].

Taxpayers are naturally not required to conclude an advance ruling with the tax authorities. Application of the IP box may be requested only once the tax return is submitted. Practice has shown in such cases that the tax authority will then itself initiate a discussion[478].

B) Relevant IP income

RIPI that is attributable to the IP box derived from a particular intangible asset is broadly defined[479]. It includes all economic benefits that may be allocated to a relevant intangible asset. It further includes direct and indirect proceeds of an intangible asset eligible for the IP box regime[480].

It is indifferent whether the RIPI is received from affiliated or non-affiliated persons that are located inside and outside the Netherlands[481]. Income attributable to intangible assets resulting from R&D activities that were outsourced, in principle, qualifies as RIPI provided that the taxpayer has owned the intangible assets uninterruptedly during and after the R&D process[482]. Income arising from transactions with affiliated persons qualifies as RIPI where the underlying transactions correspond to the arm's length principle[483].

a) Categories of relevant IP income

RIPI can arise from different ways of exploiting relevant intangible assets and generally falls within one of the following categories:

aa) Sales income

Sales income is income arising from remuneration embedded in the sales price of goods and services. Allocation issues are resolved through established transfer pricing methods and are eligible for advance pricing agreements ("APA") with the Dutch tax authorities. The authorities have a specialised IP box team that deals with IP box rulings[484].

---

477 Idem.

478 Idem.

479 Shanahan, Patent Box, p. 6; Prokisch, p. 221; Paardekooper/Brassem/Gommers, p. 7; Müller, Chapter 11, 11.2.3.

480 Sunderman, p. 227; Groot, p. 39.

481 Paardekooper/Brassem/Gommers, p. 7.

482 Groot, p. 39.

483 Sunderman, p. 228; Munting/Brassem, p. 1482 et seq.

484 Shanahan, Patent Box, p. 6; Sunderman, p. 227; Müller, chapter 11.2.3; For example, an allocation issue may be how to attribute relevant income from intangible assets, e.g. patents, and income from other non-relevant intangible assets, e.g. brands.

bb) License fees

License fees is income that consists of any license fee or royalty received by a taxpayer[485].

cc) Proceeds of sale

According parliamentary records, capital gains realised from the sale or disposal of relevant intangible assets qualify as RIPI[486]. It should be emphasised, however, that based on parliamentary records capital gains realised on the sale or disposal of relevant IP rights do not qualify as RIPI. This is why proceeds of the sale or disposal of patents are not eligible for the IP box regime[487].

dd) Damages for infringement and other compensation

Due to the broad definition of RIPI it can be assumed that amounts received from others accused of infringing patented IP qualify as RIPI. This reasoning also applies to other compensation, including damages, insurance proceeds and compensation for lost income that would have been RIPI.

b) Substance test

Article 12b paragraph (2) of the CITA specifies that the IP box is only applicable with regard to intangible assets of which the expected benefits are to an important degree derived from patents granted to the taxpayer as well as R&D IP.

This is why not all intangible assets are eligible for the IP box. Article 12b paragraph (2) of the CITA provides the additional condition that the "expected benefits" from the particular intangible asset be attributed to "an important degree" to a patent or a number of patents that have been granted to the taxpayer. Such test is met where a patented IP or an R&D IP itself for at least 30% contributes to the profit derived from the use of that intangible asset[488]. The substance test in theory implies that the taxpayer is expected to follow a functional economic approach as set out below[489]:

– Make a projection attributing total expected profits to potentially relevant intangible assets as opposed to other sources such as brand or marketing assets;

---

485 Sunderman, p. 227.

486 Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7; Sunderman, p. 227; Sporken/Gommers, The Patents Box, p. 200; Paardekooper/Brassem/Gommers, p. 7.

487 Warson/Foriers, p. 74.

488 Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7; Shanahan, Patent Box, p. 6; Sunderman, p. 228; Prokisch, p. 222; Sporken/Gommers, The Patents Box, p. 199; Dikmans, p. 162; Paardekooper/Brassem/Gommers, p. 6.

489 Paardekooper/Brassem/Gommers, p. 6.

– Make a projection of expected profits from each potentially relevant intangible asset; and
– Determine whether the IP-related component of the intangible assets tested meets the substance test.

The purpose of the substance test is to prevent a relatively insignificant patent or R&D declaration from being sufficient for an intangible asset to qualify for the IP box. As outlined before, a substantial part of the profit expectedly generated by the intangible asset itself must be attributable to such rights. Interestingly, this may imply that an intangible asset always qualifies for the IP box. At the same time, where a taxpayer applies the regime to a more comprising intangible asset having a higher threshold, it may have to ensure that the substance test will be met[490].

The Dutch Government has recognised early that the substance test is likely to cause a great number of allocation issues in practice. A functional economic approach may need to be followed in making the required determinations. The Government indicated as well that the 30% condition is not supposed to be mathematically applied to separate relevant intangible assets from non-relevant intangible assets. Instead, it is to be seen as a qualitative condition. The Government further stated that income arising due to marketing efforts cannot be RIPI. It follows that such income must not be used under the substance test[491].

Due to the complexity of implementing the substance test, parliamentary records encourage affected taxpayers to enter into discussions with the Dutch tax authorities to find practical solutions[492]. Where an intangible asset comprises more than solely one relevant IP right it is sensible to obtain advance certainty from the Dutch tax authorities that the substance test is met[493].

The tax authorities have indicated that they take a practical and flexible approach and to deal with the 30% condition in a qualitative rather than a quantitative manner. This is why despite of the wording of article 12b paragraph (2) of

490 Sunderman, p. 228; Prokisch, p. 222; For example, a taxpayer is engaged in the production of automobiles. It has developed an airbag system for which it has obtained a patent. The patented airbag system is of marginal importance to the sale proceeds of this car model, and the taxpayer does not have any other patents which have been used for this car model. This is why it cannot be argued that a substantial part of the profits are derived from the sale of the car model attributable to the patent, therefore failing the substance test. In such case, however, the taxpayer may apply the IP box only with regard to the airbag system, rather than the car model as a whole. In such case, the income attributable to the patented airbag system would be eligible for the IP box.

491 Paardekooper/Brassem/Gommers, p. 6.

492 Idem.

493 Sunderman, p. 228.

the CITA a taxpayer vis-à-vis the tax authority typically is to demonstrate the relevance and magnitude of the R&D activities within the company[494].

Although in literature reference often is made to the 30% condition, the approach taken by the tax authorities is in line with parliamentary history and established practice. As the substance test cannot be read as a 30% condition, but as a qualitative test only, there is no percentage to be defined. The wording of the law refers to "important" ("in belangrijke mate"), which term in respect of other provisions in case law is indeed defined at 30%. For IP box purposes, however, it has been confirmed that the term should not be defined as 30%[495].

C) Notional royalty

A notional royalty may be used if there is a benchmark for royalties charged to third parties. For example, where there is evidence or a benchmark that a third party royalty for a relevant IP is equivalent to 5% of the remuneration, this percentage can also be used for determining the IP-derived income as part of own sales[496].

D) Excluded income

Article 12 paragraph (4) of the CITA excludes income from brands, logos and similar assets developed by the taxpayer from the IP box regime. It is not exactly clear what a "similar asset" for these purposes implies, but the broad intention of the Dutch Government is to exclude income from marketing-related intangibles[497].

Furthermore, in the parliamentary records the Government takes the position that development costs for purposes of the IP box do not include costs for fundamental research. A necessary consequence of this view is that such costs will neither increase the threshold nor the basis for amortisation[498]. This is why any income from such activity is not eligible for the IP box.

494 Sunderman, p. 228; Baaijens/Breuer, p. 2933.

495 Thanks to Mr. Hiemstra of PwC, Amsterdam, for his support on this point.

496 Idem.

497 Prokisch, p. 221; Paardekooper/Brassem/Gommers, p. 6.

498 Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7; Baaijens/Breuer, p. 2936; Paardekooper/Brassem/Gommers, p. 4.

E) Profits arising before grant of right

Article 12b paragraph (5) of the CITA sets out that paragraph (1) of the said article is applicable where the total of the benefits incurred from intangible assets in a year exceeds the threshold. The threshold inter alia takes into account the benefits from patented IP, as referred to under article 12b paragraph (5) letter (b) of the CITA, incurred in the period starting in the year of patent application up to and including the year prior to the year of granting the patent. These benefits, however, must not exceed the addition of the amounts referred to under article 12b paragraph (5) letters (a) to (c) of the CITA.

In other words, with effect from 2011 the regime also applies to RP arising from the year a patent was applied for to the year preceding the year in which the patent is granted[499]. This allows reducing the expenses threshold until it becomes nil, not though below that figure[500].

As patents generally are granted with retroactive effect, from a conceptual perspective it seems reasonable to allow for profits generated in the period starting in the year of patent application up to and including the year prior to the year of granting the patent being eligible for the IP box[501].

4. Relevant IP losses

Before 1 January 2010 the IP box was largely relevant for companies which were in a profit making position since losses were not deductible from the taxable profit at the general tax rate. After 1 January 2010, however, losses from relevant intangible assets are deductible from the taxable profit at the general rate of 25% in the situation that the net result from relevant intangible assets is negative in a certain year. This implies that losses from relevant intangible assets deducted from taxable profits in previous years must first be recaptured at the general rate before the lower effective rate applies[502].

This new system entails that different tax rates do not have to be taken into account when losses from other years are set off against the profit of a year in which the IP box was applied. The profits falling within the IP box are set off against losses only in the amount of the part included in the basis for calculation[503]. With this system, it is possible to benefit from the advantages of the IP

499 Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7; Bal/Offermanns, p. 170; Van Eck/Schreuders.

500 Van Eck/Schreuders; Baaijens/Breuer, p. 2936.

501 Prokisch, p. 221.

502 Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7; Bal/Offermanns, p. 170; Shanahan, Patent Box, p. 6; Munting/Brassem, p. 1482 et seq; Groot, p. 39; Merks/Postmus, p. 721.

503 Baaijens/Breuer, p. 2936.

box even if losses in a given year result from other activities, while profit is generated with the intangible assets falling within the IP box. Even in this case, the profits attributable to the IP box are included in the basis for assessment only with a fraction of 5 / 25 without having first to be set off with losses from the same year[504].

5. Supplementary

A) Revocation of IP box election made

Article 12b of the CITA does not contain any provision that is dealing with the revocation of the IP box election made[505].

B) Application of the IP box in relation to partnerships and fiscal unities

There are no rules that refer to the application of the IP box in relation to partnerships and fiscal unities[506].

MNE generally do not concentrate all or most of the operational activities in one legal entity. These activities are usually performed through a network of both foreign or domestic subsidiaries as well as permanent establishment. Within such network the MNE may either claim the participation exemption or opt for fiscal unity treatment for Dutch tax purposes where the companies concerned are resident entities and other specific conditions are met for the application of the fiscal unity regime[507]. As result of the fiscal unity, in fact multiple taxpayers are taxed as if they were a single taxpayer[508].

Based on the wording of article 12b of the CITA, from a transfer pricing perspective there may still be multiple taxpayers. The intangible asset is developed by the subsidiary and the relevant IP is granted to the subsidiary. From a transfer pricing perspective the subsidiary and the fiscal unity are not one and the same taxpayer. It is unlikely, however, that the tax authorities may argue against application of the IP box regime. From a tax perspective the application of the tax measure should be possible since for tax purposes there is only one taxpayer that is responsible for the development of the intangible asset for which a relevant IP right is granted[509].

---

504 Idem.
505 Paardekooper/Brassem/Gommers, p. 8.
506 Idem, p. 5.
507 Sporken/Gommers, Transfer Pricing Implication, p. 269.
508 Idem.
509 Sporken/Gommers, Transfer Pricing Implication, p. 269.

It follows that income from intangible assets protected by relevant IP rights, which have been granted to one entity of a fiscal unity, for tax reasons melts with income earned from intangible assets protected by relevant IP rights granted to another entity of the fiscal unity. This seems to be in line with case law and also how the Dutch tax authorities actively apply it.

Besides, the regime does not apply to partnerships. They are subject to personal income tax, for which reason they are not eligible for the regime[510].

C) Application of the IP box in relation to cost sharing arrangements

A different option to structure R&D activities is provided by cost sharing arrangements under which two or more parties cooperate to develop an improved or new intangible asset[511].

It is fairly common especially for MNE to arrange for the cost sharing of intangible asset development among a number of group companies in various countries. In such cases the ownership product of a successful development effort may devolve jointly on the whole group of companies rather than on a single company. When a Dutch taxpayer is part of such a cost sharing group, the question that arises is how the situation must be characterised under article 12b of the CITA, especially where the Dutch taxpayer does not own legal title to the relevant IP rights over the intangible assets[512].

There is no rule that refers to the application of the IP box in relation to cost sharing arrangements[513]. The wording of article 12b of the CITA takes the perspective of the individual taxpayer and suggests that an intangible asset be developed by the taxpayer and the patent be granted to it. One might thus conclude that the IP box applies to an intangible asset only where a relevant IP right with regard to this intangible asset is registered in the name of the taxpayer. As a result, a taxpayer may not benefit from the IP box regime if it were a party to a cost sharing arrangement through which an intangible asset is developed, and the patent has been registered in the name of another entity[514].

When discussing cost sharing arrangements in the parliamentary process, however, while not referring to the question of the legal title to the relevant IP, the Dutch Government confirms that a taxpayer participating in a cost sharing arrangement is eligible for the IP box for its share in the contributions and prof-

510 Prokisch, p. 218.
511 Sporken/Gommers, Transfer Pricing Implication, p. 268.
512 Paardekooper/Brassem/Gommers, p. 6.
513 Munting/Brassem, p. 1482 et seq.
514 Sunderman, p. 228.

its[515]. An intangible asset developed under a cost sharing arrangement, which is protected by a relevant IP right, thus qualifies for the IP box although the taxpayer typically owns only part of the intangible asset[516]. In order to successfully claim application of the IP box, the taxpayer should characterise the costs under the cost sharing arrangement not as acquisition costs but as development costs[517].

The relative share of contributions by each of the participants in the cost sharing arrangement should correspond to their share of the expected profits. Under the arm's length principle the remuneration should be related to the functions performed, risks assumed and assets used. The ultimate remuneration to be paid to the participants should thus not differ substantially from the remuneration that would be obtained by the companies were they to work together without the cost sharing arrangements in place[518].

With respect to the value of the contribution of a company to a cost sharing arrangement, it should be determined based on market value rather than historical cost price or book value. Furthermore, under Dutch regulations it is irrelevant how the participant contributes to the cost sharing arrangement. It can be done by putting an R&D facility or R&D activities at the disposal of the parties, or by contributing cash, as long as the market value of all the contributions is similar and related to the expected profits[519].

D) Double taxation relief

In principle, when a Dutch resident taxpayer has suffered foreign withholding tax, a tax credit is available up to the Dutch income tax that is attributable to the royalty income. The parliamentary records indicate that the full foreign source withholding tax is available for credit against the Dutch corporate income tax obligations, up to the maximum of attributable Dutch tax[520].

Meanwhile, an implementation decree has been issued with respect to the credit of foreign withholding tax suffered on income from relevant IP against Dutch corporate income tax[521]. Accordingly, the lower of the following amounts may be credited to the assessed corporate income tax[522]:

– The amount of the assessed and collected withholding tax; or

---

515 Paardekooper/Brassem/Gommers, p. 7.
516 Sunderman, p. 228; Munting/Brassem, p. 1482 et seq; Baaijens/Breuer, p. 2933.
517 Sporken/Gommers, Transfer Pricing Implication, p. 269.
518 Sunderman, p. 228.
519 Sporken/Gommers, Transfer Pricing Implication, p. 268.
520 Prokisch, p. 222; Paardekooper/Brassem/Gommers, p. 8.
521 Besluit voorkoming dubbele belasting 2001, article 36a; Prokisch, p. 222.
522 Baaijens/Breuer, p. 2937.

– The amount which is in the same ratio to the assessed corporate income tax as 5 / 25 of the royalty income to total worldwide income.

Foreign withholding tax that results in a Dutch excess credit in a certain tax year may generally be carried forward to subsequent tax periods[523]. Under certain conditions it may be sensible to approach the competent tax authorities, for instance where relevant IP profits have been allocated to relevant IP based on a residual profit split method.

III. Critical acclaim

1. Relevant IP

A) Acquired patents

A major competitive disadvantage is seen in the fact that the IP box generally does not apply to acquired patents from affiliated or non-affiliated persons[524]. This effect may at least be mitigated in practice, as the IP box also applies to milestone and buy-in payments or pipeline products acquired by a Dutch company, provided that they are further developed for the account of such company[525].

B) Software

The question has been raised whether a right granted by a foreign patent office that allows for patenting innovations not considered to be patentable in the Netherlands should qualify for IP box purposes. Accordingly, the IP box would become even more accessible for income from software-related intangibles[526]. In addition, some commentators ask for improvement of the software-related IP classification[527].

2. Relevant IP profits

A) Determination of IP profits

There further seem to be doubts how IP box profits are determined in practice. The text of the law assumes that the profits are attributed to the individual intangible assets. In practice, however, this is difficult to apply since it is rarely clear at the outset what can be defined as an independent intangible asset and what turnover or costs can be attributed to it. Such information can be derived from

523 Prokisch, p. 222; Baaijens/Breuer, p. 2937.
524 Van Eck/Schreuders.
525 Idem.
526 Munting/Brassem, p. 1482 et seq.
527 Sporken/Gommers, The Patents Box, p. 201.

bookkeeping only in exceptional cases[528]. According to some authors, further clarification in respect of article 12b of the CITA would thus be useful. There have no decrees been published yet although article 12b paragraph (8) of the CITA mentions that decrees may be issued by the Government. Due to the current deficiencies, taxpayers and tax consultants in practice use informal policy which has been developed together with the tax authorities[529].

With respect to the determination of RP, the residual profit split method takes a crucial role and appears to be used in a predominant number of cases. Other essential elements such as the determination of the development costs, however, seem to take a comparatively minor role[530].

B) Thresholds

Under the IP box regime as in force as of 1 January 2010 there is no more upper threshold in the form of a maximum amount of income that can benefit from the effective tax rate of 5%. The amount of income from relevant intangible assets is no more limited, which makes the IP box more attractive[531].

The lower threshold referring to the amount of the development costs of all intangible assets for which an IP box election has been made remains however applicable. Certain authors thus see a disadvantage where the costs for the development of a certain intangible asset are high without the asset being commercially successful. The RP derived from other intangible assets can thus be subject to regular corporate income tax rate until the overall RP from the relevant intangible assets exceed the development costs relating to the expensive unsuccessful intangible asset[532].

It follows that there is room for tax planning. Where a self-developed intangible asset does not fall within the scope of the IP box, has a history of low development costs and a high current value, it is sensible to bring the asset within the scope of the regime for the specific purpose of having most of the gain taxed at the low effective tax rate. Certain corporate reorganisation alternatives exist which may achieve the same effect[533]. Conversely, where the costs in respect of the development of a certain intangible asset are high without the intangible asset being commercially successful, it is sensible not to opt for the IP box[534].

---

528 Baaijens/Breuer, p. 2937.
529 Idem, p. 2938.
530 Idem.
531 Shanahan, Patent Box, p. 6; Atkinson/Andes, p. 4.
532 Baaijens/Breuer, p. 2932; Dikmans, p. 162.
533 Paardekooper/Brassem/Gommers, p. 9.
534 Baaijens/Breuer, p. 2937.

There is thus no need for a high amount of development costs to be offset against the RP of relevant intangible assets that are commercially successful. This implies that a greater share of RP derived from successfully commercialised intangible assets benefits earlier from the lower effective tax rate provided by the IP box[535].

3. Deductibility of losses at general rate

Under the IP box regime losses from relevant IP are deductible at the general rate of 25%. Losses from relevant IP deducted from taxable profits in previous years are first to be recaptured at the regular rate before the lower effective tax rate applies[536]. In the same way, R&D costs that are deducted at once before an IP box election is made for the relevant IP also need to be recaptured. This is why the IP box is attractive even for companies that are uncertain about the economic prospects of their R&D activities[537].

4. Supplementary

A) Partnerships and fiscal unities

There are no rules that refer to the application of the IP box in relation to partnerships and fiscal unities. Some authors thus call for further guidance on how to apply IP box where a number of Dutch companies form a fiscal unity, particularly in view of the different thresholds of the respective fiscal unity members and the tax consequences of when revoking the fiscal unity[538].

B) Cost sharing arrangements

The wording of article 12b of the CITA and the explanatory memorandum raises questions relating to the effects of cost sharing arrangements. According to some commentators, the IP box legislation leaves room for relatively broad interpretation, which causes a certain risk that companies and intangibles falling outside the scope of the regime[539].

C) Missing notification

In a press release of 26 January 2007 the Netherlands Ministry of Finance refers to the communication from the European Commission of 22 November 2006 on

---

535 Munting/Brassem, p. 1482 et seq; Baaijens/Breuer, p. 2937; Paardekooper/Brassem/Gommers, p. 3.

536 Shanahan, Patent Box, p. 6.

537 Shanahan, Patent Box, p. 6; Sunderman, p. 227; Baaijens/Breuer, p. 2932.

538 Paardekooper/Brassem/Gommers, p. 5; See also Sporken/Gommers, Transfer Pricing Implication, p. 270.

539 Idem.

the more effective use of R&D tax incentives[540] so as to encourage R&D investments and enhance job creation and economic growth in the European Union. The Dutch Government reasons that the IP box meets the objectives of this communication and thus considers that approval by the Commission is unnecessary. This is why the Government has withdrawn its request for the approval of the IP box by the Commission, for which reason the Dutch regime has not been formally approved being in line with state aid principles as suggested in other sources[541].

It is sometimes argued that the Dutch IP box may not necessarily be in line with state aid law[542]. The Netherlands has however obtained approval from the Code of Conduct Group for their IP box regime being in line with the Code of Conduct for Business taxation[543].

D) Estimation of future success

Some observers believe that the Dutch IP box has become mature allowing for wide application on a domestic and international scale[544].

A decisive factor in determining success is also seen in the accessibility of the Dutch tax authorities and their willingness to agree on binding tax rulings. This circumstance compensates for the unfortunate wording of the IP box legislation. In practice, tax rulings typically cover the profit allocation method to determine the RP, the development costs to determine the threshold as well as the qualifications regarding the substance test where the relevant intangible asset covers more than solely one relevant IP right[545].

5. Conclusion

It can be conluded that the Benelux countries are highly competitive in the area of IP boxes[546]. The same goes for the UK regime[547].

---

540 Commission of the European Communities, Tax Incentives.

541 IBFD News about Patent Box Application; IBFD News about EU Commission Approval; Muntendam/Chiarella, p. 231; Sporken/Gommers, The Patents Box, p. 198; Dikmans, p. 161.

542 Prokisch, p. 218.

543 Prokisch, p. 224; Warson/Foriers, p. 72; Council of the European Union, Code of Conduct Report April 2007, p. 5 recital 15.

544 Munting/Brassem, p. 1482 et seq; See also Groot, p. 39.

545 Sunderman, p. 229; Baaijens/Breuer, p. 2932, 2937; Groot, p. 39.

546 See Eynatten/Brauns, p. 3.

A comparison of certain tax factors in respect of the Benelux IP boxes as well as the proposed UK IP box is set out below[548]:

Comparison of the IP box regimes of Belgium, Luxembourg, the Netherlands and UK				
Tax factors	**BE**	**LU**	**NL**	**UK**
ETR	0 – 6.8%	5.84%	5%	10%
Election for IP box	Yes	Yes	Yes	Yes
Relevant IP or IP rights	IP rights: Patents, SPCs	IP rights: Patents, SPCs trademarks, designs, domain names, software	IP: IP protected by patents and R&D declarations, plant variety rights	IP rights: Patents, SPCs, regulatory data and plant variety rights
Application to acquired IP or IP rights	Yes, but subject to development condition	Yes, but not from directly affiliated undertakings	Yes, but subject to development condition	Yes, but subject to development and active ownership condition
Development condition	Yes	Yes, but less pronounced	Yes	Yes
Ownership condition	Yes	Yes	Yes	Yes
Application to RIPI from:				
– Sales income	Yes	Yes, but not from acquired patents or any other IP rights	Yes	Yes
– License fees	Yes	Yes	Yes	Yes

547 HM Treasury/HM Revenue & Customs, Consultation, p. 5 recital 1.1, 9 recital 2.1; Shaheen; Shanahan, Patent Box, p. 7.

548 Obuoforibo, p. 1 et seq; Evers/Miller/Spengel, p. 8; PwC, TAXeNEWS Lizenzboxlösung; Merrill/Shanahan/Tomé Gómez/Glon/Grocott/Lamers/MacDougall/ Macovei/ Montredon/Vanwelkenhuyzen/Cernat/Merriman/Moore/Muresan/ Van Den Berghe/Linczer, p. 1667.

– Proceeds of sales	No	Yes	Yes, only to sale of relevant IP but not to sale of relevant IP rights	Yes, to sale of relevant IP rights and exclusive licenses
– Damages for infringement	Supposedly	Yes	Supposedly	Yes
– Other compensation	Supposedly	Supposedly	Supposedly	Yes
Notional royalty	Yes	Yes	Yes	Yes
Application to mixed sources of income	Yes, proportionate	Yes, proportionate	Supposedly	Yes, proportionate
Application to profits arising before grant of relevant IP or IP right	No	Yes	Yes	Yes
Includes relevant IP losses ("RL") rules	No	Yes, recapture rule	Yes, recapture rule	Yes, recapture rule
Cap on benefit	Deduction limited to 100% of pretax income	No	No	No
Includes anti-avoidance rules	Yes	Yes	No targeted rule within IP box legislation	Yes
Application to partnerships	No	Yes	No	Yes
Application to cost sharing arrangements	Yes	Supposedly	Yes	Yes
Includes transfer pricing rules	Yes	Yes	Yes	Yes
Double taxation relief	Yes	Yes	Yes, subject to limitations	Yes

Application to existing IP or IP rights	No, only IP rights granted or first used from 01.01.2007	No, only IP rights developed or acquired from 01.01.2008	No, only patented IP developed from 01.01.2007, R&D IP developed from 01.01.2008	Yes

There is no easy answer as to which of these coutries offers the optimal conditions for locating a central IP box structure. The ultimate decision may request a detailed analysis taking into account the types of IP rights as well as the particular needs of the undertakings involved[549].

Factors to consider alongside the potential benefit obtainable from the IP box include interaction with direct subsidies and front-end R&D tax incentives, availability of appropriate skills to develop, enhance, maintain and protect the IP, set-up and maintenance costs of the structure or existing presence in the jurisdiction[550].

At this point it should be held that the UK IP box taxes the RP by applying a reduced tax rate[551]. The Belgian, Luxembourg and Dutch IP boxes tax the RP by applying a partial exemption based on a tax deduction on the net or gross income. Both conceptual approaches, however, have similar effects over time and generally result in a lower effective tax rate.

An interesting feature of the Luxembourg IP box can be seen in the fact that it has a less pronounced development condition.

An interesting feature of the Dutch IP box can be seen in the fact that it applies to R&D IP as long as the intangible has been developed under an R&D declaration. Such declaration for R&D activities allows taxpayers a reduction of wage tax expenses for R&D personnel on the Dutch payroll. Relevant activities in the field of technical R&D for this type of declaration are the development of new processes, products and software.

The IP boxes of Belgium and the UK are more restrictive compared to those of Luxembourg and the Netherlands as regards the range of relevant IP rights. It

549 See Eynatten/Brauns, p. 6.

550 See Bal/Offermanns, p. 175; Jones/Hickman, p. 10.

551 Philipps/Danes, p. 7; HM Treasury, Patent Box; HM Revenue & Customs, Finance Bill 2012, p. 8 recital 1.1; HM Revenue & Customs, Draft Legislation, p. 4 recital 1.1; HM Treasury/HM Revenue & Customs, Consultation, p. 6 recital 1.14; Shanahan, Patent Box, p. 7.

follows that the regimes of Luxembourg and the Netherlands are likely to be more accessible to small and medium undertakings[552].

An interesting feature of the UK IP box can be seen in the fact that it applies to the sale or disposal of the relevant IP rights or exclusive licenses[553].

Among the jurisdictions analysed so far only the Dutch IP box refers to income from IP protected by a relevant IP right. The Belgian, Luxembourg and UK IP boxes refer to income from relevant IP rights[554].

Eventually, the UK IP box legislation by far is the most complex system[555]. It resembles the Dutch practice on how to determine the RP under the IP box. Both regimes largely follow the residual profit split method based on the OECD Transfer Pricing Guidelines.

552 See also Matteotti/Roth, p. 62.

553 Finance (No. 4) Bill, p. 148 at 357CC (7); Consultation draft, p. 9 at 357CB (8); HM Revenue & Customs, Finance Bill 2012, p. 36 recital 3.40; HM Revenue & Customs, Draft Legislation, p. 22 recital 3.31; Shaheen.

554 See Warson/Foriers, p. 74.

555 See Hickman/Rockall/Hall, p. 10; Sullivan, p. 11, 12; Nicholls/Smith; Service/Blundell, p. 19.

Part 2: Impact of European and International Principles on IP Box Regimes

1. Introduction

While taxing powers have mostly been preserved at national level, EU Member States as well as the EEA/EFTA States Iceland, Liechtenstein and Norway must exercise their rights in a way that complies with the supremacy of EU and EEA law[556].

The Code of Conduct for Business Taxation, however, is merely a political commitment and does not affect the respective spheres of competence of the EU Member States[557]. Harmful tax competition between Member States does therefore not fall within the mechanism for controlling state aid, even though most tax measures covered by the Code of Conduct also constitute state aid based on article 107 of the TFEU[558].

With this in mind, the critical question arises as to whether IP boxes constitute[559]:

– Prohibited state aid within the meaning of article 107 of the TFEU or de facto state aid[560]; and/or

– Potentially harmful or harmful tax measures within the framework of the Code of Conduct.

The following analysis thus focuses on state aid and the Code of Conduct for Business Taxation. For this purpose, the decisions by public authorities, selected case law and the EU-Switzerland Free Trade Agreement of 1972 are taken into account.

---

556 See Pistone, p. 85.

557 Opinion of Advocate General Jääskinen, recital 131; Szudoczky/Van de Streek, p. 274; Rossi-Maccancico, Proposals, p. 216; Rossi-Maccanico, Commentary, p. 25; Mors, p. 67; Council, ECOFIN Meeting Conclusions, p. 3.

558 Kalloe, p. 504; Opinion of Advocate General Jääskinen, recital 134; Mors, p. 70.

559 See Muntendam/Chiarella, p. 231; Commission of the European Communities, Tax Incentives, p. 3.

560 Treaty on the Functioning of the EU.

2. State aid

I. Overview

Promoting R&D is an important objective of common interest[561]. Article 179 paragraph (1) of the TFEU stipulates that the Union has the objective of strengthening its technological and scientific bases by achieving a European research area in which researchers, scientific knowledge and technology circulate freely, and encouraging it to become more competitive, including in its industry, while promoting all the research activities deemed necessary by virtue of other chapters of the Treaties.

Article 180 letter (c) of the TFEU further specifies that the Union in pursuing these objectives carries out activities and complementing the activities carried out in the Member States also in respect of the dissemination and optimisation of the results of activities in Union research, technological development and demonstration.

Against this backdrop, R&D became one of the key elements in the effort to strengthen the competitiveness of the EU economy to ensure sustainable growth. The target of the Europe 2020 Strategy is set at spending 3% of the EU gross domestic product on R&D by 2020[562].

In view of the recent ECJ case law, including its decision on the Gibraltar offshore regime, the importance of state aid in general and state aid in the field of taxation in particular keeps growing. Many issues involving state aid, however, remain unresolved. This is why the meanwhile long awaited update and modernisation of the state aid framework may shed light on at least some of these blurred issues[563].

The update forsees the revision and streamlining of state aid principles in order to make them consistent with the common principles[564]. The state aid rules are further expected to be clarified and simplified aiming to enhance consistency and to streamline the assessment process[565]. Most notably, the proposals may

---

561 Matteotti/Roth, p. 62; Commission, Framework for State Aid, p. 4.

562 Bal, p. 573, 574; Commission Report June 2011, p. 9; Müller/Wenger/Linder, Steuerliche Förderung, p. 846; Keuschnigg/Ribi, p. 3, 15; Linder/Müller, Steuerliche Anreize, p. 146, 148.

563 Pistone, p. 84; European Commission, Press Release May 2012.

564 European Commission, EU State Aid Modernisation, p. 6 recital 18.

565 Commission of the European Communities, Tax Incentives, p. 3; European Commission, EU State Aid Modernisation, p. 8 recital 22.

include a new set of guidelines for assessing the compatibility of state aid in tax matters as well[566].

II. Analysis

The present analysis deals especially with the material aspects of state aid rules, in order to take a closer look at their potential impact on IP box regimes. Procedural aspects of state aid, however, are touched on only very briefly[567].

It should be emphasised that article 107 of the TFEU and article 61 of the EEA Agreement are basically identical in wording. The EFTA Surveillance Authority ("ESA") and the European Commission work together closely, which is one reason why uniform application of state aid rules in the EEA must be assumed, including the three EFTA Member States Iceland, Liechtenstein and Norway as well as the 27 Member States of the EU[568].

Although Switzerland is a member of the European Free Trade Association ("EFTA") and took part in negotiating the EEA Agreement, in a referendum held on 6 December 1992 the EEA membership was rejected. In order to minimise the negative consequences of the rejection of the EEA Agreement and to ensure the Swiss integration into the EU, the bilateral relations have been intensified during the years without achieving full membership. On a technical level, about 100 bilateral agreements are currently managed through a structure of more than 15 joint committees[569].

With respect to Liechtenstein, in particular on the basis of articles 61 to 63 of the EEA Agreement, the case law of the ECJ and the EFTA Court as well as to the ESA decision of 30 June 1999 introducing guidelines on the application of state aid rules to measures relating to direct business taxation, the same state aid principles are homogeneously applied throughout the EEA[570].

---

566 Commission of the European Communities, State Aid Action Plan, p. 16 recital 64.

567 Thanks to Mr. Rädler of the European Commission, Brussels, for his valuable support in the preparation of this part.

568 Wegener Jessen, p. 137; Wenz/Linn, p. 455, 456; Linn, p. 602; Article 62 of the EEA Agreement; SCA including Protocoll 1 on the Functions and Powers of the EFTA Surveillance Authority which, through the Application of Protocol 1 to the EEA Agreement, follow from the Acts referred to in the Annexes to that Agreement, Protocol 3 on the Functions and Powers of the EFTA Surveillance Authority in the Field of State Aid and Protocol 27 on Coopertaion in the Field of State Aid.

569 European Commission, Trade with Switzerland; Jung, p. 509; Metzler, p. 269; Gudmundsson, p. 59; Cadosch, p. 586; Van den Hurk, p. 277; Leegaard, p. 110; Gjems-Onstad, p. 211.

570 Wegener Jessen, p. 137; Wenz/Linn, p. 456; EFTA Surveillance Authority, OJ L 137/20; See also EFTA Court, Case E-2/06, recital 59; EFTA Court, Case E-1/04,

Bearing this in mind, the following discussion focuses primarily on the situation in the EU.

1. Main features of state aid

A) General definition

Article 107 paragraph (1) of the TFEU stipulates that save as otherwise provided in the Treaties, any aid granted by a Member State or through state resources in any form whatsoever that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the internal market. Accordingly, this provision provides the definition of state aid.

Article 107 paragraph (3) of the TFEU sets out cases of discretionary derogation to the incompatibility. In respect of IP boxes, article 107 paragraph (3) letter (c) of the TFEU is of particular interest. It stipulates that aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered to be compatible with the internal market.

In substantive terms, all state aid in any form whatsoever is thus covered by the prohibition of state aid[571]. Article 107 of the TFEU further implies that aid may be of material nature by favouring certain undertakings and encouraging certain activities. At the same time, it suggests that aid may be of regional nature as well[572].

A closer look shows that a definition of state aid generally includes the following elements, all of which must be met for a measure to qualify as state aid[573]:

– The measure must confer an economic advantage;
– The advantage associated with the measure must be financed directly from state resources and accordingly at the expense of the state;
– The measure results in a selective benefit to certain undertakings, but not to other undertakings in a situation comparable in law and in fact;
– The measure changes the competitive situation in favour of certain under-

recital 22; EFTA Court, Case D-1/03, recital 27; ECJ, Case C-452/01, recital 29; EFTA Court, Case E-3/98, recital 21.

571 Linn, p. 602; Muntendam/Chiarella, p. 231; Mamut, p. 68 recital 225 et seq.

572 Muntendam/Chiarella, p. 231.

573 Prendina Dutler, p. 137 et seq; Muntendam/Chiarella, p. 231; Müller/Portmann/Schreiber, p. 822; Oppermann/Classen/Nettesheim, § 16 recital 17 et seq; Pinto, p. 298; See also EFD, Staatliche Beihilfen an Unternehmen, p. 25 et seq; Siegwart/Felder, p. 495.

takings;

– The measure affects the internal market and interferes with trade or risks doing so; and

– The measure is noticeable and its scope accordingly reaches a certain magnitude.

The element of economic advantage is to be understood broadly, so that not only direct payments to undertakings constituting positive aid are included, but also relief from other potential charges such as through tax benefits. This indirect advantage, also referred to as negative aid, is financed from state resources if it is provided in any form whatsoever from a state budget either directly or indirectly[574].

Yet, if the loss of tax revenue is just an attendant circumstance of a system that does not seek, through its objective and general structure, to create an advantage financed out of state resources, the advantage is not being granted by state resources and thus does not constitute state aid within the meaning of article 107 paragraph (1) of the TFEU[575].

Moreover, the evidence required to show distortion of competition is modest[576]. Where an advantageous treatment is arguably considered as being either directly or indirectly financed by state resources, it may risk distorting competition and trade between Member States[577]. In addition, it is not necessary to demonstrate that the advantageous treatment has a present effect on trade between Member States and that competition is distorted or threatened to be distorted[578].

Where a measure is assessed, it does not matter what the goals pursued by this measure are. Only the effects of the measure are decisive[579]. The most important criterion in the assessment of measures potentially relevant to state aid is that of selectivity[580].

In its notice on the application of the state aid rules to measures relating to direct business taxation, the characteristics formulated by the Commission regarding

---

574 Rossi-Maccanico, Prohibited Selectivity, p. 211; Linn, p. 602; Mamut, p. 70 recital 231; Rossi-Maccancico, Proposals, p. 216; Pinto, p. 295; See also Hausmann/Roth/Krummenacher, p. 89, 90.

575 Mamut, p. 72 recital 242; ECJ, Case C-379/98, recital 62.

576 Linn, p. 602; Di Bucci, p. 84; For a contrary opinion, see: Hausmann/Roth/Krummenacher, p. 91

577 Muntendam/Chiarella, p. 231.

578 Rossi-Maccanico, Prohibited Selectivity, p. 208; See also ECJ, Case C-222/04, recitals 140, 141.

579 Linn, p. 602; Muntendam/Chiarella, p. 231.

580 Linn, p. 602; Muntendam/Chiarella, p. 231; See also Hurter, p. 638; Linder/Müller, Steuerliche Anreize, p. 150.

general measures are sometimes vague. In this sense, it has granted itself leeway when applying state aid rules in the field of taxation[581].

Not least of all for this reason, the literature criticises that the different approaches followed by the Commission and ECJ have led to some confusion when distinguishing advantage from selectivity in the assessment of tax measures that are potentially relevant to state aid[582].

It should therefore be emphasised that advantage and selectivity are necessarily separate notions, as only the specificity but not the advantage can be justified by the nature of the tax system. A tax advantage per se is a derogation from regular taxation and in itself not justifiable by the inherent nature of the system. Measures which introduce a tax advantage are thus not necessarily selective, while selective advantages constitute state aid[583].

Since the publication of the Commission notice on the application of the state aid rules to measures relating to direct business taxation, major uncertainties have thus been created in this context[584].

The ECJ case law in the complex field of state aid continues to be in flux. For this reason, its impact on tax measures in borderline cases will continue to be only imperfectly foreseeable for the time being[585]. This entails that practically any tax relief benefiting only individual undertakings in principle risks being deemed unlawful state aid[586].

B) Procedural rules

The distortions of competition deriving from state aid fall under an ex ante system of prior Commission authorisation, subject to a prudent estimation of the effect that measures may have on the internal market[587]. Pursuant to article 108 paragraph (3) of the TFEU, state aid measures must be notified to the Commission. Member States can not put their proposed aid measures into effect until the Commission has approved them. The Commission may decide that the Member State must amend or abolish state aid, which was found to be incompatible with

---

581 Linn, p. 604; ECJ, Case C-143/99, recitals 30, 31.

582 Micheau, p. 281; Rossi-Maccancico, Proposals, p. 220, 223.

583 Idem.

584 Micheau, p. 280, 281; Rossi-Maccancico, Proposals, p. 217, Notice on the Application of the State Aid Rules, p. 4 recital 12; See also ECJ, Case C-222/04, recitals 136, 137; ECJ, Case C-143/99, recitals 30, 31; ECJ, Case 173/73, recitals 12, 15.

585 Lang, Steuerrecht, p. 570; Szudoczky/Van de Streek, p. 264; Linn, p. 606; Micheau, p. 277, 280; Di Bucci, p. 90.

586 Linn, p. 607.

587 Pistone, p. 85; Micheau, p. 280; Notice on the Application of the State Aid Rules, p. 4 recital 7.

the internal market. Where state aid has already been implemented in breach of the procedural rules, the Member States have to fully recover it from the aid recipients, unless contrary to a general principle of Union law[588].

Implementation of this recovery obligation can have a serious impact on the Member State in question and the undertakings that have benefited from the state aid. Especially since the state aid assessment of tax rules is fraught with uncertainties, the introduction of a tax benefit should be notified to the Commission by the competent political authorities. This helps rule out potential violations of the prohibition of state aid from the outset[589].

Unlike Switzerland, Liechtenstein must notify tax benefits to the ESA as "new aid" since 1 May 1995 by virtue of Protocol 3 part (I) article (1) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA")[590].

For the Member States of the EEA such as Liechtenstein, the comparable state aid rules on the basis of articles 61 and 62 of the EEA Agreement apply in relation to the European Union. Liechtenstein is supervised by the ESA instead of the Commission in regard to state aid[591].

If after conclusion of a formal investigation procedure the ESA is of the view that new, non-notified state aid is being granted, it issues a recovery decision. This recovery decision requires Liechtenstein to recover the improperly granted state aid from the beneficiaries[592].

2. Sate aid rules in the field of direct taxation

Assessing a measure for the purpose of state aid is a difficult task, in particular in respect of its selectivity element. In tax matters, this task becomes evermore complex not least because state aid rules in their origin are not adapted to taxation[593]. This is why the Commission and the ECJ are confronted to the difficulty of adjusting those rules to tax measures while at the same time respecting the rationale of state aid provisions[594].

---

588 Rossi-Maccanico, Prohibited Selectivity, p. 206; Rossi-Maccanico, Commentary, p. 27; Di Bucci, p. 87; Notice on the Application of the State Aid Rules, p. 4 recital 7.

589 Rossi-Maccanico, Prohibited Selectivity, p. 206, 207; Lang, Steuerrecht, p. 570; Linn, p. 607.

590 European Economic Area, p. 227; SCA including, Protocol 3 on the Functions and Powers of the EFTA Surveillance Authority in the Field of State Aid.

591 European Economic Area, p. 201; Article 4 et seq. of the SCA.

592 European Economic Area, p. 237; SCA, Article 14 of the Protocol 3 on the Functions and Powers of the EFTA Surveillance Authority in the Field of State Aid.

593 Micheau, p. 283.

594 Idem.

A first fundamental fiscal standard established by the Commission is its notice on the application of the state aid rules to measures relating to direct business taxation, which is addressed below[595].

A) Commission notice on the application of the state aid rules to measures relating to direct business taxation

On 1 December 1997 the Council of Economics and Finance Ministers ("ECOFIN") inter alia agreed a resolution on a Code of Conduct for Business Taxation. On that occasion, the Commission outlined guidelines on the application of articles 107 and 108 of the TFEU to measures relating to direct business taxation and committed itself to the strict application of the aid rules concerned[596].

The Commission notice on the application of the state aid rules to measures relating to direct business taxation ("Commission notice") forms part of the wider objective of clarifying and reinforcing the application of the state aid rules in order to reduce distortions of competition as they affect the single market and economic and monetary union[597]. In particular it was considered to be necessary establishing a level playing field in the granting of tax subsidies aimed at attracting the location of multinational enterprises ("MNE") and limit the most prominent tax distortions refraining the internal market from functioning effectively[598].

The Commission notice essentially illustrates the cirumstances in which the conditions laid down in article 107 paragraph (1) of the TFEU are met[599].

a) Cumulative conditions of article 107 of the TFEU

To be termed state aid within the meaning of article 107 of the TFEU, a tax measure must meet the four cumulative criteria set out below[600]:

---

595 Idem.

596 Bal, p. 574; Adamczyk, p. 31 recital 65; Rossi-Maccancico, Proposals, p. 215; Mors, p. 66; Notice on the Application of the State Aid Rules, p. 3 recital 1; Council, ECOFIN Meeting Conclusions, p. 4, 5; Commission of the European Communities, Package, p. 3 recital 6 et seq; Commission of the European Communities, Tax Co-ordination, p. 5 recital 14; Commission of the European Communities, Tax Systems, p. 5 recital 3.12 et seq; 9 recital 6.5; Commission of the European Communities, EU Taxation, p. 2, 5, 13.

597 Commission of the European Communities, Implementation Report, p. 3 recital 1; Pinto, p. 295.

598 Rossi-Maccanico, Prohibited Selectivity, p. 208.

599 Rossi-Maccancico, Proposals, p. 216; Commission of the European Communities, Implementation Report, p. 4 recital 6.

600 Rossi-Maccanico, Commentary, p. 26; Pinto, p. 298; Notice on the Application of

Firstly, an advantage must be granted in the field of taxation. This is the case if a measure in any form whatsoever confers on recipients an advantage which relieves them of charges that are normally borne from their budgets. Obviously, taxes are charges that an undertaking must normally bear[601].

Secondly, the advantage must be granted by the State or through state resources. Since, unlike direct state aid, no state resources are paid out in the case of tax benefits, this criterion is met by the state's renunciation of revenue[602].

The advantage may consist in a reduction of the tax assessment basis, a reduction of the tax amount or even merely a time extension, for instance by granting of a delay of payment[603].

The argument is not supported that the tax benefit attracts certain undertakings to a country in the first place, so that tax revenue increases overall. Only the comparison between the tax burden of the favoured undertaking with the charges borne by economically comparable undertakings is relevant[604].

Thirdly, the measure must affect competition and trade between Member States. It is comparatively easy to show distortion of competition in the field of taxation, given the moderate demands made on this criterion in general. The mere fact that the aid strenghtens the position of an undertaking compared with that of other undertaking which are competitors in other Member States is enough to reason that trade in the European Union is affected[605].

Lastly, the measure must be specific or selective by favouring certain undertakings or the production of certain goods. A selective advantage may result from an exception to the tax provisions of a legislative, regulatory or an administrative nature or from a discretionary practice on behalf of the tax authorities. The

---

the State Aid Rules, p. 4 recital 8.

601 Rossi-Maccanico, Prohibited Selectivity, p. 206, 211; Linn, p. 604; Rossi-Maccancico, Proposals, p. 216; Rossi-Maccanico, Commentary, p. 26; Di Bucci, p. 74, 76; Pinto, p. 298; Notice on the Application of the State Aid Rules, p. 4 recitals 8, 9.

602 Rossi-Maccanico, Prohibited Selectivity, p. 206, 211; Linn, p. 604; Rossi-Maccancico, Proposals, p. 217; Rossi-Maccanico, Commentary, p. 26; Di Bucci, p. 75; Pinto, p. 298; Notice on the Application of the State Aid Rules, p. 4 recitals 9, 10; See also ECJ, Case C-248/84, recital 17.

603 Linn, p. 604; Di Bucci, p. 76, 78; Pinto, p. 298; Notice on the Application of the State Aid Rules, p. 4 recitals 9, 10.

604 Linn, p. 604.

605 Rossi-Maccanico, Prohibited Selectivity, p. 208; Linn, p. 604; Rossi-Maccancico, Proposals, p. 216, 217; Rossi-Maccanico, Commentary, p. 26; Notice on the Application of the State Aid Rules, p. 4 recital 11; See also ECJ, Joined Cases C-278/92, C-279/92 and C-280/92, recitals 40, 41; ECJ, Case 730/79, recital 11.

selective nature of a tax measure may, however, be justified by the nature or general scheme of the system[606].

b) Distinction between state aid and general measures

On condition that the tax measures apply without distinction to all businesses and to the production of all goods, also with respect to IP boxes, the following measures do not constitute state aid[607]:

– Tax measures of a purely technical nature, such as setting the rate of taxation, depreciation rules and rules on loss carry-overs as well as provisions to prevent double taxation or tax avoidance; and

– Tax measures pursuing general economic policy objectives through a reduction of the tax burden related to certain development costs in the field of R&D, environment, training and employment.

If some businesses or sectors benefit more than others from some of these tax measures, this does not necessarily imply that they are caught by state aid regulation[608]. With respect to IP boxes, the majority of patent applications are generally filed by a small number of undertakings. These are also likely to be the undertakings that are most able to commercialise patented technologies and generate large revenue streams. Where the tax benefits predominantly accrue to a small number of undertakings, this does not necessarily constitute state aid[609].

Moreover, any measure intended partially or wholly to exempt undertakings in a particular sector from the charges arising from the normal application of the general system without there being any justification for this exemption based on the nature or general scheme of this system is likely to constitute state aid. Article 107 of the TFEU does further not distinguish between the measures of State intervention applied by reference to their causes or aims, but describes them in relation to their effects. The Member States may likewise not justify their own

---

606 Temple Lang, p. 805; Rossi-Maccanico, Prohibited Selectivity, p. 211; Linn, p. 604; Rossi-Maccancico, Proposals, p. 217; Rossi-Maccanico, Commentary, p. 26; Di Bucci, p. 78; Pinto, p. 298; Notice on the Application of the State Aid Rules, p. 4 recital 12.

607 Micheau, p. 278; Rossi-Maccanico, Prohibited Selectivity, p. 212; Commission of the European Communities, Tax Incentives, p. 7; Notice on the Application of the State Aid Rules, p. 4 recital 12, See also ECJ, Case 173/73, recital 15.

608 Commission of the European Communities, Tax Incentives, p. 7; Notice on the Application of the State Aid Rules, p. 5 recital 14.

609 Griffith/Miller/O'Connell, Effect of Patent Boxes, p. 15 et seq; See Commission of the European Communities, Tax Incentives, p. 7; Notice on the Application of the State Aid Rules, p. 5 recital 14.

state aid by referring to comparable rules in other Member States or to compensation for other disadvantages incurred by their own economic agents[610].

As a preliminary conclusion, IP box regimes as a rule do confer on recipients an advantage, which is granted by state resources and on the other hand affects competition and trade between Member States.

However, IP boxes can be seen as tax measures which are open to all economic agents operating within a Member State. This is why they should qualify as general measures. Accordingly, the question of the selectivity of a tax measure is of crucial importance in the field of taxation in general, and with respect to the state aid assessment of IP box regimes in particular. The Commission notice thus spends the most time on this element[611].

c) Selectivity

Only tax measures whose scope extends to the entire territory of a jurisdiction and which are open to all economic agents operating therein escape the specificity condition stipulated in article 107 paragraph (1) of the TFEU. Tax measures that are regional or local in scope may favour certain undertakings, subject to condition that the exception to the system or differentiations within that system are justified by the nature or general scheme of the tax system[612].

Measures are considered selective whose application[613]:

– Is restricted to certain types of undertakings or to some of their functions. Such measures amount to horizontal selectivity;

– Does not cover all economic sectors in the Member State. Such measures amount to sectoral selectivity; or

– Is regionally limited and thus does not cover the entire Member State. Such measures thus amount to regional selectivity.

Both horizontal selectivity and sectoral selectivity are also referred to as material selectivity.

A tax measure whose main effect is to promote one or more sectors of activity thus constitutes state aid. In addition, a measure that targets all of the sectors subject to international competition constitutes aid. It follows that derogation

---

610 Temple Lang, p. 805; Linn, p. 604; Micheau, p. 279; Notice on the Application of the State Aid Rules, p. 5 recital 15.

611 Rossi-Maccanico, Prohibited Selectivity, p. 212; Linn, p. 604.

612 Szudoczky/Van de Streek, p. 266; Linn, p. 604; Micheau, p. 278; Rossi-Maccancico, Proposals, p. 217, 218; Notice on the Application of the State Aid Rules, p. 5, 16, 17; Lübbig/Martin-Ehlers, recitals 204, 209.

613 Linn, p. 605; Di Bucci, p. 79, 80; Notice on the Application of the State Aid Rules, p. 5, 6 recitals 18, 19, 20.

from the base rate of corporation tax for an entire section of the economy generally constitutes state aid[614].

In light of their general characteristics, IP boxes are less likely to be exposed in terms of regional selectivity. The following discussion thus focuses especially on material selectivity.

At this point it should be emphasised that the selectivity or specificity test respectively has been further developed by the ECJ in its Adria-Wien judgement in 2001. The Commission notice does therefore not reflect the latest version of the test[615].

The determination of a selective advantage according to the case law of the ECJ currently comprises the three elements set out below[616]:

– Determination of the system of reference;

– Determination of derogations from the system of reference;

– Justification by the nature or general scheme of the tax system.

When assessing the selectivity of a tax provision, it must first be determined the general or usual rules applicable to the field of taxation concerned under the existing tax system or system of reference respectively[617].

It must then be determined whether the measure is an exception to the system of reference by differentiation between economic operators who, in the light of the objective pursued by the tax system of the Member State concerned, are in a comparable factual and legal situation[618].

In a third and last step it is to be determined whether the measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part. If so, the measure does not fulfil that condition of selectivity[619].

---

614 Notice on the Application of the State Aid Rules, p. 5 recital 18.

615 ECJ, Case C-143/99, recitals 34, 41, 42; See also Paterno, p. 344; Commission Decision, Sanierungsklausel, p. 29 recital 51 et seq; Fridensköld, p. 128.

616 Commission Decision, Sanierungsklausel, p. 32 recital 64 et seq; EGC, Joined Cases T-211/04 and T-215/04, recitals 143, 144; Mamut, p. 74 recital 249 et seq; See also ECJ, Case C-172/03, recital 40; ECJ, Case C-308/01, recital 68; ECJ, Case C-143/99, recitals 41, 42.

617 Commission Decision, Sanierungsklausel, p. 32 recital 65.

618 Idem.

619 Commission Decision, Sanierungsklausel, p. 34 recital 80; See also ECJ, Case C-172/03, recital 43; ECJ, Case C-308/01, recital 72; ECJ, Case C-143/99, recital 42; ECJ, Case C-75/97, recital 33; ECJ, Case 173/73, recital 15.

The ECJ has clarified in this regard that the objectives attributed to a particular tax scheme which are extrinsic to it, and on the other hand, the mechanisms inherent in the tax system which are necessary to achieve such objectives. Only the second mechanisms qualify for a justification by the nature or general scheme of the tax system of which it is part[620].

d) Discretionary administrative practices

The discretionary practices of tax authorities may also cause measures that are caught by article 107 TFEU. Treating taxpayers in a discretionary manner may imply that the distinct application of a general measure adopts the features of a selective measure[621]. Where in daily practice tax rules have to be interpreted, they must not allow for a discretionary treatment of undertakings. Every decision of tax authorities that deviates from the general tax rules in favour of individual undertakings in principle leads to an assumption of state aid and needs to be examined in detail. As far as administrative rulings only provide an interpretation of general rules, however, they do not induce an assumption of state aid[622].

In practice, it may not be easy to demonstrate whether the misapplication of a tax provision by the tax authorities to the advantage of a taxpayer constitutes state aid in breach of article 107 paragraph (1) of the TFEU[623]. The Liechtenstein tax authorities are not able to engage in discretionary administrative practices, so that no selective advantage can be derived in this regard when assessing the Liechtenstein IP box regime in terms of state aid.

It should nevertheless be emphasised that the determination of relevant IP profits is subject to application of internationally recognised and professional transfer pricing standards. Obviously, the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations as well as the recommendations of the Joint Transfer Pricing Forum are the most suitable options in this regard.

Against this backdrop, in Part 3 of the treatise it is proposed that Liechtenstein formally adopts the OECD Transfer Pricing Guidelines.

The following report on the implementation of the Commission notice on the application of the state aid rules to measures relating to direct business taxation is, inter alia, also relevant in this context.

---

620 Commission Decision, Sanierungsklausel, p. 34 recital 83.

621 Micheau, p. 277; Notice on the Application of the State Aid Rules, p. 6 recital 21.

622 Notice on the Application of the State Aid Rules, p. 6 recital 22.

623 Mamut, p. 70 recital 235.

B) Report on the implementation of the Commission notice on the application of the state aid rules to measures relating to direct business taxation[624]

The purpose of the report is not to complement the Commission notice[625], but to illustrate how the principles it contains have been applied by the Commission[626].

a) Concept of advantage

aa) Alternative taxation methods under the OECD Transfer Pricing Guidelines

The principles covered in the Commission notice apply both to traditional analytical tax methods, where taxable income of a taxpayer is calculated by the difference between the revenue and the associated expenses, and to alternative tax methods such as those recommended in the OECD Transfer Pricing Guidelines[627].

Although alternative tax methods as such are not caught by article 107 paragraph (1) of the TFEU, they may lead to an advantage where the tax arrangements applied do not reflect the economic reality of the transactions and thus cause a lower rate of taxation than if the traditional analytical tax method principles together with the arm's length principle had been properly considered[628]. With respect to the tax base, for instance, schemes based on a cost-plus method may provide for the exclusion of certain expenditure from the calculation base. The expenditure excluded, however, may be closely linked to the business of the taxpayer concerned. Excluding certain costs from the basis of assessement in this way generally confers an advantage on the buinsess concerned as compared with the normal situation since it necessarily results in a reduction of the tax due[629]. The advantage may also occur in the profit margins, which could be set arbitrarily, without any account taken of the real nature of the activities carried out. Obviously, the advantage is all the greater in that the margin is underestimated[630].

This issue of transfer pricing is very important to the practical application of IP boxes. When assessing IP boxes in terms of state aid, however, the mere existence of an economic advantage as such does not necessarily result in a selective

---

624 Commission of the European Communities, Implementation Report.
625 Notice on the Application of the State Aid Rules.
626 Commission of the European Communities, Implementation Report, p. 3 recital 6.
627 Idem, p. 3, 4 recitals 9, 10.
628 Idem, p. 4 recital 10.
629 Idem, p. 4 recital 11.
630 Idem, p. 4 recital 12.

advantage. In order to still rule out an economic advantage to the extent possible, it is obligatory to take account of and comply with internationally recognised transfer pricing standards. This especially applies to the practical application of the Liechtenstein IP box as well.

bb) Avoidance of double taxation

Where a scheme deviates from the credit or exemption method normally applied in a jurisdiction to avoid double taxation, this may constitute state aid as well on the condition that the resulting tax burden is lower than that which would have resulted from the method normally applied[631]. For example, a scheme that ordinarily is subject to the credit method can confer an advantage in the form of lower domestic taxation if the scheme by way of derogation from the rule benefits from the exemption method instead. The Commission finds that tax schemes in practice create an advantage on undertakings by tolerating a switch over from the credit method to the exemption method for the mere fact that the foreign tax due is less than that normally payable on a domestic level on the same income[632].

In the assessment of whether the IP boxes may confer selective advantages relating to the avoidance of double taxation, any risk originating thereof is generally assumed to be negligible.

cc) Recipients of aid

Where a certain tax measure applies, account must be taken of the actual effects of the aid. Thereafter, the recipients of the state aid can be both the undertakings subject to the tax measure and any other undertaking that has actually benefited from the tax measure[633].

For the assessment of an IP box structure in terms of state aid, this fact may turn out to be quite important. Nevertheless, the present treatise will not engage in more detailed general and abstract discussion of this element. From what is said so far one must assume that IP boxes represent a tax measure providing for privileged treatment of income from relevant IP or IP rights, thereby relieving the recipients of tax charges normally borne from their budgets[634]. IP boxes are thus likely to always provide an economic advantage to their recipients.

631 Idem, p. 5 recital 16.

632 Idem.

633 Idem, p. 6 recital 17.

634 See Rossi-Maccanico, Prohibited Selectivity, p. 206, 211; Linn, p. 604; Rossi-Maccancico, Proposals, p. 216; Rossi-Maccanico, Commentary, p. 26; Di Bucci, p. 74, 76; Pinto, p. 298; Notice on the Application of the State Aid Rules, p. 4 recitals 8, 9.

b) State resources condition

Granting a tax concession entails a loss of resources for the State by forgoing revenue. This argument is applicable to regional or local public bodies below central state level as well[635]. The objection that a tax aid scheme has a positive overall effect on budget revenue does not preclude the presence of state resources[636]. The state resources condition must thus be assessed at the level of individual recipients[637].

It is likely that IP boxes are considered granting tax concession, which entails a loss of resources for the State in that it forgoes revenue. IP boxes will therefore generally meet the state resources condition[638].

c) Effect on trade and competition

The moment aid strengthens the competitive position of one or more undertakings in a sector open to competition within the European Union, the condition requiring an effect on trade is met. The presence of comparable aid in other Member States has no influence on the assessment of this condition by the Commission[639].

Again, it is likely that IP boxes always meet the condition relating to the effect on trade and competition[640].

d) Selectivity

Measures that are available to all sectors can nevertheless qualify as selective where the eligibility conditions – albeit not formally restricted – in reality confine the potential number of recipients. Measures that apply only to multinational or large enterprises due to the fact that they exclude all small or local businesses from receiving aid may thus be seen as selective. Equally selective may be considered measures that apply merely to undertakings set up after a certain

---

635 Commission of the European Communities, Implementation Report, p. 6 recital 18; See also ECJ, Case C-248/84, recital 17.

636 Commission of the European Communities, Implementation Report, p. 6 recital 19.

637 Idem, p. 6 recital 20.

638 See Rossi-Maccanico, Prohibited Selectivity, p. 206, 211; Linn, p. 604; Rossi-Maccancico, Proposals, p. 217; Rossi-Maccanico, Commentary, p. 26; Di Bucci, p. 75; Pinto, p. 298; Notice on the Application of the State Aid Rules, p. 4 recitals 10; See also ECJ, Case C-248/84, recital 17.

639 Commission of the European Communities, Implementation Report, p. 7 recitals 21 to 24.

640 See Rossi-Maccanico, Prohibited Selectivity, p. 208; Linn, p. 604; Rossi-Maccancico, Proposals, p. 216, 217; Rossi-Maccanico, Commentary, p. 26; Notice on the Application of the State Aid Rules, p. 4 recital 11; See also ECJ, Joined Cases C-278/92, C-279/92 and C-280/92, recitals 40, 41; ECJ, Case 730/79, recital 11.

date while existing undertakings are exluded from receiving aid[641]. In this regard, measures that consist in a reduction of the assessment basis were found to be selective by the Commission because only undertakings set up after the entry into force of the respective rules were eligible for aid[642].

Although article 55 (Deduction for income from IP rights) paragraph (1) of the Tax Act entails the provision that the IP box only applies to IP rights created or acquired from 1 January 2011, the tax measure consisting in a reduction of the assessment basis is still eligible for aid to all undertakings within Liechtenstein.

e) Justification of a measure by the nature or general scheme of the system

The specific nature of certain sectors or certain types of transaction may in exceptional circumstances justify tax treatment that deviates from the standard system for grounds inherent in the logic of the tax system concerned. It is for the affected Member State to prove that the derogation is justified by the nature and general scheme of the system[643]. According to the Commission, however, only in a few cases a materially selective measure was so far considered to be justified by the general scheme of the system[644].

It should be emphasised that the Commission suggests using the notion of justification in a single and rather strict meaning. The ECJ on the contrary uses the notion of justification both to define an unjustified derogation from the nature of the tax system and to distinguish between state aid and general tax measures on the grounds of the logic deriving from the specific legal and factual situations concerned with the measure, leading to different meanings and complex questions related therewith[645].

f) Concept of aid and harmful tax measure within the meaning of the Code of Conduct

While the state aid and the Code of Conduct for Business Taxation follow the same general goal of reducing distortions of competition within the internal market, the respective procedures for assessing tax schemes are different. Besides, the classification of a measure as harmful tax competition under the Code

641 Commission of the European Communities, Implementation Report, p. 8 recitals 26 to 29.

642 Idem, p. 8 recital 29.

643 Idem, p. 10 recitals 35 to 37.

644 Idem, p. 10 recital 35.

645 Micheau, p. 282; Rossi-Maccancico, Proposals, p. 217, Notice on the Application of the State Aid Rules, p. 4 recital 12; See also ECJ, Case C-222/04, recitals 136, 137; ECJ, Case C-143/99, recitals 30, 31; ECJ, Case 173/73, recital 15.

of Conduct does not imply that it will be regarded as state aid[646]. Neither does from a classification of a measure as harmless under the Code of Conduct follow that it involves no state aid within the meaning of article 107 paragraph (1) of the TFEU[647].

Although that the conditions set out in article 107 paragraph (1) of the TFEU and in the Code of Conduct are similar to some extent, the two concepts do thus not entirely overlap[648].

C) Community framework for state aid for research and development and innovation

The framework for state aid for R&D&I specifies the conditions Member States are supposed to respect when granting aid to promote R&D&I while at the same time allowing the Member States to target their support to R&D&I according to their national specificities[649]. The framework largely refers on input effects and thus on incentives for undertakings to conduct additional research rather than on output effects including the commercialisation of technological and scientific research achievements.

It follows that the framework is of less importance in assessing potential state aid issues in respect of IP boxes.

D) Commission regulation declaring certain categories of aid compatible with the common market in application of articles 107 and 108 of the TFEU

The actual Commission regulation is also referred to as General Block Exemption Regulation ("GBER"). It alleviates the burden of notifying certain types of state aid and is therefore linked to the Community framework for state aid for R&D&I[650].

Due to the direct connection with the Community framework for state aid for R&D&I referred to above, the Commission regulation is of less importance with respect to the assessment of potential state aid issues in respect of IP boxes as well.

---

646 Rossi-Maccanico, Commentary, p. 27; Commission of the European Communities, Implementation Report, p. 17 recital 64; See also Council of the European Union, Code of Conduct Report November 1999, Annex C, p. 314, 315.

647 Idem, p. 17 recital 66.

648 Idem, p. 17 recital 64.

649 Commission Report June 2011, p. 12; Commission, Framework for State Aid, p. 4.

650 Commission Report June 2011, p. 12; Commission of the European Communities, Investing in Research, p. 19.

3. Selected state aid decisions

In the following, again the focus is put less directly on regional selectivity and more on material selectivity.

A) Spanish IP box

On 14 August 2007 the competent authorities notified their intention to introduce an IP box regime allowing for a 50% reduction on the gross corporate income from certain intangible assets. The IP box purposes to stimulate technological and scientific development in Spain[651].

a) Description of the measure

The eligible income for the purposes of the Spanish IP box includes income from transfer of the right to use or exploit any patent, design and model, plan, secret formula or process[652]. It further includes the income from the right to use information convering industrial, commercial or scientific experience[653].

Royalties from any other source inlcuding trademarks, copyright of literary, artistic or scientific work including cinematograph films, image rights, software or lease of industrial commercial or scientific equipment are, however, excluded from the IP box[654].

The conditions to be eligible for the tax exemption are set out below[655]:

– The transferring entity must have developed the intangible assets to be transered on its risk and account. The development activity related thereto can be contracted to independent third parties inside or outside of Spain as well as beyond the European Union;

– The receiving entity uses the rights transferred to conduct an economic activity. The rationale behind this condition is an anti-avoidance rule to the extent that the transferring and receiving entities are affiliated entities. If so, the results from the use of the transferred rights must not be derived from the supply of goods or the performance of services on the part of the receiving entity and thus the holder of the rights, if the underlying economic activity produces tax deductible expenses for the transferring entity;

– The seat of the transferring entity must not be in a tax-free jurisdiction or

---

651 Rossi-Maccanico, Gibraltar Judgment, p. 72; Matute, p. 1; Commission Decision, Intangible Assets, p. 1 recital 1, p. 3 recital 11; Domínguez, p. 2.

652 Matute, p. 1; Commission Decision, Intangible Assets, p. 1 recital 3.

653 Idem, p. 2 recital 4.

654 Matute, p. 1.

655 Matute, p. 1, 2; Commission Decision, Intangible Assets, p. 2 recital 6.

a territory thereof or in a tax haven;

– Transfer agreements must indicate the remuneration for the services provided separately, if any;

– The transferring and receiving entities must keep appropriate accounting records that allow identifying income and expenses that directly and indirectly correspond to the intangible assets transferred[656];

– Where the entities benefit from a fiscal consolidation system, the income and expenses derived from the transfer of rights must not be excluded when determining the assessment basis of the tax group.

Morevoer, the income from the commercialisation of each intangible asset that is eligible for the IP box is capped at six times the amount of the respective development costs[657]. The measure finally applies to all corporate taxpayers as well as self-employed persons irrespective of the activity they pursue. The IP box is thus not limited in respect of sector of activity and geographical area. Furthermore, the tax measure does not involve discretionary practice on behalf of the tax authorities[658].

b) Assessement

aa) Economic advantage

The Commission in its assessment of 13 February 2008 finds that the tax measure provides for privileged treatment of income from intangible assets, which derogates from ordinary corporate taxation. The tax measure thus provides an economic advantage[659].

bb) Presence of state resources

The measure is further described to have a mitigating effect on the costs that companies would normally have to bear without the existence of the tax measure at issue[660].

Although the Commission in its assessment does not directly refer to the presence of state resources, granting a tax concession entails a loss of resources for the State in that it forgoes revenue[661]. It may thus be considered that the Spanish

656 Commission Decision, Intangible Assets, p. 3 recital 8.

657 Idem, p. 2 recital 7.

658 Muntendam/Chiarella, p. 231; Commission Decision, Intangible Assets, p. 3 recitals 9, 10.

659 Commission Decision, Intangible Assets, p. 3 recital 14.

660 Idem.

661 See Commission of the European Communities, Implementation Report, p. 6 recital 18.

IP box regime provides for a tax measure involving the presence of state resources.

cc) Effect on trade and competition

Interestingly, the Commission holds that the measure does not strengthen the position of any particular class of undertakings in relation to other undertakings competing in intra-Community trade without further reflecting on this specific point[662]. Although the evidence required to show distortion of competition is modest[663], the findings of the Commission suggest that the tax measure does not have any effect on trade and competition within the European Union.

dd) Selectivity

The tax scheme is available to any undertaking subject to coporate taxation in Spain that develops intangible assets. Any such undertaking, irrespective of its size, legal structure and sector in which it operates, in principle can therefore be beneficiary to the tax measure at issue[664]. The Commission holds that the fact that not every undertaking develops a relevant intangible asset itself in order to subsequently receive remuneration for the transfer of the right to use or exploit such intangible asset merely reflects an economic reality[665].

The tax measure was also found to apply without distinction to all economically active persons[666]. At the same time it was acknowledged that some undertakings may benefit from the measure more than others. According to the Commission, however, this effect does not necessarily make the measure selective[667]. Neither was the fact that the advantage is limited to six times the costs of self-developing the intangible asset considered a sign of selectivity in itself[668].

With respect to the relevant IP rights, in particular secret formulas or processes were seen as so wide and horizontal in nature so that no undertaking being in a legally or factually comparable position in the light of general policy objective pursued by the tax measure at issue were granted a selective advantage. According to the findings of the Commission, in princple an indefinite number of sec-

662 Rossi-Maccanico, Gibraltar Judgment, p. 72; Muntendam/Chiarella, p. 231; Commission Decision, Intangible Assets, p. 4 recital 15; See also ECJ, Case C-53/00, recital 21; ECJ, Case 730/79, recital 11.

663 Linn, p. 602.

664 Commission Decision, Intangible Assets, p. 3 recital 14.

665 Commission Decision, Intangible Assets, p. 3 recital 15; See also Commission Decision, Ireland Company Holding Regime, 28 May 2005.

666 Commission Decision, Intangible Assets, p. 3 recital 14.

667 Muntendam/Chiarella, p. 231; Commission Decision, Intangible Assets, p. 4 recital 17, See also EGC, Case T-92/02, recital 109.

668 Commission Decision, Intangible Assets, p. 4 recital 17.

tors may have an interest in developing patentable inventions, designs or models, plans or secret formulas or processes as well as industrial, commercial or scientific experience[669].

In respect of the conditions in order to be eligible for the IP box, the Commission finds them to be justified by the nature or general scheme of the Spanish tax system[670]. In the light of appyling the IP box, their common feature may be seen in the prevention of abuse and artificial settings[671]. As a result, the Commission concluded that the Spanish IP box regime does not provide a selective advantage in the meaning of article 107 paragraph (1) of the TFEU. This essentially is because the tax scheme is available to the benefit of all undertakings subject to Spanish corporate tax, irrespective of their size, legal structure and sector in which they operate[672].

B) Gibraltar corporate tax reform

a) Decision of the Commission

Despite the state aid investigation initiated by the Commission in the exempt and qualifying companies schemes and the criticisms expressed in the context of the Code of Conduct for Business Taxation, the Gibraltar Government set up a proposed reform of corporate tax system, which UK notified to the Commission on 12 August 2002 and, thereafter, did not enter into force[673]. In particular, the reform included the repeal of the former tax system and the introduction of a hybrid system consisting of three taxes applicable to all Gibraltar companies, namely a registration fee for companies, a payroll tax and a business property occupation tax ("BPOT"), with a cap on liability to payroll tax and BPOT of 15% of profits[674].

In October 2002 the Commission decided to open the formal investigation procedure based on article 108 paragraph (2) of the TFEU because of its doubts

669 Commission Decision, Intangible Assets, p. 4 recital 16.

670 Commission Decision, Intangible Assets, p. 4 recital 19; See also: ECJ, Case C-143/99, recital 42; ECJ, Case C-75/97, recital 33.

671 Commission Decision, Intangible Assets, p. 4 recital 19; See also ECJ, Case C-308/01, recital 74.

672 Rossi-Maccanico, Gibraltar Judgment, p. 72; Matute, p. 1.

673 Temple Lang, p. 805; Rossi-Maccanico, Beyond the Pillars, p. 443; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; Horacek, p. 97; Commission Decision, Gibraltar Corporation Tax Reform, p. 1 recital 1.

674 Wattel, section 3.4; Temple Lang, p. 805; Rossi-Maccanico, Beyond the Pillars, p. 443, 444; Dubout/Maitrot de la Motte, p. 49; Idot, p. 38; Chérot, p. 163; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; Horacek, p. 97; Commission Decision, Gibraltar Corporation Tax Reform, p. 2 recitals 5 et seq.

regarding the compatibility of this scheme with the internal market[675]. Due to its evaluation of the information submitted by the UK in the notification, the Commission in principle raised two issues. A first doubt as to the compatibility of the measure referred to regional selectivity, because the whole scheme appeared to grant an advantage to companies registered in Gibraltar compared with those in the UK. A second doubt as to the compatibility of the measure addressed the issue of material selectivity[676].

The existence of a hybrid system allowed for application of the tax scheme on two different tax assessement bases depending on the particular situation of a company. The Commission found that under these circumstances it was impossible to identify the nature and general scheme of the system and to apply this justification[677].

The Commission eventually found three aspects of the notified system to be materially selective[678]:

– The condition that a company must make a profit before payroll tax and BPOT incur, as it would favour companies that do not generate profits;

– The cap on liability to payroll tax and BPOT to 15% of profits, as it would favour companies that generate profits that are low in relation to their number of employees and their occupation of business property; and

– The payroll tax and BPOT per se, as the effects thereof would favour tax-exempted offshore companies allowing them to escape payroll tax and BPOT.

It held that a system that in law appears to be general should be subject to state aid discipline when de facto it grants advantages to certain undertakings or sectors for an economy. The Commission in 2004 thus decided that the notified measure entails material selectivity due to several isolated aspects of the reform and to their combined effects[679]. In conformity with the Commission decision

---

675 Temple Lang, p. 805; Rossi-Maccanico, Beyond the Pillars, p. 444; Rossi-Maccanico, Commentary, p. 35; Horacek, p. 97; Commission Decision, Gibraltar Corporation Tax Reform, p. 1 recital 2.

676 Temple Lang, p. 805; Rossi-Maccanico, Beyond the Pillars, p. 444; Horacek, p. 97; Commission Decision, Gibraltar Corporation Tax Reform, p. 5 recitals 31 et seq.

677 Horacek, p. 99; Commission Decision, Gibraltar Corporation Tax Reform, p. 20 recital 132.

678 Rossi-Maccanico, Beyond the Pillars, p. 444, 445; Dubout/Maitrot de la Motte, p. 49, 50; Chérot, p. 163; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; Horacek, p. 99; Commission Decision, Gibraltar Corporation Tax Reform, p. 20 recital 133, p. 20 recital, 135, p. 21 recital 141.

679 Rossi-Maccanico, Commentary, p. 35; Horacek, p. 100, 101; Commission Decision, Gibraltar Corporation Tax Reform, p. 20 recital 136, p. 21 recital 140, p. 23

concerning the Azores[680], the measure was also considered regionally selective as it benefitted the companies in Gibraltar due to paying lower rates than the companies in the UK[681]. Consequently, the Commission did not authorise the implementation of the system[682].

b) Decision of the General Court

On 18 December 2008 the General Court (the Court of First Instance at that time, "EGC") anulled the Commission decision of 30 March 2004 in its entirety particularly due to misapplication of the condition of material selectivity[683].

With respect to regional selectivity, the EGC held that the Commission made an error of law and of assessment in identifying the correct system of reference to determine the regionally aid character of Gibraltar's proposed tax reform[684]. According to the EGC, in order to demonstrate that the tax measure was selective the Commission should have shown that certain of its elements constituted derogations from the reference framework relating to Gibraltar's common or normal tax regime. The EGC found that the correct system of reference to assess the nature of the tax scheme was the one set up by Gibraltar with its reform, rather than the one of the UK in accordance with the ECJ decision concerning the Azores[685] [686].

By referring to the Commission notice relating to state aid in the field of direct business taxation[687], the EGC then determined a three-stage analysis to be pursued to classify a tax measure as materially selective[688]:

– Identification and examination of the common or normal regime under

---

recital 148, p. 25 recitals 162, 163.

680 Commission Decision, Autonomous Region of the Azores, p. 52; See also Seitz, p. 417 et seq.

681 Rossi-Maccanico, Commentary, p. 35; Horacek, p. 100; Commission Decision, Gibraltar Corporation Tax Reform, p. 25 recitals 162, 163.

682 ECJ, Joined Cases C-106/09 and C-107/09, Press Release; Commission Decision, Gibraltar Corporation Tax Reform, p. 25 recital 163.

683 Temple Lang, p. 806; Rossi-Maccanico, Beyond the Pillars, p. 443, 444; Dubout/Maitrot de la Motte, p. 50; Chérot, p. 163; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; Rossi-Maccanico, Gibraltar Judgment, p. 67, 70.

684 Temple Lang, p. 806; Rossi-Maccanico, Gibraltar Judgment, p. 70; EGC, Joined Cases T-211/04 and T-215/04, recital 116.

685 ECJ, Case C-88/03.

686 Temple Lang, p. 806; EGC, Joined Cases T-211/04 and T-215/04, recitals 143, 144, 145.

687 Notice on the Application of the State Aid Rules, p. 5 recital 16.

688 Dubout/Maitrot de la Motte, p. 50, 51; EGC, Joined Cases T-211/04 and T-215/04, Press Release; EGC, Joined Cases T-211/04 and T-215/04, recitals 143, 144; See also ECJ, Case C-143/99, recital 42.

the tax system applicable in the geographical area constituting the relevant reference framework;

– Assessment whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime to the extent that the measure differentiates between economic operators who are in a comparable factual and legal situation; and

– Determination whether the measure at issue is not selective in nature, even though it gives an advantage to the undertakings which are able to benefit from it.

The EGC reasoned that there is no other corporate tax system that would apply in the absence of the one proposed by Gibraltar. Given the specific economic situation of Gibraltar, the lack of harmonisation of corporate taxes on a community level and the competence of Member States in the filed of direct taxation, the tax system devised by Gibraltar was found to be a system of general application suited best to the economy of that particular jurisdiction[689].

The EGC concluded that none of the three aspects of the tax system as notified conferred a selective advantage for the purposes of Article 107 paragraph (1) TFEU, as the Commission did not properly demonstrate that they constitute derogations from the common or normal tax regime introduced by the reform in Gibraltar giving rise to differentiations between companies as to the tax burden[690]. The EGC further concluded that in order to prove that the tax system at issue was selective, the Commission was not entitled to regard general tax measures as being selective in the light of their effects, as it had done in its decision[691].

Some commentators have expressed scepticism whether the EGC in its Gibraltar judgment has reached a point of equilibrium between the freedom of Member States to design their tax systems in the way they think to be most appropriate and the internal coherence which is required to avoid granting state aid[692]. It would appear at first glance that excluding the profits from corporate tax earned by companies, which have their seat in Gibraltar but do not employ personnel or use property locally, would provide for an exceptional tax advantage compared

689 Dubout/Maitrot de la Motte, p. 50; Rossi-Maccanico, Gibraltar Judgment, p. 70; EGC, Joined Cases T-211/04 and T-215/04, recital 146.

690 Rossi-Maccanico, Beyond the Pillars, p. 445; Rossi-Maccanico, Gibraltar Judgment, p. 70; EGC, Joined Cases T-211/04 and T-215/04, recital 185.

691 Rossi-Maccanico, Beyond the Pillars, p. 445; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; EGC, Joined Cases T-211/04 and T-215/04, recital 186.

692 Wattel, section 3.4; See also Rossi-Maccanico, Beyond the Pillars, p. 443; Rossi-Maccanico, Gibraltar Judgment, p. 74.

to companies that operate within Gibraltar, whose profits are subject to corporate tax and that do employ personnel or use property, to be prohibited by state aid regulation[693].

c) Opinion of Advocate General Jääskinen

In a strongly worded opinion, Advocate General Jääskinen in essence agreed with the EGC on the question of material selectivity, and also with its findings of regional selectivity. By the same token, he criticised the Commission for a grave error in the assessment of the criterion of selectivity. The Advocate General pointed out that in so doing, the Commission proposed the ECJ to establish a new concept of a de "facto selective tax system" and thus to adopt a method of analysis departing from that set out in its notice relating to state aid in the field of direct business taxation[694] [695].

The Commission uses the concept of a de facto selective system to describe a tax regime that by its very structure confers an advantage on one or more categories of undertaking through selection of the criteria to be applied in the allegedly "normal" taxation system[696]. The Advocate General stressed that accepting the Commission's proposition of establishing a concept of de facto selective system ultimately leads to the necessity of examining measures that are not covered by the state aid principles but rather fall within the area of harmful tax competition[697]. Harmful tax competition and state aid rules were different from each other and the legitimiate objective of combating harmful tax competition could not justify distortion of applicable state aid principles by innovative interpretation of article 107 paragraph (1) of the TFEU[698].

Advocate General Jääskinen further reasoned that while the proposed tax system results in offshore companies not being taxed, undertakings such as for example holding companies whose activity in Gibraltar requires neither the employment of staff nor the occupation of premises in Gibraltar were in exactly the same fiscal situation. In addition, a similar exclusion of offshore activities could be achieved through a system of corporate taxation that within the tax base only

---

693 Rossi-Maccanico, Gibraltar Judgment, p. 71.

694 Notice on the Application of the State Aid Rules.

695 Temple Lang, p. 806; Gemma, p. 166; Rossi-Maccanico, Beyond the Pillars, p. 445; Dubout/Maitrot de la Motte, p. 50; PwC, Tax Bulletin Gibraltar, p. 1; Opinion of Advocate General Jääskinen, recital 4, 120.

696 Opinion of Advocate General Jääskinen, recital 4 Fn 4; Muntendam/Chiarella, p. 231; Micheau, p. 199, 200; Flett/Walkerova, p. 233; Friederiszick/Röller/Verouden, p. 172.

697 Gemma, p. 166; Rossi-Maccanico, Beyond the Pillars, p. 445; Hancher/Ottervanger/Slot, p. 87; Opinion of Advocate General Jääskinen, recital 170.

698 Temple Lang, p. 806; Gemma, p. 166; Dubout/Maitrot de la Motte, p. 52; Opinion of Advocate General Jääskinen, recital 171.

includes criteria relating to energy consumption or the generation of waste[699]. Given the diversity of tax measures, it was becoming increasingly complex to trace a dividing line between general measures and selective measures. This is why the determination of the reference framework, as difficult it may be, would be instrumental in ascertaining whether a tax measure is "abnormal" and thus "selective"[700].

The Advocate General then argued that accepting a de facto selectivity approach would be tantamount to sparking off a methodological revolution in the application of the state aid principles for the purposes of article 107 paragraph (1) of the TFEU. According to that approach, the existence of an advantage would be assessed no longer based on a comparison between the measure and the generally applicable tax regime, but by virtue of a comparison between the tax regime as it exists and another hypothetical and non-existent system[701].

Eventually, the Advocate General rejected the argument whereby a de facto selectivity approach would apply only in exceptional cases. He held that the legal methodology is directly based on article 107 paragraph (1) of the TFEU and thus in line with the objects of EU competition law. This could not be abandoned merely because the Commission would not achieve the desired result in a specific case[702].

d) Decision of the European Court of Justice

On 15 November 2011 the ECJ did not follow the opinion of Advocate General Jääskinen. To the surprise of many practitioners it held instead that the EGC erred in law in finding that the proposed tax reform of Gibraltar by virtue of article 107 paragraph (1) of the TFEU does not confer selective advantages on offshore companies. As a result, the ECJ set aside the judgment of the EGC of 18 December 2008[703].

Contrary to the reasoning of the EGC, the ECJ held that the classification of a tax system as selective is not conditional upon that system being designed in such a way that all undertakings which might enjoy a selective advantage are, in general, liable to the same tax burden as other undertakings but benefit from

---

699 Temple Lang, p. 807, 809; Opinion of Advocate General Jääskinen, recital 172.

700 Temple Lang, p. 807; Opinion of Advocate General Jääskinen, recital 178.

701 Temple Lang, p. 807; Idot, p. 39; Opinion of Advocate General Jääskinen, recital 202.

702 Temple Lang, p. 807; See also Dubout/Maitrot de la Motte, p. 52.

703 Rossi-Maccanico, Beyond the Pillars, p. 443, 445; Dubout/Maitrot de la Motte, p. 50; Lang, Das Gibraltar-Urteil, p. 593; Rossi-Maccanico, Prohibited Selectivity, p. 216; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; ECJ, Joined Cases C-106/09 P and C-107/09 P, recitals 108, 191.

derogating provisions that give them a selective advantage[704]. Such an interpretation of the selectivity criterion, according to the ECJ, would require that in order for a tax system to be classifiable as selective, it must be designed in accordance with a certain regulatory technique. The result of such approach would be that national tax rules from the outset fall outside the scope of control of state aid merely because they were adopted under a different regulatory technique although they produce the same effects[705].

The ECJ admitted that a different tax burden resulting from the application of a general tax regime is not sufficient on its own to establish the selectivity of taxation for the purposes of article 107 paragraph (1) of the TFEU[706]. The criteria forming the basis of assessment of a tax system do however confer a selective advantage where they are such as to characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category of undertakings[707]. The ECJ then finds that the specific features of the proposed tax regime of Gibraltar are a combination of the payroll tax and BPOT as the sole bases of assessment, together with the requirement to make a profit and the tax thereon capped at 15%. On the other hand, there is no generally applicable basis of assessment providing for the taxation of all companies covered by that regime[708].

Against this backdrop, while the tax bases are found on criteria that are in themselves of a general nature, by combining them discriminates between companies that are in a comparable situation with regard to the objective of the proposed tax reform, which is the introduction of a general tax system for all companies established in Gibraltar[709]. Combining those bases of assessment in practice thus

---

704 Rossi-Maccanico, Beyond the Pillars, p. 445; Dubout/Maitrot de la Motte, p. 50, 51; Chérot, p. 164; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; ECJ, Joined Cases C-106/09 P and C-107/09 P, recital 91.

705 Donnat, p. 8; Temple Lang, p. 807; Rossi-Maccanico, Beyond the Pillars, p. 446; Dubout/Maitrot de la Motte, p. 51, 52; Idot, p. 38; Chérot, p. 164; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; ECJ, Joined Cases C-106/09 P and C-107/09 P, recital 92.

706 Muguet-Poullennec, p. 85; Chérot, p. 163; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; ECJ, Joined Cases C-106/09 P and C-107/09 P, recital 103; See also ECJ, Case C-156/98, recital 22.

707 Muguet-Poullennec, p. 86; Rossi-Maccanico, Beyond the Pillars, p. 447; Dubout/Maitrot de la Motte, p. 52; Idot, p. 38; Chérot, p. 163; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; ECJ, Joined Cases C-106/09 P and C-107/09 P, recital 104.

708 Rossi-Maccanico, Beyond the Pillars, p. 445, 447; Dubout/Maitrot de la Motte, p. 52; Chérot, p. 163; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; ECJ, Joined Cases C-106/09 P and C-107/09 P, recitals 100, 104.

709 Rossi-Maccanico, Beyond the Pillars, p. 447; Dubout/Maitrot de la Motte, p. 52;

not only results in taxation according to the number of employees and the size of the business premises occupied. Due to the absence of other bases of assessment, it also excludes from the outset any taxation of offshore companies and thus 99% of the companies in Gibraltar since they have no employees and do not occupy business property[710].

Contrary to the findings of the EGC and Advocate General Jääskinen, the ECJ concludes that the fact that offshore companies are not taxed in Gibraltar is not an unintended result of the regime at issue, but the predictable consequence of the fact that both bases of assessment are specifically designed so that offshore companies, which generally by their nature have no employees and do not occupy business premises, avoid taxation[711].

Without a doubt, the ECJ took into consideration that the effects of the Gibraltar corporate tax reform were scarcely different from the effects of its previous tax system, which had been prohibited for being state aid. As that previous exemption system had been found to be state aid and the new system had the same effect, it was probably inconceivable to the ECJ that the new system would not be state aid[712]. As a result, in the opinion of the ECJ the fact that offshore companies due to their specific features avoid taxation gave reason to conclude that they enjoy selective advantages[713]. The ECJ thus explicitly agrees with the intervention of Spain that the proposed tax regime is a special regime creating de facto selectivity[714].

Because the proposed tax reform was found materially selective in that it grants de facto selective advantages to offshore companies, the ECJ considered it not to be relevant to examine whether the proposed reform is territorially selective[715].

Joined Cases C-106/09 and C-107/09, Press Release; ECJ, Joined Cases C-106/09 P and C-107/09 P, recitals 100, 101, 104.

710 Wattel, section 3.4; Temple Lang, p. 807; Dubout/Maitrot de la Motte, p. 52; Luja, Highlights, p. 98, 99; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; ECJ, Joined Cases C-106/09 P and C-107/09, recital 102.

711 Wattel, section 3.4; Temple Lang, p. 807; Rossi-Maccanico, Beyond the Pillars, p. 447; Dubout/Maitrot de la Motte, p. 52; ECJ, Opinion of Advocate General Jääskinen, recital 220; Joined Cases C-106/09 and C-107/09, Press Release; ECJ, Joined Cases C-106/09 P and C-107/09 P, recital 106.

712 Wattel, section 3.4; Dubout/Maitrot de la Motte, p. 52.

713 Luja, Highlights, p. 98, 99; Dubout/Maitrot de la Motte, p. 52; Chérot, p. 163; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; ECJ, Joined Cases C-106/09 P and C-107/09 P, recital 107.

714 Luja, Highlights, p. 98; ECJ, Joined Cases C-106/09 P and C-107/09, recitals 55, 109.

715 Donnat, p. 8; Temple Lang, p. 807; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; ECJ, Joined Cases C-106/09 P and C-107/09 P, recitals 184.

This implies that there has been no change in the principles established by the ECJ in the Azores case[716].

Some authors appreciate the position of the ECJ taken in the case at issue because it may enable future development towards a stronger protection of free competition within the European Union. The Gibraltar decision may allow for an equivalent level of protection of free competition in the area of state aid to the one that, before such decision, only the soft law approach could reach[717]. It may thus be observed that the Gibraltar decision expands the "offshore" criterion of the Code of Conduct for admittedly suspect tax measures from the soft law area into the very firm law area of state aid[718].

C) Liechtenstein IP box

Only a few months prior to the ECJ decision in the Gibraltar case referred to above, the ESA confirmed the Liechtenstein IP box regime not to be selective under state aid rules.

Although the new Liechtenstein Tax Act was strictly drafted with the purpose of avoiding any selective measure[719], Liechtenstein transmitted the notification of its IP box legislation as a non-aid measure to the ESA for reasons of legal certainty on 23 December 2010[720]. The reasons why the competent authorities in Liechtenstein were considering that the measure did not constitute state aid in the meaning of article 61 paragraph (1) of the EEA Agreement was that article 55 of the Tax Act provided for a special tax relief in an amount of 80% of the sum of the positive income from IP rights as commercially justified and deductible expense aiming to promote R&D.

It should be emphasised that Liechtenstein notified article 55 of the Tax Act in combination with article 33 of the Tax Ordinance. At that time, the precise design of the IP box, which is modelled based on the IP boxes of Belgium, Luxembourg and the Netherlands, was still specified in article 33 of the Tax Ordinance[721].

Additionally, the notification request was in particular referring to the relevant IP rights set out in article 33 paragraph (1) of the Tax Ordinance and the fact

---

716 Gemma, p. 166; Foreign & Commonwealth Office; See also ECJ, Case C-88/03.

717 See Wattel, section 3.4; Rossi-Maccanico, Beyond the Pillars, p. 443, 447; Pistone, p. 87; Lang, Das Gibraltar-Urteil, p. 598, 599; See also: Luja, Highlights, p. 98; Temple Lang, p. 812; Engelen, p. 206; Section 2 (III) (Critical acclaim) of this Part.

718 Wattel, section 3.4; Rossi-Maccanico, Beyond the Pillars, p. 447, 448.

719 Wenz/Linn, p. 457.

720 EFTA Surveillance Authority, OJ C 278, p. 2.

721 Idem.

that pursuant to article 33 paragraph (5) of the Tax Ordinance the IP box was only applying to IP rights created or acquired from 1 January 2011[722].

The assessment taken by the ESA in its decision of 1 June 2011 can be considered as straightforward and in line with its guidelines regarding the application of state aid rules to measures relating to direct business taxation aiming to uniformly apply the same state aid principles throughout the EEA[723].

As set out in the following, one of the four cumulative conditions for a measure to constitute state aid within the meaning of article 61 paragraph (1) of the EEA Agreement was not met:

a) Economic advantage

As illustrated earlier, a measure must confer on an undertaking an advantage that relieves it of a charge that is normally born from its budget[724].

The authority rightly asserted that article 55 of the Tax Act allows for a deduction in income derived from IP rights. Undertakings that benefit from the deduction thus pay less income tax. It follows that these undertakings receive an economic advantage[725].

b) Presence of state resources

In order a measure to be subject to state aid, it must be granted by the State or through state resources[726].

Article 55 of the Tax Act stipulates that undertakings may claim a relief of 80% of their income from IP rights as a deductible expense for income tax purposes. By allowing for such a deduction prior to the imposition of personal or corporate income tax, the State clearly sacrifices tax revenue. A loss of tax revenue equals the consumption of state resources in the form of a fiscal expenditure[727].

The authority thus rightly asserted that with respect to the Liechtenstein IP box there is presence of state resources involved.

c) Selectivity

The presence of state aid further requires that a measure is selective in that it favours certain undertakings or the production of goods[728].

---

722 Idem.
723 EFTA Surveillance Authority, OJ L 137/20.
724 EFTA Surveillance Authority, OJ C 278, p. 3 recital 1.2.
725 Idem.
726 Idem, p. 3 recital 1.3.
727 Idem.
728 Idem, p. 4 recital 1.4.

The authority finds that the tax deduction based on article 55 of the Tax Act is available to any undertaking subject to personal or corporate income tax. It thus applies without distinction to all economically active persons, irrespective of their size, legal structure or sector[729].

In addition, the authority declares that the measure does not confer discretionary powers on the tax administration. The competent Liechtenstein authorities confirmed that to their knowledge no particular group of undertakings should benefit more from the measure than others[730].

Against this backdrop, the authority considered article 55 of the Tax Act not to strengthen the position of any particular class of undertakings. The IP box was thus confirmed as not being selective[731].

In its reasoning the ESA further elaborates that a measure open to all economic agents operating within an EFTA State, in principle, is a general measure. The central fact that not every undertaking benefits from the measure in the same way is seen as a mere reflection of economic reality[732].

Because one of the cumulative conditions of article 61 paragraph (1) of the EEA Agreement is not fulfilled, which must be met in order for aid to be involved, the Liechtenstein IP box was confirmed to be in line with European state aid principles[733].

On these grounds there was no more need for the ESA to refer to the question whether the measure distorts competition and affects trade between contracting parties.

By a resolution of the Liechtenstein Parliament on 25 April 2012, article 55 of the Tax Act has been amended. Article 33 of the Tax Ordinance has basically been absorbed by article 55 of the Tax Act. Furthermore, the catalogue of relevant IP rights has been expanded by software and medical, technical and scientific databases. Again, the Government decided to formally notify the modified provision in order to obtain legal certainty[734].

---

729 Idem.

730 EFTA Surveillance Authority OJ C 278, p. 4 recital 1.4; See also Cavelti, Besteuerung nach dem Aufwand, p. 153.

731 Idem.

732 Idem.

733 Idem, p. 4 recital 2.

734 Felder/Harmann, p. 75, 76; EFTA Surveillance Authority, State Aid; EFTA Surveillance Authority, 480/12/COL, p. 1 recital 1; Liechtenstein Government, Report and Application No 139/2012, p. 29, 50; Liechtenstein Government, Statement No 21/2012, p. 8, 9, 23; Liechtenstein Government, Report and Application No 123/2011, p. 23; Liechtenstein Constitutional Court, StGH 2011/13; See also sec-

On 12 December 2012 the authority confirmed article 55 of the Tax Act to be a general measure and thus not to constitute state aid within the meaning of the EEA law[735]. The notified measure, however, covered income from medical databases. In order to eliminate a potentially selective element, the Liechtenstein authorities decided to amend article 55 of the Tax Act during the notification process by taking out the reference to medical databases with effect from 1 January 2012[736].

With respect to discretionary practices it should be emphasised that further than in its decision of 1 June 2011 the ESA expressly held that the Liechtenstein tax authorities are bound to accept the tax deduction where the conditions set out in article 55 of the Tax Act are met[737].

4. EU-Switzerland Free Trade Agreement

The effects of state aid law of the European Union are also noticeable in Switzerland. The question is to what degree they affect the tax sovereignty of Switzerland, and thus what the impact on the cantonal tax privileges under article 28 paragraphs (2) to (5) of the Tax Harmonisation Act ("FTHL") is.

The prohibition of state aid is laid down in article 23 paragraph (1) subparagraph (iii) of the Free Trade Agreement ("FTA")[738]. Thereafter, any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the proper functioning of the Free Trade Agreement, in so far as it may affect trade between the European Union and Switzerland. The prohibition of state aid under the Free Trade Agreement is marked by high uncertainty and thus in need of interpretation.

What is certain is that irrespective of the question of whether article 107 paragraph (1) of the TFEU can be used as a point of reference for the interpretation of the Free Trade Agreement, the prohibition of state aid according to article 23

---

tion 3 (II) (1) (Rights to which the IP box applies) of Part 3.

735 EFTA Surveillance Authority, State Aid; EFTA Surveillance Authority, 480/12/COL, p. 7 recital 28; See also Maute/Senn/König, p. 419.

736 Article 55 paragraph (1) letter (b) of the Amended Tax Act; Section II (Inkrafttreten), article 2 of the Amended Tax Act; EFTA Surveillance Authority, 480/12/COL, p. 3 recital 11; Liechtenstein Government, Report and Application No 139/2012, p. 29, 50; See also Maute/Senn/König, p. 419.

737 EFTA Surveillance Authority, 480/12/COL, p. 4 recital 17, 7 recital 26; EFTA Surveillance Authority, OJ C 278.

738 Agreement between the European Economic Community and the Swiss Confederation 1972.

paragraph (1) subparagraph (iii) of the FTA is only applicable if trade between the European Union and Switzerland is affected[739].

While acknowledging this fact, the European Commission gave notification of its unilateral decision dated 13 February 2007 that certain cantonal taxation modalities contradict the aid rules in article 23 paragraph (1) of the FTA. The Commission threatened to adopt safeguard measures, in particular to withdraw tariff concessions, according to article 27 paragraph (3) letter (a) of the FTA[740].

Against this backdrop, principles of interpretation relevant in law as well as Swiss and European case law in connection with article 23 paragraph (1) subparagraph (iii) of the FTA are acknowledged and examined below.

A) European interpretation

In view of the European Commission, article 23 paragraph (1) of the FTA very clearly declares incompatible with the proper functioning of the Free Trade Agreement any state aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it may affect trade between the European Union and Switzerland[741].

The wording used in the state aid provision in article 23 paragraph (1) of the FTA is very similar to article 107 paragraph (1) of the TFEU. The only difference is that under the FTA it suffices that trade between the European Union and Switzerland "may be affected", whereas article 107 of the TFEU requires that the aid actually "affects trade between Member States". According to the Commission, neither the terms nor the purpose of the Free Trade Agreement indicate that article 23 paragraph (1) should be interpreted narrowly[742].

The Commission further considers that the important role which the Free Trade Agreement ascribes to the principle of fair competition in the economy and the specific language used to express the principle of incompatibility of state aid are arguments in favour of giving broad scope to that provision[743]. Moreover, the

---

739 Hirsbrunner/Seidl, p. 555.

740 Matteotti/Roth, p. 57; Baudenbacher, p. 831; Roth, FHA im Licht des Rechts der EU und WTO, p. 721; Freimoser/Huber/Kubaile/Ziegler, p. 398, 400; Seitz, p. 415; Hirsbrunner, p. 46; Zurkinden, p. 19; EFD, No infringement of FTA; Hirsbrunner/Seidl, p. 544; Commission decision, Incompatibility of certain Swiss company tax regimes under FTA 1972, p. 7 recitals 26, 74; König/Reich, p. 45; Siegwart/Felder, p. 492.

741 Commission decision, Incompatibility of certain Swiss company tax regimes under FTA 1972, p. 7 recital 26.

742 Roth, FHA im Licht des Rechts der EU und WTO, p. 722, 723; Freimoser/Huber/Kubaile/Ziegler, p. 399; Commission decision, Incompatibility of certain Swiss company tax regimes under FTA 1972, p. 7 recitals 27, 65.

743 Commission decision, Incompatibility of certain Swiss company tax regimes under

Commission believes that, in the context of the Free Trade Agreement, the traditional strong economic and geographic links between the European Union and Switzerland as well as the fact that Swiss companies already enjoy privileged access to the single market, require correct application of the competition rules, including prohibition of state aid incompatible with the Free Trade Agreement[744].

In certain cases, the ECJ has indeed considered it appropriate to extend the interpretation of a provision of the TFEU to an identical or similar provision of an agreement concluded with a non-Member State[745]. It is clear from its case law that the extension of the interpretation of a provision in the TFEU to a comparably, similarly or even identically worded provision of an agreement concluded by the European Union with a Non-Member State like Switzerland depends, inter alia, on the aim pursued by each provision in its particular context and that a comparison between the objectives and context of an agreement and those of the TFEU is of considerable importance[746]. An international treaty must not be interpreted solely by reference to the terms in which it is worded but also in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the law of treaties stipulates in this respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose[747].

B) Swiss interpretation

The Swiss Federal Court has also commented on the Free Trade Agreement. According to the Federal Court, it is important to recognise from the history of the origins of the Free Trade Agreement that the latter is purely an agreement on tariffs and trade, which does not seek to create a single market with a supranational competition regime like the TFEU, but merely seeks to create a free trade zone. In addition, it is essentially restricted to industrial free trade. During its negotiation, not only has an obligation to mutually align the Union and Swiss legal standards been deliberately excluded; in reality it remained the mutual

---

FTA 1972, p. 7 recital 27; For a contrary opinion see: Freimoser/Huber/Kubaile/Ziegler, p. 399.

744 Commission decision, Incompatibility of certain Swiss company tax regimes under FTA 1972, p. 7 recital 28.

745 Cases where provisions of the TFEU have been applied by way of analogy to Free Trade Agreements: ECJ, Case C-17/81, recital 27; ECJ, Case C-163/90, recital 26; Cases where provisions of the TFEU have not been applied by way of analogy to Free Trade Agreements: ECJ, Case C-312/91, recital 19; ECJ, Case C-104/81, recital 30; ECJ, Case C-270/80, recital 15; See also Hirsbrunner/Seidl, p. 546.

746 ECJ, Case C-312/91 recital 11; See Hirsbrunner/Seidl, p. 546.

747 ECJ, Case C-312/91, recital 12; Opinion of the Court 1/91, recital 14; See also Baudenbacher, p. 827; Hirsbrunner/Seidl, p. 546; EGC, T-115/95, recitals 107, 108.

prerogative of the existing legal systems and their unrestricted autonomous implementation[748].

According to the Swiss Federal Court, these differences must be observed for interpretation of the individual provisions as well. It does not concern the fact that ECJ case law has to be adopted indiscriminately by way of analogy to provisions of the TFEU. Switzerland is not forced by the Free Trade Agreement to harmonise its economic policy and internal legislation with that of the European Union, even though it may be obvious to strive for similar solutions as neighbouring states in concrete cases for similar problems. This however does not alter the fact that the Swiss judge has to autonomously interpret and apply the Free Trade Agreement according to its trade policy character and purpose[749].

The Swiss Federal Court then adds that treaties must primarily be interpreted according to their wording. If the wording is clear, and its meaning as it ensues from normal usage as well as from the object and purpose of the contract, is not obviously absurd, then another interpretation is only worth considering if the context or history of origin for certain suggests that the consensus between the treaty states deviates from the wording[750].

But the Swiss Federal Court has rather softened its rigid attitude in the meantime so that the case law of the ECJ is not inconsiderable[751]. The Federal Appeals Commission of Infrastructure and Environment has concluded from this that the case law of the ECJ can be used for interpreting the Free Trade Agreement, unless there are obvious grounds to deviate from it. The Appeals Commission has thus shifted the trend in favour of taking into account the case law of the ECJ[752].

The view that a vague standard such as article 23 paragraph (1) subparagraph (iii) of the FTA can be filled with meaning through recourse to a further developed practice under a comparable agreement appears plausible[753]. It is also quite understandable that a Swiss authority in the autonomous interpretation, within the meaning of the Federal Supreme Court, found out about the case law of the ECJ in order to draw its own conclusions.

---

748 Roth, FHA im Licht des Rechts der EU und WTO, p. 722; Hirsbrunner/Seidl, p. 546; BGE 105 II 49 E. 3a p. 59.

749 Hirsbrunner/Seidl, p. 546, 547; BGE 105 II 49 E. 3a p. 59, 60.

750 BGE 105 II 49 E. 3a p. 59, 60; See also Hirsbrunner/Seidl, p. 547.

751 Hirsbrunner/Seidl, p. 547; BGE 131 II 271 E. 10.3 p. 295.

752 Hirsbrunner/Seidl, p. 547; Eidgenössische Rekurskommission für Infrastruktur und Umwelt, H-2004-174, recital 13.6 et seq.

753 Hirsbrunner/Seidl, p. 547.

C) Lack of jurisdiction

The EU-Switzerland Free Trade Agreement does not provide for any higher justice instance that could mandatorily define the direct applicability of individual provisions for the contracting parties. Article 29 of the FTA simply provides for a joint committee. It has to ensure proper compliance with the Free Trade Agreement, but can only pronounce recommendations[754]. Since there is no higher justice mechanism, which would have jurisdiction, the conflict has so far not been dispelled. Meetings of the joint committee on the Free Trade Agreement have been to no avail. With the existence of a surveillance and justice mechanism based on the model of EU or EEA law, the unilateral political course of action of one contracting party would not have been possible. The surveillance authority could have adopted a decision by way of an infringement proceeding declaring that certain elements of article 28 of the FTHL were inconsistent with the state aid regime according to article 23 paragraph (1) of the FTA. An action for annulment to the court would then have been open to Switzerland[755].

Naturally, it is also conceivable that the surveillance authority would have come to the conclusion that there is no state aid situation within the meaning of article 23 paragraph (1) of the FTA[756]. One way or another, the conflict would have been depoliticized and probably settled a long time ago. Not unfounded is the assumption that in Switzerland the overriding view is that the lack of a higher justice mechanism constitutes a kind of protective barrier; at any rate one has already gained time. Furthermore, one retains more freedom of action during diplomatic negotiations than would be the case with jurisdiction of a court[757].

D) Open criticism

In its decision, the Commission holds that advantages which could favour certain undertakings, in line with the definition of state aid provided by article 23 paragraph (1) of the FTA, can take many forms, including not only a direct subsidy but also indirect relief from charges normally borne by beneficiary undertakings. It is clear that an advantage in the form of a tax reduction is the economic equivalent of a direct subsidy. Accordingly, the Commission considers that a tax reduction which favours certain beneficiary undertakings and the groups of which they form part by relieving them of charges which would nor-

754 EFD, No infringement of FTA; Hirsbrunner/Seidl, p. 546; BGE 105 II 49 E. 3a p. 59.

755 Baudenbacher, p. 831, 832.

756 Baudenbacher, p. 832; See also Roth, FHA im Licht des Rechts der EU und WTO, p. 723; Zurkinden, p. 19; Siegwart/Felder, p. 495.

757 Baudenbacher, p. 832.

mally have been born by their budgets may constitute state aid under article 23 paragraph (1) of the FTA[758].

In its decision and using a classic state aid examination procedure, the European Commission hence argued that the tax advantages in favour of management and mixed companies do not stem from the nature or general set-up of the Swiss tax system. More specifically, those regimes provide that income earned from sources outside Switzerland is liable to the ordinary tax rate only in proportion to the volume of management activity performed in Switzerland. Thus, such regimes confer an advantage since such companies are not taxed on their income which cannot be attributed to management activities performed in Switzerland[759]. They reduce the costs that certain beneficiary companies bear in the course of their business and thus provide advantages to them and to the groups of which they form part within the definition of state aid provided by article 23 paragraph (1) of the FTA[760]. The Commission further concludes that the measures in question equate to direct subsidies in the form of forgone fiscal expenditure by the Swiss cantons granting such tax reductions, are selective and may affect cross-border prices in dealings between the European Union and Switzerland thus distorting trade[761].

Unsurprisingly, Switzerland immediately rejected the criticism of the Commission as unfounded. The Federal Council argues that the provisions in article 28 of the FTHL do not fall within the scope of the Free Trade Agreement, since the material scope of this Agreement is limited to trade in industrial products and processed agricultural products and thus to originating products. Furthermore, the view was taken that neither the Union rules of competition nor the rules of the Code of Conduct for Business Taxation are applicable to Switzerland as a non-Member State. Even if the criticised tax provisions fell under the Free Trade Agreement, according the Federal Council, they would not constitute state aid, due to their concrete design[762].

On 14 May 2007, the Council of the European Union granted a mandate to the European Commission for negotiations with Switzerland. Switzerland continued

---

758 Commission decision, Incompatibility of certain Swiss company tax regimes under FTA 1972, p. 7, 8 recital 30.

759 Matteotti/Roth, p. 57; Commission decision, Incompatibility of certain Swiss company tax regimes under FTA 1972, p. 8 recital 35.

760 Matteotti/Roth, p. 57; Commission decision, Incompatibility of certain Swiss company tax regimes under FTA 1972, p. 9 recital 37.

761 Matteotti/Roth, p. 57; Roth, FHA im Licht des Rechts der EU und WTO, p. 721; Commission decision, Incompatibility of certain Swiss company tax regimes under FTA 1972, p. 9 recital 39, 11 recital 49, 12 recital 54.

762 Matteotti/Roth, p. 57; Roth, FHA im Licht des Rechts der EU und WTO, p. 722, 723; Hirsbrunner, p. 46; EFD, No infringement of FTA.

to deny the existence of an infringement of the Free Trade Agreement. In its view, since the cantonal tax rules did not fall within the scope of the Free Trade Agreement and any impact on the movement of goods was thus unlikely, there was also nothing to negotiate. Subsequently, however, Switzerland engaged of necessity in a tax dialogue with the European Union[763].

The tax dialogue between Switzerland and the Commission led to the drafting of a compromise solution in 2009. The proposal submitted by Switzerland, however, failed in the face of resistance from individual EU Member States[764]. In June 2010, the Commission then requested Switzerland to adopt the EU Code of Conduct. Switzerland has so far rejected an integral adoption of the Code of Conduct. But at the same time, it has signalled its willingness to discuss certain criteria contained in the Code of Conduct[765].

On 4 July 2012 the Federal Council finally adopted a mandate for dialogue with the EU on business taxation. The aim is to find a solution which takes the interests of both parties into account. The business taxation dialogue with the European Union is closely linked to the Corporate Tax Reform III conducted jointly by the Confederation and the cantons[766]. The steering body in charge of the project submitted its interim report on 17 May 2013, following consultation with the cantons and interested parties. In view of progress made in the dialogue with the European Union and work being carried out by the OECD, the Federal Department of Finance will report back to the Federal Council in autumn 2013[767]. The Federal Council will adopt a consultation draft for Corporate Tax Reform III for submission to the Swiss Councils over the course of 2014[768].

To be right and to be proven to be right are sometimes two different things. From a legal perspective, one has to agree with the Federal Council that the applicability of the Free Trade Agreement is not obvious. The reason lies primarily in the fact that the prohibition of state aid under article 23 paragraph (1)

---

763 EFD, Zwischenbericht USTR III, p. 7; PwC, TAXeNEWS Stand der Dinge; Baudenbacher, p. 831; Freimoser/Huber/Kubaile/Ziegler, p. 399.

764 Matteotti/Roth, p. 57; PwC, TAXeNEWS Stand der Dinge.

765 Matteotti/Roth, p. 57; EFD, Zwischenbericht USTR III, p. 7; EFD, Steuerdialog Schweiz – EU; EFD, Company taxation: dialogue with the EU; EFD, Federal Council adopts mandate text on EU dialogue.

766 PwC, TAXeNEWS Stärkung der steuerlichen Wettbewerbsfähigkeit; PwC, TAXeNEWS Stand der Dinge; EFD, Steuerdialog Schweiz – EU; EFD, Company taxation: dialogue with the EU.

767 Hausmann, p. 5; PwC, TAXeNEWS Stärkung der steuerlichen Wettbewerbsfähigkeit; EFD, Zwischenbericht USTR III, p. 46; EFD, Steuerdialog Schweiz – EU; EFD, Company taxation: dialogue with the EU.

768 PwC, TAXeNEWS Stärkung der steuerlichen Wettbewerbsfähigkeit; EFD, Stärkung Standort Schweiz mit Reform der Unternehmensbesteuerung; EFD, Zwischenbericht USTR III, p. 46.

subparagraph (iii) of the FTA only extends to measures that are suitable to influence trade between the European Union and Switzerland[769]. By the same token, from an economic perspective, it should be understood that the traditional strong economic and geographic links between the European Union and Switzerland require a reasonable application of the competition rules, including the prohibition of state aid[770].

Against this backdrop, it must be expected that within the framework of Corporate Tax Reform III the attractiveness of Switzerland as a tax location is consolidated with different measures. Paramount in this respect is fiscal funding of R&D activities, and therefore inter alia the introduction of a Swiss IP box regime. The introduction of an incentive, which provides for an increased deduction on R&D expenses, is also being contemplated[771].

In the on-going dialogue with the European Union, Switzerland is requesting that its tax sovereignty and that of the cantons be respected[772]. Irrespective of the legal qualification of the EU-Switzerland Free Trade Agreement, however, a certain loss of sovereignty should not be dismissed. The economic and political realities imply that it is not possible for Switzerland to unswervingly foster an autonomous existence in the midst of Europe. It must bear the influence of the European state aid law. Switzerland is thus well advised to further acknowledge prohibition of state aid within the meaning of article 107 of the TFEU, especially in such a way as to guarantee non-discriminatory and unrestricted access to the single market.

III. Critical acclaim

Belgium, Luxembourg and the Netherlands have not subjected their IP box regimes to a formal notification procedure with the Commission. The same appears to be the case for the UK in this regard.

In the case of the Netherlands, which was the first Benelux country to introduce an IP box regime, apparently talks with the Commission have led the Dutch Government to believe that this type of tax benefit will not be objected. In any event, the restrained response by the Commission to the introduction of comparable IP box regimes in other EU Member States indicates that its attitude in

769 See also Hirsbrunner, p. 47.

770 Commission decision, Incompatibility of certain Swiss company tax regimes under FTA 1972, p. 7 recital 28; See also Müller/Portmann/Schreiber, p. 821, 822.

771 Obrist, p. 649, 650; PwC, TAXeNEWS Lizenzboxlösung; EFD, Zwischenbericht USTR III, p. 25, 27; EFD, Stärkung Standort Schweiz mit Reform der Unternehmensbesteuerung.

772 EFD, Steuerdialog Schweiz – EU; EFD, Faktenblatt Steuerdialog Schweiz – EU; See also Hirsbrunner, p. 46; 47; König/Reich, p. 48.

these cases has not been overly restrictive so far[773]. Should the Commission however change its attitude concerning IP boxes and decide potential treaty violation proceedings against meanwhile numerous EU Member States in its favour, the resulting recovery obligations of state aid recipients would certainly be critical, also given that the field of R&D represents a centrepiece of Europe's strategic development[774].

At this stage it can be summarised that IP boxes so far seem challenging to tackle under the current state aid framework although they may entail distortive elements on trade and competition, which can be in conflict with the principles of the internal market[775]. The selectivity test, which aims at ascertaining whether the effect of a tax measure is to create any advantage to certain undertakings or goods, in theory excludes general tax measures from the scope of state aid prohibition. Its application by the ECJ requires prior identification of the general tax regime applicable within a specific tax jurisdiction, in order to then single out the derogations that may give rise to selective advantages. An additional element of complexity is the fact that a selective tax measure may be justified in the light of the general nature of the tax system[776].

Despite of this situation one must bear in mind that after the recent Gibraltar decision of the ECJ, application of the selectivity test may in fact not be as straightforward as it was in the past. Both the General Court and Advocate General Jääskinen were of the opinion that, as much as the Gibraltar tax reform might have been harmful tax competition, it was not state aid. But the ECJ considered the Gibraltar corporate tax system to be de facto selective and thus to amount to state aid[777].

A remarkable feature of the comparability analysis of the ECJ in fiscal state aid cases is that its comparison criterion may shift according to the need to reach a specific result. In Paint Graphos, the ECJ stipulated that for a finding of selectiveness of a tax regime, it is necessary to identify the normal tax regime applicable, and to demonstrate that the measure derogates from that normal regime in favouring certain economic operators[778]. In the Gibraltar case, which was decid-

---

773 Prokisch, p. 224, See also Hinny, Lizenzbox des Kantons Nidwalden, p. 142, 143, 158, 159.

774 European Commission, Growth Strategy, 3 March 2010.

775 See Prendina Dutler, p. 142; Pistone, p. 85, 86.

776 Pistone, p. 87; Commission of the European Communities, Implementation Report, p. 18 recital 66.

777 Wattel, section 2.3, 3.4; Dubout/Maitrot de la Motte, p. 51; Luja, Highlights, p. 99; ECJ, Joined Cases C-106/09 and C-107/09, Press Release; ECJ, Joined Cases C-106/09 P and C-107/09 P, recital 107; Opinion of Advocate General Jääskinen, recital 174.

778 Wattel, section 2.3; Lang, Das Gibraltar-Urteil, p. 598; ECJ, Joined Cases C-78/08

ed only two months later and was welcomed by the Commission as a landmark judgment, the ECJ took the opposite view. It held that the contested decision does not deal with the question whether the advantage enjoyed by offshore companies might be justified by the nature and general scheme of the tax system[779]. The cases cited by the ECJ for reference in this regard, however, provide for a clearer picture in the context of environmental taxes[780].

Another notable feature is that the Gibraltar decision is strongly characterised by the underlying assumption that there is an obligation to tax profits. It almost appears that the ECJ has difficulty in acknowledging that sovereign EU Member States may freely decide to abolish any profits tax if they so wish[781].

It is not easy to measure the impact of the Gibraltar decision[782]. The question arises, however, as to whether the state aid criteria in direct tax matters need to be rewritten in the light of it. After the Gibraltar decision, an imporant issue in state aid matters seems to be whether a distinguishing effect is justified by the logic of the fiscal policy objective pursued. In this respect, a proportionality test in state aid tax cases may be needed as there is one in free movement tax cases[783].

Provided that the ECJ will be confronted with an increasing number of cases, in which no derogation from the general tax system was present, then the need to justify tax differentiations within a national tax system will rise. A proportionality test would permit the ECJ to supervise the tax systems of Member States, as they would need to be able to explain and justify effective differentiations in their tax systems. By the same token, implementation of such test creates more risk of political assessment, as it further limits fiscal sovereignty of Member States while increasing legal uncertainty for both taxpayers and the national tax legislature[784].

It should further be assumed that the considerations leading the ECJ to its conclusions in the Gibraltar decision cannot be generalised to analyse state aid in general for several reasons. In particular, the political background of the Gibraltar decision must be taken into account. The Commission has for quite some

---

to C-80/08, recital 49; See also ECJ, Case C-88/03, recital 56.

779 Wattel, section 2.3; Luja, Highlights, p. 98; Rossi-Maccanico, Beyond the Pillars, p. 443; Lang, Das Gibraltar-Urteil, p. 598; ECJ, Joined Cases C-106/09 P and C-107/09 P, recital 143.

780 Luja, Highlights, p. 98; ECJ, Joined Cases C-106/09 P and C-107/09 P, recitals 145, 146; Case C-279/08 P recital 77; Case C-487/06 P recital 83; Flett/Walkerova, 233.

781 Temple Lang, p. 810, 811; Luja, Highlights, p. 98.

782 Temple Lang, p. 809; Luja, Highlights, p. 99.

783 Wattel, section 2.4.

784 Wattel, section 2.4; See also Temple Lang, p. 812; Dubout/Maitrot de la Motte, p. 54.

time been bothered by the rules existing in several third countries that do not want to include the foreign profits of certain companies in the tax base. These include the cantonal tax privileges pursuant to article 28 of the FTHL, which the Commission has qualified as a form of state aid. The objection that third countries are being called upon to abolish such tax regimes even though it is not certain that effective action can be taken against similar rules in EU Member States under Union law had previously not been fully rebutted. The ECJ has now provided support to the Commission and allowed it to approach third countries such as Switzerland more credibly. The Gibraltar decision has made clear that offshore tax regimes can be combatted within the EU[785].

In addition, de facto selectivity is not a new concept. It has been frequently applied in state aid case law[786]. Taking into consideration the effects of a tax measure in order to avoid the state aid principles from being circumvented because of a lack of de jure selectivity provides that the nature and general scheme of a tax system is thoroughly assessed and certainly seems to be a sensible approach. The ECJ however held that the absence of other bases of assessment – other than staff and business property – was what from the outset excluded any taxation of offshore companies. Confirming that different tax burden resulting from the application of a general tax regime is not sufficient on its own to establish the selectivity of taxation for the purposes of article 107 paragraph (1) of the TFEU, the ECJ then reasoned that in the present case it was possible to characterise the recipient undertakings by virtue of the properties that are specific to them as a privileged category. The fact that offshore companies, which constitute a group of companies with regard to the bases of assessment adopted in the proposed tax reform, avoid taxation precisely on the account of specific features characteristic of that group gave reason to conclude that those companies enjoy selective advantages[787].

It is exactly this kind of reasoning that raises serious concerns, as de facto selectivity may gain a much broader scope of application. If that slippery slope towards selectivity were to be followed, state aid may not only apply to extreme cases, which in the proposed Gibraltar tax reform resulted in zero taxation. Even partial reductions of tax may then be covered by the concept[788]. At this time it is difficult to anticipate whether the concept only applies to admittedly very unsual cases or rather substantiates a methodological revolution. But in any case it

785 Wattel, section 3.4; Lang, Das Gibraltar-Urteil, p. 598, 599.

786 Luja, Highlights, p. 99; Kociubinski, p. 9, 10; Luja, Working paper, p. 7; Micheau, p. 199, 200; Flett/Walkerova, p. 233; Friederiszick/Röller/Verouden, p. 172.

787 Rossi-Maccanico, Beyond the Pillars, p. 445, 447; Dubout/Maitrot de la Motte, p. 50, 53; Luja, Highlights, p. 99; Joined Cases C-106/09 P and C-107/09 P, recitals 102 to 107.

788 Luja, Highlights, p. 99; See also Dubout/Maitrot de la Motte, p. 51, 53.

would be an unusual example of judicial legislation if the ECJ in state aid tax cases were to compare national measures with hypothetical tax measures visualised only by the ECJ itself[789].

Given that the same standard used by the ECJ for the comparability analysis in its Gibraltar decision is also applied in other constellations, this may accordingly lead to serious practical consequences. It is for instance conceivable that the exemption of foreign permanent establishment profits provided in many double taxation agreements could be attacked under state aid rules, since this might be considered favourable treatment of undertakings[790]. In the same spirit, partial exemption of income from relevant IP rights or special tax rates on such income could be covered by the concept. It is also conceivable that holding companies would be seen as a group of undertakings which, in light of the typical and specific characteristics of that group, are not taxed[791].

Given the major importance of the Gibraltar decision, the situation may thus not be as straightforward as it used to be. It should now be examined whether a tax measure may particularly benefit one certain sector of industry given its special characteristics. Although it may be acceptable that some undertakings profit more than others from what once seemed to be a general measure, it should also be determined whether in such situations those who do profit more have particular characteristics that de facto make them benefit more than others. According to some commentators, this may result in a typical vicious circle and to break it, case-by-case guidance from the ECJ would be necessary[792].

As already discussed, such methodology would not yet seal the fate of tax measures under state aid rules. When applying the selectivity test, the question of the justification of a differentiation must namely also be raised[793].

The consequences suggested here, however, are in no way the necessary consequences of the prohibition of state aid. The specific situation underlying the Gibraltar decision tends to speak against the relevance of the same considerations also in all other cases. Whether the ECJ applies the same standard in constellations less likely to raise suspicion of abuse cannot easily be predicted[794]. Should the ECJ in fact apply as strict a standard in its comparability analysis as

---

789 Temple Lang, p. 812; Dubout/Maitrot de la Motte, p. 53; Idot, p. 39; Luja, Highlights, p. 99.

790 Lang, Das Gibraltar-Urteil, p. 599.

791 Luja, Highlights, p. 99; Lang, Das Gibraltar-Urteil, p. 599, 600; See aslo Temple Lang, p. 812; Dubout/Maitrot de la Motte, p. 54.

792 Luja, Highlights, p. 99; See also Rossi-Maccanico, Beyond the Pillars, p. 447, 448; Dubout/Maitrot de la Motte, p. 53, 54.

793 Dubout/Maitrot de la Motte, p. 51; Lang, Das Gibraltar-Urteil, p. 599, 600.

794 Temple Lang, p. 809; Dubout/Maitrot de la Motte, p. 51, 53; Luja, Highlights, p. 99; Lang, Das Gibraltar-Urteil, p. 599.

it did in the Gibraltar decision, it risks imposing its own tax policy views on how the tax regimes of Member States ought to look like. In that way, the ECJ would come close to curtail the fiscal sovereignty of Member States even though the ECG and Advocate General Jääskinen warned strongly against encroaching on the powers of Member States to choose their own tax policies, including the bases for their taxes. If that proved to be true, the ECJ would trigger a revolutionary legal methodology[795]. The constellations relevant to state aid rules would increase sharply, confronting not only the Commission with new quantitative and qualitative facts[796].

In defence of the decision, the ECJ did at least demonstrate its willingness to use the prohibition of state aid to derive far-reaching requirements for the tax law competence of the Member States[797]. It remains to be seen whether the derogation-based selectivity test after the Gibraltar decision will effectively allow for an approach based on a wider spectrum of the prohibition of state aid in tax matters. Future developments would inter alia have to come with harmonisation at the Union level by addressing tax disparities and thus the distortive impacts of measures that apply to specific categories of income, such as for example license fees or royalties, which reduce the tax assessment bases of undertakings through box taxation regimes[798].

Before then, it can be concluded that IP boxes result in advantages from a general measure applicable without distinction from the outset to all economic operators – ideally also to self-employed persons – and therefore do not constitute state aid within the meaning of article 107 of the TFEU[799]. The traditional derogation-based selectivity test can still be considered as relevant as it was, not least at all because most state aid can be described as providing a selective advantage compared to the normal tax system. Prior to that test, however, it should be analysed whether the normal tax system is broad enough in nature as not to exclude undertakings from the outset in light of the nature and general scheme of the tax at hand[800].

A different tax burden resulting from the application of a general tax regime is further not sufficient on its own to establish the selectivity of taxation[801]. The fact that in practice the benefits of the tax scheme may accrue to a relatively

---

795 Temple Lang, p. 811, 812; Dubout/Maitrot de la Motte, p. 52, 54; Luja, Highlights, p. 99; Engelen, p. 206; Flett/Walkerova, p. 233.

796 Luja, Highlights, p. 99, 100; Lang, Das Gibraltar-Urteil, p. 600; See also Wattel, section 2.4;

797 Lang, Das Gibraltar-Urteil, p. 598, 600; See also Dubout/Maitrot de la Motte, p. 54.

798 See Pistone, p. 88; Flett/Walkerova, p. 233.

799 Joined Cases C-106/09 P and C-107/09 P, recital 73.

800 Luja, Highlights, p. 100.

801 Idem, recital 103.

small number of undertakings insofar does not alter this situation[802]. According to the ECJ, a measure which benefits all undertakings in a tax jurisdiction without distinction cannot constitute state aid[803].

The cumulative conditions by virtue of article 107 paragraph (1) of the TFEU may thus hardly ever be met when assessing existing IP box legislations in view of the prohibition of state aid. This implies that the more IP rights are eligible for an IP box, the more accessible the tax scheme is to undertakings in a specific tax jurisdiction and the more potential there is for distortive effects on trade and competition within the European Union, but the less selective it is under the derogation-based selectivity test[804]. The assessment of IP box regimes thus somewhat illustrates the limits of the current state aid framework.

To better contribute both to the implementation of the Europe 2020 strategy for sustainable growth as well as to budgetary consolidation, the state aid control is expected to be updated[805]. In this regard, account may also be taken of the relevant cumulation rules under article 107 paragraph (1) of the TFEU[806]. It remains to be seen whether in respect of IP boxes the Commission will elaborate a new set of guidelines for assessing the compatibility of state aid in tax matters. One may expect that the Commission sooner or later complements its general reflections by revising the notice on the application of the state aid rules to measures relating to direct business taxation published in 1998. The reflections may also include the latest case law and the own decision making of the Commission as well as the question whether the notice should be extended to indirect taxation[807].

As will be demonstrated in the following, even though a tax measure may be formally in line with state aid principles, the same tax measure may still be considered harmful under the Code of Conduct for Business Taxation[808].

---

802 Griffith/Miller/O'Connell, Effect of Patent Boxes, p. 15 et seq; Commission of the European Communities, Tax Incentives, p. 7; Notice on the Application of the State Aid Rules, p. 5 recital 14; See also Luja, Opinion, p. 283.

803 ECJ, Case C-143/99, recital 35.

804 See Commission Decision, Intangible Assets, p. 4 recital 16.

805 European Commission, EU State Aid Modernisation, p. 3 recital 5; See also EFD, Staatliche Beihilfen an Unternehmen, p. 17.

806 Commission of the European Communities, Tax Incentives, p. 7.

807 Commission of the European Communities, State Aid Action Plan, p. 16 recital 64; Commission of the European Communities, Implementation Report, p. 20, 21 recital 78.

808 Dubout/Maitrot de la Motte, p. 53; Rossi-Maccanico, Prohibited Selectivity, p. 208; Rossi-Maccanico, Commentary, p. 27; Notice on the Application of the State Aid Rules recital 30; See also ECJ, Joined Cases C-182/03 and C-217/03, recital 151; See also EFD, Staatliche Beihilfen an Unternehmen, p. 24.

3. Code of Conduct

I. Overview

EU Member States do not want to give up any tax sovereignty. By the same token, they not wish to lose any policy race to the bottom from their fellow Member States either. This is why in October 1997 the Commission suggested an approach to tackle harmful tax competition. The proposed measures largely dealt with direct tax matters, including[809]:

– The Code of Conduct for Business Taxation;

– The Commission notice on the application of the state aid rules to measures relating to direct business taxation;

– Proposals for the Savings Directive and Interest and Royalty Directive, or

– Reversion of the trend of an increasing tax burden on labour as compared to more mobile tax bases.

The amended version of the Code of Conduct for Business Taxation has finally been adopted in the conclusions of the Council of Economics and Finance Ministers ("ECOFIN") of 1 December 1997[810].

Tax competition in general may involve an overall lowering of the tax burden in order to improve the economic situation of a jurisdiction by increasing the competitiveness of its domestic business and also by attracting foreign investment. That concept plays an important role both at the level of international economic relations and within the internal market of the European Union[811].

---

809 Prendina Dutler, p. 136; Economiesuisse, Steuerstandort Schweiz, p. 36; Wattel, section 3.1; Dubout/Maitrot de la Motte, p. 51; Rossi-Maccanico, Prohibited Selectivity, p. 210; EFD, Staatliche Beihilfen an Unternehmen, p. 34; Adamczyk, p. 31 recital 65; Rossi-Maccanico, Commentary, p. 25; Lüthi, p. 841; See also; Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments; Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States; Notice on the Application of the State Aid Rules; Commission of the European Communities, Package, p. 3 recital 6 et seq; Commission of the European Communities, Tax Co-ordination, p. 5 recital 14 et seq; Commission of the European Communities, Tax Systems, p. 5 recital 3.12 et seq; 9 recital 6.5; Commission of the European Communities, EU Taxation, p. 2, 5, 13.

810 Adamczyk, p. 31 recital 66; Mors, p. 66; Council, ECOFIN Meeting Conclusions, p. 4, 5.

811 Opinion of Advocate General Jääskinen, recital 124; Council, ECOFIN Meeting

Harmful tax competition between Member States does not fall within the mechanism for controlling state aid established by the TFEU[812]. All the same, in drafting the Code of Conduct, the Member States as well as the Commission recognised that most tax measures covered by the Code of Conduct may also constitute state aid by virtue of article 107 of the TFEU[813].

As is apparent from its preamble, the Code of Conduct is a political commitment and does not affect the rights and obligations or the respective spheres of competence of the Member States[814]. The most likely but somewhat aggressive way to tackle harmful tax competition from a legal standpoint would be to engage article 116 and 117 of the TFEU. The reason is that harmful tax competition can amount to serious market distortions caused by disparities in national tax legislations to which these articles apply. Beyond, articles 116 and 117 of the TFEU do not require unanimity, but a mere qualified majority[815].

It should be emphasised the Code of Conduct does not challenge competitive tax systems with low tax rates but is rather directed to tax measures departing from the normal tax system by favouring certain mobile investments[816]. Thus, the Code of Conduct in principle targets non-selective incentives for highly mobile foreign investors not reflecting the true balance of taxes and public service[817]. To date, the Code of Conduct Group has examined over 400 tax measures, a 100 of which were found to be harmful. Those measures have been abolished or amended by the Member States[818].

II. Analysis

The present analysis refers especially to harmful tax measures covered by the Code of Conduct, but not to related areas such as the review process, action to combat tax avoidance and evasion, geographical extension or monitoring and

---

Conclusions, p. 1, 2.

812 Opinion of Advocate General Jääskinen, recital 134; Following its report "Harmful Tax Competition: An Emerging Global Issue" in 1998, the OECD as well intensified its efforts to end harmful tax practices in the form of tax havens and harmful preferential tax regimes in OECD Member countries and non-Member countries and their dependencies; See OECD Harmful Tax Competition Report.

813 Kalloe, p. 504; Mors, p. 70.

814 Wattel, section 3.1; Opinion of Advocate General Jääskinen, recital 131; Szudoczky/Van de Streek, p. 274; Rossi-Maccancico, Proposals, p. 216; Rossi-Maccanico, Commentary, p. 25; Mors, p. 67; Council, ECOFIN Meeting Conclusions, p. 3.

815 Wattel, section 3.1.

816 Adamczyk, p. 32 recital 68.

817 Wattel, section 3.1.

818 Szudoczky/Van de Streek, p. 274; See also Matteotti/Roth, p. 60.

revision, which are dealt with in paragraphs F to N of the Code of Conduct[819]. The goal principally is to illuminate the material impact of the Code of Conduct on IP box regimes.

1. Scope

When adopting the Code of Conduct, the Council acknowledged the positive effects of fair competition. The Code of Conduct was thus designed to detect measures, which excessively affect the location of business activity in the Community by being targeted only at non-residents and by providing them with a more favourable tax treatment than that which is generally available in the Member State concerned. For the purpose of identifying such harmful measures the Code of Conduct sets out the following conditions against which any potentially harmful measures are to be tested[820].

2. Harmful Tax Measures

The Code of Conduct follows a three-step process to find whether a certain measure is to be considered a harmful tax measure.

A) Step 1

The first step consists of determining whether the Code of Conduct applies to a measure at issue at all[821]. Paragraph A of the Code of Conduct thus stipulates that without prejudice to the respective spheres of competence of the Member States and the Community, the Code of Conduct concerns those measures in the field of business taxation which affect, or may affect, in a significant way the location of business activity in the Community[822]. In this respect, business activity also includes all activities carried out within a group of companies[823]. This implies that where activities are performed within a group of companies, the Code of Conduct considers those to be business activities without further analysis[824].

Moreover, the tax measures covered by the Code of Conduct include both laws or regulations and administrative practices[825]. Other tax measures subject to

819 See Council, ECOFIN Meeting Conclusions, p. 4, 5.

820 EFD, Staatliche Beihilfen an Unternehmen, p. 35 et seq; Council, ECOFIN Meeting Conclusions, p. 3.

821 Szudoczky/Van de Streek, p. 274.

822 Wegener Jessen, p. 132; Rossi-Maccanico, Prohibited Selectivity, p. 209; Rossi-Maccancico, Proposals, p. 216; Rossi-Maccanico, Commentary, p. 26; Mors, p. 67; Council, ECOFIN Meeting Conclusions, p. 3.

823 Council, ECOFIN Meeting Conclusions, p. 3.

824 Szudoczky/Van de Streek, p. 274.

825 Szudoczky/Van de Streek, p. 274; Mors, p. 67; Council, ECOFIN Meeting Conclu-

personal income tax are, however, not part of the Code of Conduct[826]. It thus covers the tax measures which may affect in a significant way the location of business activity in the Community[827]. IP box regimes are therefore likely to be regarded as a measure in the field of business taxation within the meaning of paragraph A of the Code of Conduct.

B) Step 2

The second step consists of determining whether the measure is potentially harmful[828]. Paragraph B of the Code of Conduct specifies that within the scope of paragraph A, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and are, for that reason, covered by the Code of Conduct[829]. The level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor[830]. Contrary to specific tax measures, however, there is nothing wrong with a tax system as such. It follows that like any other tax system, the Liechtenstein corporate income tax regime with a regular rate of 12.5% is not found to be potentially harmful under the Code of Conduct[831].

As will be shown in the following, it is rather unlikely that the Liechtenstein IP box qualifies as a harmful measure.

C) Step 3

The third and probably most challenging step consists of determining whether the potentially harmful measure is actually harmful[832]. When assessing whether such measures are harmful, account should inter alia be taken of[833]:

– Whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents. This feature may be referred to as offshore or ring-fencing 1 condition; or

– Whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base. This feature may be referred to as ring-

sions, p. 3.

826 Szudoczky/Van de Streek, p. 274.

827 Rossi-Maccanico, Commentary, p. 26.

828 Szudoczky/Van de Streek, p. 274.

829 Szudoczky/Van de Streek, p. 275; Mors, p. 67; Council, ECOFIN Meeting Conclusions, p. 3.

830 Szudoczky/Van de Streek, p. 275; Council, ECOFIN Meeting Conclusions, p. 3.

831 Szudoczky/Van de Streek, p. 275; Adamczyk, p. 32 recital 68.

832 Szudoczky/Van de Streek, p. 275.

833 Matteotti/Roth, p. 60; Bal, p. 574; Adamczyk, p. 32 recital 67; Szudoczky/Van de Streek, p. 275; Mors, p. 67, 68; Council, ECOFIN Meeting Conclusions, p. 3.

fencing 2 condition; or

– Whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages. This feature may be referred to as lack of substance condition; or

– Whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD; or

– Whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.

These criteria for consideration in paragraph B of the Code of Conduct are not exhaustive[834]. In addition, they partially overlap each other and mainly refer to the question whether a tax measure derogates from the reference tax system in a harmful manner[835].

By virtue of paragraph G of the Code of Conduct, the Council emphasises the need to evaluate carefully in the assessment of harmful measures the effects that the tax measures have on other Member States, inter alia in the light of how the activities concerned are effectively taxed throughout the Community[836]. It may be argued that a potentially harmful measure is only considered harmful based on this criterion where the measure results in a tax burden that is considerably lower than the average in the EU[837].

The Liechtenstein IP box regime charges relevant IP profit with an effective tax rate of only 2.5%. Other European IP box regimes generally offer similar rates[838]. It should be emphasised that real economic activity and proper economic presence is a decisive component in the commercialisation of relevant IP rights on the basis of any IP box system, which is incidentally presumed to be in place. In the light of the above it can be concluded that the Liechtenstein IP box is not a potentially harmful measure. Even if one might not agree on this conclusion, the Liechtenstein IP box is unlikely to be classifed as harmful measure under the Code of Conduct.

---

834 Wegener Jessen, p. 132; Szudoczky/Van de Streek, p. 275; Lüthi, p. 842.

835 Matteotti/Roth, p. 60; Szudoczky/Van de Streek, p. 275.

836 Szudoczky/Van de Streek, p. 275; Council, ECOFIN Meeting Conclusions, p. 3.

837 Szudoczky/Van de Streek, p. 275.

838 See Merrill/Shanahan/Tomé Gómez/Glon/Grocott/Lamers/MacDougall/Macovei/Montredon/Vanwelkenhuyzen/Cernat/Merriman/Moore/Muresan/Van Den Berghe/Linczer, p. 1667.

3. Standstill and Rollback

By virtue of paragraphs C and D, the Code of Conduct requires Member States to refrain from introducing any new harmful tax measures ("Standstill") and amend any laws or practices that are deemed to be harmful in respect of the principles of the Code of Conduct ("Rollback")[839].

4. Relation to State Aid

In order to be seen as harmful, a measure needs to fulfil at least one of the conditions listed in paragraph B of the Code of Conduct, which are not identical to those specified in article 107 paragraph (1) of the TFEU. In particular, the selectivity criterion seems not to be part of the Code of Conduct and its geographical scope is larger as it applies to dependent and associated territories that are not covered by state aid rules[840].

The Code of Conduct inter alia aims to prevent the tax bases of some Member States being eroded to the benefit of others. It thus addresses a problem with at least two Member States involved, as it is caused by a disparity or a mismatch in regulation respectively. As opposed to that, the purpose of state aid control is to prevent situations where competition and trade between businesses are concerned[841]. Accordingly, the assessment of harmful measures follows an inter-state comparison between two or more Member States while the assessment of state aids follows an intra-state comparison[842]. Moreover, state aid monitoring so far only covers specific measures and thus cannot remove distortions of competition that might result from the application of general rules in force in the Member States. It follows that state aid monitoring policy cannot substitute coordinated activities by the Member States to abolish harmful tax competition[843].

It may occur that the Commission gives priority to measures that will be subject to review under the Code of Conduct. The measures targeted jointly may be selected because of their substantial economic impact and their harmful effects

---

839 Mors, p. 67; See also Council, ECOFIN Meeting Conclusions, p. 4.

840 Wattel, section 3.2; Mors, p. 67; Commission of the European Communities, Implementation Report, p. 17 recital 64; Council, ECOFIN Meeting Conclusions, p. 5 paragraphs J, M.

841 Kalloe, p. 505; Commission of the European Communities, Implementation Report, p. 18 recital 66.

842 Wattel, section 4.2; See also Szudoczky/Van de Streek, p. 275; Council, ECOFIN Meeting Conclusions, p. 3.

843 Kalloe, p. 505; Commission of the European Communities, Implementation Report, p. 18 recital 66.

on trade and competition[844]. When reviewing a tax aid for compatibility with the internal market the Commission can further take into account its effect revealed by the Code of Conduct[845]. So far, no compatibility conditions based on the

---

844 Commission of the European Communities, Implementation Report, p. 18 recital 69.

845 The following state aid cases were also relevant for the Code of Conduct Group: Aid E 6/05, International Trading Companies and Aid E 11/05, Companies with Foreign Income, Malta (Harmful measures: ML 4 and ML 5, appropriate measures accepted by MS), Aid C 3/06, Exempt Holdings and Billionaire Holdings, Luxembourg (Harmful measure: A013), OJ L 366/2006, p. 47 (Negative decision without recovery); Aid E 7/02, Gibraltar Exempt Companies, UK (Harmful measure: B 012), OJ C 228/2005, p. 9 (Appropriate measures accepted by MS); Aid C 53/01, Gibraltar Qualifying Companies, UK (Harmful measure: B 013), OJ L 29/2005, p. 24 (Negative decision without recovery); Aid C 66/02, Gibraltar Corporate Tax Reform, UK (Measure not examined by the Group but replacing the Exempt and Qualifying Companies schemes), OJ L 85/2005, p. 1 (Negative decision - notified aid scheme); Aid C 30/02, Tax Ruling for US Foreign Sales Corporations, Belgium (Harmful measure: Z001), OJ L 23/2004, p. 14 (Negative decision without recovery); Aid C 45/01, Headquarters and Logistic Centres, France (Harmful measure: A006), OJ L 23/2004, p. 1 (Negative decision without recovery); Aid C 16/02, Trieste Financial Services and Insurance Centre, Italy (Harmful measure: B002), OJ L 91/2003, p. 47 (Negative decision without recovery); Aid C 15/02, Coordination Centres, Belgium (Harmful measure: A001), OJ L 282/2003, p. 25 (Negative decision without recovery); Aid C 54/01, Companies with Foreign Income, Ireland (Harmful measure: E007), OJ L 204/2003, p. 51 (Negative decision without recovery); Aid C 51/01, International Financing Activities, The Netherlands (Harmful measure: B004), OJ L 180/2003, p. 52 (Negative decision without recovery); Aid C 50/01, Finance Companies, Luxembourg (Harmful measure: B003), OJ L 153/2003, p. 40 (Negative decision without recovery); Aid C 49/01, Coordination Centres, Luxembourg (Harmful measure: A007), OJ L 170/2003, p. 20 (Negative decision without recovery); Aid C 48/01, Vizcaya Coordination Centres, Spain (Harmful measure: A004), OJ L 31/2003, p. 26 (Negative decision without recovery); Aid C 47/01, Control and Coordination Centres, Germany (Harmful Measure: AAM019), OJ L 177/2003, p. 17 (Negative decision without recovery); Aid C 46/01, Central Corporate Treasury Companies, France (Measure not considered harmful by the Group), OJ L 330/2003, p. 23 (Negative decision without recovery); Aid E 4/00, Taxation of Foreign Commercial and Industrial Firms Covered by Act 89/97, Greece (Harmful measure: B011), OJ C 108/2002, p. 2 (Appropriate measures); Aid E 3/00, Foreign Insurance Companies, Sweden (Harmful measure: B009), OJ C 150/2002, p. 7 (Appropriate measures accepted by MS); Aid C 55/01, Aland Island Captive Insurance Companies, Finland (Harmful measure: B008), OJ L 329/2002, p. 22 (Negative decision without recovery); Aid E 2/98, Corporate Tax, Ireland (Harmful measure: C024), OJ C 395/1998, p. 19 (Appropriate measures accepted by MS); Aid E 1/98, International Financial Service Centre and Shannon customs-free airport zone, Ireland (Harmful measures: B001 and D017), OJ C 395/1998, p.

harmful nature of a measure have been developed by the Commission. Instead, it has given priority to examining tax measures relative to MNE which constitute state aid and have substantial economic impact and harmful effects on competition and trade[846].

III. Critical acclaim

In order to facilitate the work of the Code of Conduct Group in promotion of the adoption of the principles of the Code of Conduct in third countries, the Council invited the Commission to start a dialogue with Liechtenstein and Switzerland on the application of the principles and conditions of the Code of Conduct[847].

As regards Switzerland, the Code of Conduct Group continues to take note of the state of discussions and reiterates that the aim is for Switzerland to apply the principles and criteria of the Code of Conduct. The Code of Conduct Group encourages the Commission to intensify the dialogue with Switzerland starting in September 2012, which is expected to[848]:

– Identify company tax issues that have the potential to distort business operations and opportunities, including ring-fenced tax regimes;

– Pursue possible technical solutions to the issues raised; and

– Attempt to reach agreement on implementing any agreed solution.

If satisfactory progress in this dialogue is not achieved at the end of the Cypriot Presidency, the Code of Conduct Group is willed to follow alternative approaches, including the unilateral assessment of the regimes[849].

---

15 (Appropriate measures accepted by MS); See also Council of the European Union, Code of Conduct Report November 1999, Annex C, p. 314, 315.

846 Commission of the European Communities, Implementation Report, p. 19 recital 70.

847 Council of the European Union, Code of Conduct Report June 2012, p. 8 recital 24; Council of the European Union, Code of Conduct Report December 2011, p. 5 recital 19; Kalloe, p. 507; Council of the European Union, Code of Conduct Report November 2011, p. 5 recital 19; Council of the European Union, General Secretariat Report December 2010, p. 8 recitals 28, 29; Council of the European Union, General Secretariat Report December 2010, p. 2 recital 2; Council of the European Union, General Secretariat Report November 2010, p. 2 recital 3; Council of the European Union, Code of Conduct Report November 2010, p. 2 recital 3; Council of the European Union, COREPER Report June 2010, p. 1, 2: See also Matteotti/Roth, p. 60.

848 Council of the European Union, Code of Conduct Report December 2011, p. 5 recital 20; Kalloe, p. 507; Council of the European Union, Code of Conduct Report November 2011, p. 5 recital 20.

849 EFD, Zwischenbericht USTR III, p. 7, 8; Marti/Küttel; Council of the European

With regard to Liechtenstein, without prejudice to possible future analysis of other aspects its tax system, the Code of Conduct Group agrees that at this stage the following issues should be addressed[850]:

– Full exemption for dividends and capital gains;

– Exemption for capital gains combined with a tax deductible write-down and thus the value adjustment for participations decreasing in value; and

– Special regime for private asset structures.

It must be assumed, however, that some Member States have their concerns with the Liechtenstein IP box. Being a complex topic that may not yet have fully matured in the Code of Conduct Group itself, the issue for the time being is not included in the list of problematic tax measures[851].

It is a ground for optimism in this regard that the Dutch IP box regime was notified to the Code of Conduct Group and obtained its approval[852]. In addition, the Code of Conduct Group discussed the Belgium IP box regime and agreed that there was no need for the measure to be assessed against the criteria of the Code of Conduct[853]. The German delegation dissented on that occasion and considered it to be necessary to assess the IP box legislations of Belgium, Spain and Luxembourg against the criteria of the Code of Conduct[854]. The report to the ECOFIN Council therefore held that according to paragraph G of the Code of Conduct, the effect of a tax measure on other Member States is essential in answering the question of whether a measure is harmful, in which case the measure must be abolished or not be introduced. The effect on other Member States

---

Union, Code of Conduct Report December 2011, p. 5 recital 20; Kalloe, p. 507; Council of the European Union, Code of Conduct Report November 2011, p. 5 recital 20; See also Hausmann/Roth/Krummenacher, p. 87.

850 Council of the European Union, Code of Conduct Report June 2012, p. 8 recital 25; Council of the European Union, Code of Conduct Report December 2011, p. 6 recital 21; Council of the European Union, Code of Conduct Report November 2011, p. 6 recital 21.

851 See also Nouwen, p. 12; Evers/Miller/Spengel, p. 39; NZZ, Gemeinsame Regeln, aber keine Steuerharmonisierung, p. 25; NZZ, Schäuble greift Lizenzboxen an, p. 26; Matteotti/Roth, p. 61; EFD, Zwischenbericht USTR III, p. 8.

852 Nouwen, p. 13; Prokisch, p. 224; Warson/Foriers, p. 72; Council of the European Union, Code of Conduct Report April 2007, p. 5 recital 15; See also NZZ, Gemeinsame Regeln, aber keine Steuerharmonisierung, p. 25.

853 Nouwen, p. 13; Council of the European Union, Code of Conduct Report November 2008, p. 3, 4 recitals 12, 14.

854 Idem, p. 4 recital 14 Fn 1.

can, however, only be evaluated once data about the actual use of a measure by non-resident undertakings have been provided[855].

It should thus be noted that the Commission in a statement to the Member States very recently criticised the UK patent box. According to the Commission, the UK patent box in a number of points may violate the Code of Conduct. Furthermore, it is expected that the UK patent box is on the agenda for Code of Conduct meeting of 22 October 2013[856].

In order to ensure that the Liechtenstein IP box successfully undergoes the three-step process under the Code of Conduct, the exploitation of relevant IP rights under article 55 of the Tax Act in practice must be furnished with the appropriate commercial substance[857]. Deviation from this quasi-requirement in the worst case may entail that the regime is deemed a harmful measure. In the same spirit, particular attention must be paid to the fact that the G-20 finance ministers recently called on the OECD to develop an action plan to address base erosion and profit shifting issues in a co-ordinated and comprehensive manner. The action plan in particular aims at providing countries with domestic and international instruments to better align taxing rights with economic activity[858].

Liechtenstein would further be well advised to formally recognise and adhere to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, as Switzerland has[859]. The practical application of the IP box requires complex transfer pricing analyses so that a formal adoption of this standard would be conducive to professional and fair determination of the relevant IP profit. Taking these aspects into account, the Liechtenstein IP box is rather difficult to attack even under the Code of Conduct.

Besides, the work of the Code of Conduct Group usually has not been transparent to the outside world and no public documents of its deliberations on potentially harmul tax measures are accessible in the nomal course of action[860]. This circumstance may have contributed to the fact that only few indications are available of the concrete impact of the Code of Conduct on the behaviour of companies. Most probably, however, the overall impact is likely to be signifi-

---

855 Idem.

856 Van der Made; Cahill; Legendre; Schweizerische Depeschenagentur.

857 See also OECD Revised Discussion Draft, p. 1; PwC, TAXeNEWS BEPS Comprehensive Action Plan, p. 3; PwC, The board: duty calls, p. 6; Economiesuisse, Steuerstandort Schweiz, p. 36, 37; OECD Action Plan on BEPS, p. 13, 18 action 5, p. 20 action 8; OECD Discussion Draft, p. 13 recital 37 et seq.

858 OECD Action Plan on BEPS, p. 11; See also section 4 (Conclusion) of this Part.

859 OECD TP Guidelines; KS ESTV 19 März 2004; See also OECD Action Plan on BEPS, p. 20 action 8.

860 Szudoczky/Van de Streek, p. 274.

cant, especially also in view of the obligations arising for Liechtenstein and Switzerland in respect of the potential adoption of the Code of Conduct[861].

According to Federal Councillor Merz at the time, the number of Swiss holding companies apparently increased by 60% since 1997, which is the year of adoption of the Code of Conduct. The increase may be due to the fact that some companies confronted by the impact of introduction of the Code of Conduct moved their domicile to Switzerland. Since the measures deemed harmful predominantly concerned mobile group activities, the activities most likely to have been affected by relocation at the time were likely of that sort[862].

In the last few years, the Code of Conduct Group has largely been monitoring standstill and the implementation of rollback and reported regularly to the Council[863]. At least so far, this gives rise to the impression that the intensity of the Code of Conduct Group's work decreased significantly since adoption of the tax package in June 2003. It has also been noted that fewer high-ranking representatives have taken part in the meetings of the Code of Conduct Group since then[864]. It is also rather unlikely that consensus could be reached on expanding the Code of Conduct in the present environment. A revision of the Code of Conduct would in any event require unanimity of the Ministers of Finance[865].

After the Code of Conduct allowed for the successful rolling back of harmful tax measures and preventing the introduction of new such measures, some Member States have reshaped their tax systems in a way that has opened up a smart use of tax disparities in cross-border situations[866]. Similarly to the field of state aid, a certain tendency has also been observed to deliberately design preferential tax measures so that they are not formally covered by the Code of Conduct[867]. If, in this context and in light of the principle of unanimity, no adjustments are made to the recent legal and practical developments, it must be assumed that the effectiveness of the Code of Conduct may erode[868].

Even if the Code of Conduct may not play the same role over the coming years as in the past in the design of tax competition at the European level, the question nevertheless arises whether this is true equally for Liechtenstein and for Switzerland. Already in the conception of its new tax legislation, Liechtenstein paid close attention to compliance with international and especially European norms, and critical elements have meanwhile been abolished completely, subject to

861 Mors, p. 71.
862 Idem.
863 Idem, p. 74.
864 Matteotti/Roth, p. 60; Mors, p. 74.
865 Mors, p. 74.
866 Matteotti/Roth, p. 60; Pistone, p. 86; Szudoczky/Van de Streek, p. 274.
867 Mors, p. 75.
868 Idem.

relatively short transition periods[869]. As mentioned earlier, the Code of Conduct Group has meanwhile considered Liechtenstein's new Tax Act and addressed the following points[870]:

– Full exemption for dividends and capital gains;

– Exemption for capital gains combined with a tax deductible write down and thus the value adjustment for participations decreasing in value; and

– Special regime for private asset structures.

Should it be deemed necessary in due time, adjustments in these three areas might be detrimental to legal and planning security on the whole, but may otherwise be feasibly implemented. In this light, adoption of the principles of the Code of Conduct would likely be acceptable for Liechtenstein.

The situation in this regard is different for Switzerland. The body of Union law relating to the internal market applies to Switzerland inter alia under the EU-Switzerland Free Trade Agreement of 1972. According to the Commission, this fact limits the scope for distortive tax regimes and, indeed, it challenged some Swiss business tax regimes granting benefits which were seen as state aids[871]. Thereafter, certain company tax regimes in Swiss Cantons in favour of holding, mixed and management companies are considered to constitute a form of state aid incompatible with the proper functioning of the EU-Switzerland Free Trade Agreement. In the focus of interest are thus schemes providing unfair tax advantages to companies established in Switzerland, for profits generated in the EU. This is why the Commission requests Switzerland to amend these tax schemes[872].

It is clear from the outset that the Swiss business tax regimes in part entail ring-fenced elements that are not consistent with the two ring-fencing conditions under the Code of Conduct[873]. Accordingly, the Code of Conduct would have a striking level of potential impact in view of the tax regime currently in force in

---

869 Liechtenstein Government, Report and Application No 48/2010, p. 21; Wenz, p. 87.

870 Nouwen, p. 20; Council of the European Union, Code of Conduct Report June 2012, p. 8 recital 25; Council of the European Union, Code of Conduct Report December 2011, p. 6 recital 21; Council of the European Union, Code of Conduct Report November 2011, p. 6 recital 21.

871 Economiesuisse, Steuerstandort Schweiz, p. 35; EFD, Zwischenbericht USTR III, p. 7; Commission of the European Communities, Good Governance; See also Kantonsrat/Parlament Kanton Luzern; Hausmann/Roth/Krummenacher, p. 87; Linder/Müller, Steuerliche Anreize, p. 152; Müller/Gramigna/Linder, p. 810.

872 Matteotti/Roth, p. 56, 57; Economiesuisse, Steuerstandort Schweiz, p. 35; EFD, Zwischenbericht USTR III, p. 7; Hinny, Lizenzbox des Kantons Nidwalden, p. 140; European Commission, Press Release February 2007.

873 Economiesuisse, Steuerstandort Schweiz, p. 35; See Kalloe, p. 504.

Switzerland. Unlike Liechtenstein, the application of the principles and criteria of the Code of Conduct would thus have a massive impact on the Swiss business and tax location. This circumstance can probably only be mitigated if a comprehensive Corporate Tax Reform III were to be implemented in a timely manner[874].

4. Conclusion

A considerable number of EU Member States have been introducing IP boxes over the last few years. The question therefore arises as to whether those regimes may constitute prohibited state aid within the meaning of article 107 of the TFEU or harmful tax measures within the framework of the Code of Conduct for Business Taxation. IP boxes seem challenging to tackle under the current state aid framework although they may entail distortive elements on trade and competition that may be in conflict with the principles of the internal market[875]. The assessment of IP box regimes thus illustrates the limits of the current state aid framework to some extent. It remains to be seen, however, in what way the recent Gibraltar decision of the ECJ[876] and the modernised framework of state aid will unfold in the present environment[877].

While tax measures such as IP boxes can be formally in line with state aid principles, the same tax measure may still be considered harmful under the Code of Conduct for Business Taxation[878]. On the condition of proper economic activity, however, IP boxes appear not to be straightforward in tackling under the Code of Conduct as well and are thus less likely to be classifed as a harmful measure. It should be noted that the Code of Conduct Group discussed the Belgium IP box regime and agreed that there was no need for the measure to be assessed against the criteria of the Code of Conduct[879]. At this point, however, the Ger-

---

874 See also Economiesuisse, Steuerstandort Schweiz, p. 36; Zwischenbericht USTR III, p. 7, 8.

875 See Prendina Dutler, p. 142; Pistone, p. 85, 86.

876 ECJ, Joined Cases C-106/09 and C-107/09, Press Release; ECJ, Joined Cases C-106/09 P and C-107/09 P; See also section 2 (III) (Critical acclaim) of this Part.

877 See Pistone, p. 84; European Commission, Press Release May 2012; Section 2 (I) (Overview) and (III) (Critical acclaim) of this Part.

878 Rossi-Maccanico, Prohibited Selectivity, p. 208; Rossi-Maccanico, Commentary, p. 27; Notice on the Application of the State Aid Rules recital 30; See also ECJ, Joined Cases C-182/03 and C-217/03, recital 151.

879 Council of the European Union, Code of Conduct Report November 2008, p. 3, 4 recitals 12, 14.

man delegation urged to analyse the IP box regimes of Belgium, Spain and Luxembourg against the criteria of the Code of Conduct[880]. The report to the ECOFIN Council thereupon held that the effect of a tax measure on other Member States is essential in answering the question of whether a measure is harmful. The effect on other Member States can however only be assessed once facts about the actual use of a measure by non-resident undertakings have been provided[881].

It should thus be noted that the Commission in a statement to the Member States very recently criticised the UK patent box. According to the Commission, the UK patent box in a number of points may violate the Code of Conduct. Furthermore, it is expected that the UK patent box is on the agenda for Code of Conduct meeting of 22 October 2013[882].

The majority of EU Member States have not subjected their IP box legislations to a formal state aid notification procedure with the Commission. In the worst case, treaty violation proceedings in this connection could, depending on their outcome, trigger dramatic recovery obligations for the affected state aid recipients. Such an approach appears critical, not least because the field of R&D represents a centrepiece of Europe's strategic development[883].

As taxation is at the core of Member States' sovereignty, the interaction of domestic tax rules sometimes leads to gaps and frictions[884]. What creates tax policy queries is that, because of gaps in the interaction of different tax systems, and in some cases due to the application of bilateral tax treaties, income from cross-border activities may remain untaxed or be only subject to low taxation. According to the opinion of the OECD, no or low taxation is not per se a cause of concern. But it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it[885].

The policy concerns expressed in the OECD report on harmful tax practices of 1998 as regards the race to the bottom on the mobile income tax base are thus still as relevant[886]. The race to the bottom nowadays, however, often takes less the form of traditional ring-fencing and more the form of across the board corporate tax rate reductions on particular types of income, including income from

880 Idem, p. 3, 4 recitals 12, 14 Fn 1.

881 Council of the European Union, Code of Conduct Report November 2008, p. 4 recital 14 Fn 1.

882 Van der Made; Cahill; Legendre; Schweizerische Depeschenagentur.

883 European Commission, Growth Strategy, 3 March 2010.

884 OECD Action Plan on BEPS, p. 9; See also Wattel, section 4.2; Matteotti/Roth, p. 61, 63; Economiesuisse, Steuerstandort Schweiz, p. 37; Pistone, p. 86.

885 OECD Action Plan on BEPS, p. 10; See also article 31 paragraph (1) letter (c) of the DTA Liechtenstein-Germany.

886 OECD Harmful Tax Competition Report.

the provision of intangibles. The OECD base erosion and profit shifting report ("BEPS report") aims calling for proposals to develop solutions to counter harmful regimes more effectively, taking into account factors such as transparency and substance. In furtherance of this goal, the work of the Forum on Harmful Tax Practices is supposed to be refocused to develop more effective solutions and may thus result in the involvement of the Code of Conduct Group[887].

Action 5 of the BEPS report suggests revamping the work on harmful tax practices with a priority on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes, and on requiring substantial activity for any preferential regime such as IP boxes[888]. Moreover, in order to assure that transfer pricing outcomes are in line with value creation, action 8 of the BEPS report suggests developing rules aiming to prevent base erosion and profit shifting by moving intangibles among group members. This will involve[889]:

– Adopting a broad and clearly delineated definition of intangibles;
– Ensuring that profits associated with the transfer and use of intangibles are appropriately allocated in accordance with (rather than divorced from) value creation;
– Developing transfer pricing rules or special measures for transfers of hard-to-value intangibles; and
– Updating the guidance on cost contribution arrangements.

In terms of possible consequences of the BEPS report, no fundamental change of the taxation principles should be expected. It may rather be seen as a revamp of the work carried out under the OECD 1998 report on harmful tax competition. The old criteria of the report are low tax rate, ring-fencing, lack of transparency and lack of effective exchange of information and are still in place, but are now added by the requirement of substantial activity. The BEPS report essentially is a matter of ensuring adequate commercial substance at the purported place of economic activity and pressure will thus increase on structures and transactions without relevant substance as well as on structures where tax savings are based on international differences in terms of qualification. Accordingly, functions should be performed by key personnel and undertakings should necessarily bear associated costs and risks[890].

Against this backdrop, it can be conjectured that selected IP box regimes will rather be subjected to an assessment under the Code of Conduct in due time

887 Nouwen, p. 3; OECD Action Plan on BEPS, p. 17; See also Schelling, p. 44; Chérot, p. 163.
888 Michel, Tax News Service BEPS; OECD Action Plan on BEPS, p. 18 action 5.
889 OECD Action Plan on BEPS, p. 20 action 8.
890 Michel, Tax News Service BEPS; Jäggi; PwC, The board: duty calls, p. 6.

instead of an assessment under the state aid framework. For the sake of completeness it should be mentioned that any form of R&D tax incentive, including IP boxes, must be compatible not only with state aid principles, but also with the fundamental freedoms[891].

[891] Bal, p. 574; Bal/Offermanns, p. 169; Lang, Steuerrecht, p. 570; Linder/Müller, Steuerliche Anreize, p. 149; For example, see: ECJ, Case C-169/08, recitals 49, 64; ECJ, Case C-248/06; ECJ, Case C-39/04; ECJ, Case C-254/97.

Part 3: Liechtenstein IP Box Regime

1. Introduction

So far only few detailed academic sources are available on the new Liechtenstein Tax Act, which entered into force on 1 January 2011.

The commentary below analyses the Liechtenstein IP box regime in light of case law, academic literature and legal interpretative materials. Also taken into account were EU documents and other materials relating to the law governing state aid as well as the Code of Conduct for Business Taxation.

The analysis was also performed on the basis of the IP box regimes of other jurisdictions. Firstly, the Benelux countries were taken into account, since their IP box legislations served as the actual model for the design of the Liechtenstein IP box. Secondly, the detailed UK IP box regime entering into force in April 2013 was drawn upon for interpretative guidance to the extent such guidance might meaningfully be supported by the legal foundations in Liechtenstein, even though it has no legal significance per se. Where required the use of the extensive and highly complex UK IP box legislation and the associated Technical Notes closely follow these specifications.

Moreover, the analysis extends to possibilities for improving the Liechtenstein IP box regime even where such improvements are not currently reconcilable with the legal foundations. The analysis thus includes recommendations for adjustments to the legislative foundations.

2. Commentary

I. Overview

Effective 1 January 2011, article 55 of the Law of 23 September 2010 on National and Municipal Taxes ("Tax Act") introduced a provision granting a tax deduction of 80% for income from relevant IP rights, thus reducing the effective tax rate on income derived from relevant IP rights.

As early as in its Lisbon Agenda, the European Union stressed the significance of R&D for the future prosperity of Europe. Especially for small jurisdictions

like Liechtenstein, which is poor in natural resources, it is vitally important to safeguard the future for the long term through R&D by protecting and realising the innovative achievements thereof[892].

To take account of the European trend, Liechtenstein adopted an IP box regime intended to keep the business location attractive and competitive[893].

It should be emphasised that the industrial member companies of the Liechtenstein Chamber of Commerce and Industry ("LIHK") invested more than CHF 300 million in staff and material expenditures for R&D in 2007. That corresponds to a share of more than 7% of the gross domestic product of Liechtenstein[894]. Due to this fact, an amount of CHF 8.770 per capita is spent on R&D in Liechtenstein each year. This quota exceeds the quotas of all OECD countries, which average approximately is 2.3%. The main export product of Liechtenstein is thus research-intensive and based on innovative high technology. Many Liechtenstein undertakings are world market leaders in their respective niches[895].

Activities relating to technical property rights, as seen in the number of applications filed with the European Patent Office ("EPO"), have likewise been remarkably intense. Applicants domiciled in Liechtenstein, for instance, submitted more patent applications in 2010 than applicants domiciled in Turkey, Poland, the Czech Republic or Portugal[896].

The IP box legislation of 23 September 2010, as amended, was published in the Liechtenstein Law Gazette of 18 November 2010. The EFTA Surveillance Authority ("ESA") confirmed article 55 of the Tax Act not to be selective and thus not to infringe state aid law[897].

The Constitutional Court, however, voided article 33 paragraph (1) of the Tax Ordinance shortly afterwards, finding it unconstitutional and unlawful[898]. The Court justified its decision essentially with reference to the fact that article 55 of

---

892 Bal, p. 573, 574; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 16; Lehmann/Zanettin, p. 10; Wanger, Kommentar Steuergesetz, p. 180; Liechtenstein Government, Report and Application No 48/2010, p. 141.

893 Wanger, Kommentar Steuergesetz, p. 180.

894 Government Spokesperson's Office, p. 7; See also Müller/Wenger/Linder, Tax Incentives, p. 4.

895 Government Spokesperson's Office, p. 7; For Switzerland, see Linder/Müller, Steuerliche Anreize, p. 146.

896 Harmann, Immaterialgüterrechte in Liechtenstein, p. 1.

897 Liechtenstein Government, Report and Application No 123/2011, p. 22, 23; EFTA Surveillance Authority, OJ C 278, p. 4.

898 See also Maute/Senn/König, p. 418; Section 3 (II) (1) (Rights to which the IP box applies) of this Part.

the Tax Act did not envisage a material restriction of IP rights. Such a restriction would have to be undertaken by the legislator itself and not merely by way of a Government ordinance[899]. As a result, the Liechtenstein legislator incorporated the entire content of the rule set out in article 33 of the Tax Ordinance into article 55 of the Tax Act effective 1 January 2012[900].

On the same occasion, the catalogue of relevant IP rights applicable to the IP box was expanded to include software as well as technical and scientific databases created or acquired on or after 1 January 2011[901]. This is why the amended rule governing the IP box, again, required notification to the ESA[902]. On 12 December 2012 the authority found article 55 of the Tax Act to be a general measure and thus not to constitute state aid within the meaning of EEA law[903].

An outline summary of the commentary's structure is set out below:

What is the IP box and who can elect for it?	Section 1 specifies:	– Annual election by taxpayers for each relevant IP right for IP box – Amount of tax deduction – Application of IP box to relevant taxpayers subject to personal income tax and corporate income tax – Application of IP box limited to IP rights created or acquired from 1 January 2011
What is a relevant taxpayer?	Section 2 specifies:	– Meaning of relevant taxpayer – Definition of relevant IP rights to which the IP box applies – Development condition – Ownership condition

899 Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17, 18; Lehmann/Zanettin, p. 10; Liechtenstein Government, Report and Application No 123/2011, p. 4; Roth, p. 62.

900 Landtag des Fürstentums Liechtenstein, Landtag 2012; Liechtenstein Government, Statement No 21/2012, p. 8; Liechtenstein Government, Report and Application No 123/2011, p. 4.

901 Liechtenstein Government, Statement No 21/2012, p. 14.

902 Liechtenstein Government, Report and Application No 123/2011, p. 23.

903 EFTA Surveillance Authority, State Aid; EFTA Surveillance Authority, 480/12/COL, p. 7 recital 28.

How are the relevant IP profits ("RP") calculated?	Section 3 specifies: **Main calculation approach**	– Application of tax deduction to relevant IP profits ("RP") and not relevant IP income ("RIPI") – Determination of basis of assessment of tax deduction based on cost accounting ("Spartenrechnung") – Subject to tax condition – Specification of associated tax-relevant expenses – Implications of excess tax deduction
	Section 3 (B) to (E) specifies: **Relevant IP income ("RIPI")**	– Income that can be RIPI and from what sources and items – Other income deemed to be RIPI based on the concept of notional royalty – Income that cannot be RIPI – Identification of RIPI arising from mixed agreements
What happens to income while the relevant IP right is pending?	Section 3 (F) specifies: **Relevant IP right pending income**	– Income qualifies for the IP box from the day of grant of a relevant IP right – Availability of additional relief in order to recognise any RP prior to the grant of a relevant IP right for the tax year in which the relevant IP right is granted
How are elections made, what happens for partnerships or cost sharing arrangements ("CSA") etc?	Sections 4 to 6 specify:	– Recapture rule – Anti-avoidance rules – Mechanics of electing for the IP box and revocation – Rules for partnerships and cost sharing arrangements – Transfer pricing aspects – Double taxation relief

II. Analysis

In the Report and Application No 48/2010 the Government expresses its view that in particular the domestic industrial sector must remain highly innovative in terms of its R&D possibilities[904].

Especially for small jurisdictions like Liechtenstein, which is poor in natural resources, technological and scientific R&D is a lifeline for economic advantage and growth. To take account of the European trend, the special deduction of 80% set out in article 55 (Deduction for income from IP rights) of the Tax Act creates an output tax incentive intended to keep the business location attractive[905].

Against this backdrop, it is assumed that the legislator intended to create a sustainable and competitive IP box regime, which gains a high international recognition[906].

This commentary, which in some parts has been strongly characterised by the UK IP box legislation, contains key concepts from a national tax perspective. A failure to positively consider these concepts would entail a competitive disadvantage of the Liechtenstein IP box as compared with the IP boxes of the UK and the Benelux countries.

By the same token, the commentary is guided by the original intent to use tax incentives to promote technological and scientific R&D activities and the achievements thereof. No concepts are advocated which would undermine or threaten to undermine material tax law in a harmful way[907].

1. Reduced taxation of profits from relevant IP rights

A) Election for special treatment of profits from relevant IP rights

By virtue of article 55 paragraphs (1) and (2) of the Tax Act, the IP box regime establishes a partial exemption of 80% of the relevant IP profit ("RP"). The taxable base for the tax deduction is the income from the use, realisation or sale of the relevant IP rights, less associated tax-relevant expenses, including write-downs on relevant IP rights, even where the expenses arose over several assess-

904 Liechtenstein Government, Report and Application No 48/2010, p. 47.

905 Wanger, Kommentar Steuergesetz, p. 180; Liechtenstein Government, Report and Application No 48/2010, p. 141.

906 See also Müller/Gramigna/Linder, p. 804.

907 See Liechtenstein Government, Report and Application No 48/2010, p. 141.

ment periods[908]. It follows that only 20% of the RP is taxable at the regular income tax rate.

Article 61 of the Tax Act sets the corporate income tax at 12.5% of the taxable net corporate income. In the case a corporate taxpayer this implies that the profit in respect of relevant IP rights is subject to an effective tax rate of only 2.5%. Furthermore, the availability of additional tax deductions, such as notional interest deduction, time unlimited losses carried forward or group taxation, can lower the overall effective tax rate to nil[909].

For a relevant taxpayer the aggregate amount of the tax deduction in respect of profits from relevant IP rights for a tax year is:

AD = (RP – C) x PD

where:

– AD is the amount of the tax deduction;

– RP is the relevant IP profit;

– C is the correction from previous tax years; and

– PD is the fixed-rate percentage of the tax deduction.

It should be noted that C generally equals the relevant IP losses of previous tax years that so far have not been offset with RP[910]. With respect to PD, by virtue of article 55 paragraph (1) of the Tax Act this figure is fixed at 80%. Taxpayers that elect into the IP box thus alter the way they calculate taxable profits for each tax year provided that they are relevant taxpayers for IP box purposes.

Notwithstanding the absence of an express provision in article 55 of the Tax Act, the IP box is optional for taxpayers engaged in activities related to the commercialisation of relevant IP rights. The IP box only applies to the extent that the income and expenses associated with the commercialisation of such rights are recognised in the statutory accounts of the taxpayer or deemed a commercially justified expense under domestic tax law.

The application of the IP box for a tax year can further only be considered where in respect of a relevant IP right the aggregate of relevant IP income ("RIPI") for

---

908 Felder, Country Survey, chapter 1, 1.3.3; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 19; Lehmann/Zanettin, p. 10, 11; Liechtenstein Government, Report and Application No 123/2011, p. 7, 23; Hosp/Langer, Steuerstandort Liechtenstein, p. 113; Roth, p. 62; Wanger, Kommentar Steuergesetz, p. 180; Liechtenstein Government, Report and Application No 48/2010, p. 75, 134.

909 Lehmann/Zanettin, p. 10; Vils/Bürkler, p. 2; See also Müller/Gramigna/Linder, p. 809.

910 Steuerverwaltung des Fürstentums Liechtenstein, Wegleitung juristische Personen, p. 18.

the tax year exceeds the corresponding associated tax-related expenses. The expenses to be taken into account may arise over several prior assessment periods[911].

Subject to the condition that in respect of a relevant IP right there is positive income or RP respectively, the option whether to apply for the IP box can be exercised from the tax year, in which the relevant IP right has been created or acquired.

Taking into account these aspects, it is in principle up to the taxpayer when to apply for the IP box in respect of the relevant IP right. Election to apply the IP box is made annually with the filing of the corporate income tax return. The tax deduction figure is calculated by using form G, which is an integral part of the corporate income tax return. This form has to be included every year when filing the corporate income tax return[912]. It is possible to revoke the application of the IP box in respect of a relevant IP right that has once been brought into its scope. This can simply be done by not requesting the tax measure in respect of the relevant IP right when filing form G for the tax year or not filing form G at all. Beyond the use of form G, a relevant taxpayer is recommended to consult the tax authorities regarding the necessary documentation when first applying for the IP box in respect of the relevant IP right[913].

It should be emphasised that according to the guidelines of the tax authorities, the tax deduction under the IP box is calculated separately for each relevant IP right[914]. This implies that the IP box may be applied to one relevant IP right, whereas another relevant IP right may remain outside the scope of the regime. Articles 93, 94 and 97 of the Tax Act require the taxpayer to prove eligibility for the tax deduction under the IP box. This is why the proof of fulfilment whether article 55 of the Tax Act applies is incumbent on the taxpayer.

Article 16 paragraph (6) of the Tax Act stipulates that article 55 of the Tax Act not only applies to the determination of corporate profit, but also to the determination of the agricultural and forestry profit and to the determination of any profit arising from self-employment in areas such as commerce, trade and industry. The IP box thus applies to taxpayers, which are either subject to personal or corporate income tax.

Accordingly, it seems appropriate to use the term “taxpayer” when describing the different provisions of article 55 of the Tax Act. The term “taxpayer” covers persons that are subject to restricted and unrestricted tax liability. This implies that the IP box extends to resident and non-resident individuals, as well as to

911 Idem.
912 Idem.
913 Idem.
914 Idem.

resident corporate entities and permanent establishments of non-resident companies, carrying on a business in Liechtenstein. It follows that the IP box also applies to RIPI derived both from the exercise of a liberal profession and a partnership. Relevant IP rights belonging to the private wealth of a taxpayer, however, do not fall within the scope of the regime.

Article 55 paragraph (1) subparagraph (a) of the Tax Act stipulates that patents, utility models, trademarks and designs have to be registered in a domestic, foreign or international register[915]. It should be noted that this requirement does not apply in respect of software as well as technical and scientific databases.

It should further be emphasised that unlike other jurisdictions eligibility to the IP box is not subject to a development condition. Like other jurisdictions, however, article 55 paragraph (1) of the Tax Act limits the IP box benefits to IP rights created or acquired from 1 January 2011[916].

2. Relevant taxpayers

A) Meaning of relevant taxpayer

For the purposes of article 55 of the Tax Act, a taxpayer is a "relevant taxpayer" for a tax year where:

– The taxpayer is subject to personal or corporate income tax under the Tax Act;

– The taxpayer holds at least one relevant IP right or a license in respect of the relevant IP right;

– The taxpayer satisfies the ownership condition[917]; and

– The taxpayer in respect of the relevant IP right or the license is entitled to elect for the IP box.

A relevant IP right can be owned solely or jointly on the basis of ownership, beneficial rights or usufruct[918].

Moreover, if a taxpayer:

– Disposes of a relevant IP right but receives income from the disposal only

---

915 See also OECD Revised Discussion Draft, p. 20 recital 67; OECD Discussion Draft, p. 13 recitals 31, 32.

916 Felder, Country Survey, chapter 1, 1.3.3; Liechtenstein Government, Statement No 21/2012, p. 8, 23; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17; Lehmann/Zanettin, p. 10; Liechtenstein Government, Report and Application No 123/2011, p. 24; Hosp/Langer, Steuerstandort Liechtenstein, p. 113; Wanger, Kommentar Steuergesetz, p. 182.

917 See section 2 (II) 2 (D) (Ownership condition) of this Part.

918 Idem.

in a later tax year; or

– Receives income as a result of infringement of a relevant IP right but not until after the expiry of the IP right;

then a taxpayer is a relevant taxpayer for the purposes of the IP box as well, irrespective whether it satisfies the ownership condition or in respect of the IP right it is entitled to elect for the IP box or not. In these situations the taxpayer is eligible for the IP box and is taxed in the appropriate tax year on income, which has been derived from an event at that earlier time concerning a then relevant IP right. Other than in the situations referred to above for income to qualify for the IP box, the taxpayer must hold a relevant IP right or a license in respect of such right at the time the income is recognised for the purposes of the IP box regime[919].

B) Rights to which the IP box applies

According to a broad definition by the OECD, the term "intangible" is intended to address something which is not a physical or financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances[920].

It may be argued, however, that the question of intangibility has nothing to do with qualification as a financial asset. Even financial assets should be able to be intangibles. Moreover, depending on the way they are used and considered, property rights should certainly also be capable of qualifying as financial assets[921].

For the qualification as intangible it is irrelevant whether the intangible asset is recognised for accounting purposes or whether it is legally, contractually or otherwise protected[922].

---

919 For example, income from stocks of goods protected by a utility model produced before the corresponding utility model expires and which are not sold until after expiry of that utility model is, in principle, not recognised as RIPI.

920 See OECD Revised Discussion Draft, p. 14 recital 40; Rouenhoff, p. 654; OECD Discussion Draft, p. 7 recital 5 et seq; European Commission, EU Single Market, recital 8.

921 See OECD Revised Discussion Draft, p. 14 Fn 1: It has been clarified that a financial asset is any asset that is cash, an equity instrument, a contractual right or obligation to receive cash or another financial asset or to exchange financial assets or liabilities or a derivative. Examples include bonds, bank deposits, stocks, shares, forward contracts, futures contracts, and swaps.

922 See OECD Revised Discussion Draft, p. 14 recitals 41, 42; Rouenhoff, p. 654, 655; OECD Discussion Draft, p. 7 recitals 6, 7.

Intangibles can generally be categorised in commercial intangibles and marketing intangibles, and be differentiated between soft intangibles and hard intangibles, between routine and non-routine intangibles and between other classes and categories of intangibles[923].

Commercial intangibles include patents, utility models, know-how, designs, and models that are used for the production of a good or the provision of a service, as well as intangible rights that are themselves business assets transferred to customers or used in the operation of business, such as for example software[924].

It should be noted that commercial intangibles other than marketing intangibles are referred to as trade intangibles. Trade intangibles often are created through risky and costly R&D activities, and the developer generally tries to recover the expenditures on these activities in order to receive a return thereon through product sales, service contracts or license agreements[925].

Marketing intangibles are a special type of commercial intangible with a somewhat different nature[926]. Marketing intangibles include trademarks and trade names that aid in the commercial exploitation of products or services, customer lists, distribution channels, and unique names, symbols or pictures that have an important promotional value for the product concerned[927].

It can sometimes be difficult to make a clear distinction between income from trade and marketing intangibles. In research-oriented industries, for instance, the trademark and trade name are important elements in securing sufficient income to reward past research and undertake new projects, particularly as patents are time-limited. Building up brand confidence and trademark recognition is thus vitally important to make sure that the product continues to be commercially viable after the patent expires or even in cases where no patent was developed[928].

Article 55 paragraph (1) of the Tax Act lists the IP rights which are relevant IP rights for the purposes of the IP box. The catalogue of relevant IP rights includes

---

923 OECD Revised Discussion Draft, p. 16 recital 49; OECD Discussion Draft, p. 8 recital 13.

924 OECD TP Guidelines, p. 192 recital 6.3, See also OECD Revised Discussion Draft p. 17 recital 53 et seq; Rouenhoff, p. 654; OECD Discussion Draft, p. 9 recital 15 et seq.

925 OECD TP Guidelines, p. 192 recital 6.3; See also Hausmann/Roth/Krummenacher, p. 88.

926 OECD TP Guidelines, p. 192 recital 6.3.

927 OECD TP Guidelines, p. 192 recital 6.4; See also Hausmann/Roth/Krummenacher, p. 88.

928 OECD TP Guidelines, p. 195 recital 6.12; See also Gilmore; Intel Inside Program; Zimmermann.

the following IP rights, which must be created or acquired from 1 January 2011[929]:

- Patents, utility models, trademarks and designs, provided that they are protected by entry in a domestic, foreign or international register; and
- Software as well as technical and scientific databases.

The provision provides no autonomous definition of the term "intellectual property rights" or "intellectual property" alternatively[930]. The situation in Luxembourg and the Netherlands is quite similar in this regard[931]. As article 2:365 of the Dutch Civil Code ("Burgerlijk Wetboek") enumerates a list of costs that arise in the development of an intangible asset, an intangible asset as referred to in article 12b paragraph (1) of the CITA can be described as a value that arises through R&D expenditure or through the acquisition of IP licenses and rights[932].

Despite of the fact that the Luxembourg IP circular does not provide such definition either, it identifies a common element in respect of the relevant IP rights. A relevant IP right covered by article 50bis paragraphs (1) and (3) of the ITA confers to its holder the exclusive right to use a monopoly, which disallows a third party to use any such right on legally protected territory. The holder of a relevant IP right can decide to exploit the right himself, whether exclusively or not, or to use it by either transferring or licensing the relevant IP right to one or several licensees[933].

It can be argued whether a relevant IP right indeed confers to its holder the exclusive right to use a monopoly disallowing a third party to use any such right on legally protected territory. Instead a relevant IP right confers to its holder the exclusive legal and commercial right to use the relevant IP right, as well as the right to prevent others from using or otherwise infringing the relevant IP right.

---

929 Maute/Senn/König, p. 418; Felder, Country Survey, chapter 1, 1.3.3; Liechtenstein Government, Statement No 21/2012, p. 4, 14; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17; Lehmann/Zanettin, p. 10; Liechtenstein Government, Statement No 21/2012, p. 23; Liechtenstein Government, Report and Application No 123/2011, p. 4, 7, 8, 22, 24; Hosp/Langer, Steuerstandort Liechtenstein, p. 113; Roth, p. 62; Wanger, Kommentar Steuergesetz, p. 181.

930 Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17; See also OECD Revised Discussion Draft, p. 14 recital 40; OECD Discussion Draft, p. 7 recital 5; Müller/Gramigna/Linder, p. 808.

931 See O'Neal/Macovei-Grencon/Van Eysinga, p. 3; Administration des contributions directes, Circulaire, p. 4; Munting/Brassem, p. 1482 et seq; Paardekooper/Brassem/Gommers, p. 2, 5.

932 See Prokisch, p. 220.

933 See Loyens & Loeff, p. 1; O'Neal/Macovei-Grencon/Van Eysinga, p. 11; Administration des contributions directes, Circulaire, p. 14.

These rights may be granted for a specific geographic area and/or for a specific period of time[934].

In principle, the catalogue of relevant IP rights as laid down in article 55 paragraph (1) of the Tax Act is exhaustive[935]. While Belgium[936], Luxembourg[937], the Netherlands[938] and the UK[939] consider supplementary protection certificates to be relevant IP rights under their IP box legislations, article 55 paragraph (1) of the Tax Act does not refer to such form of property right. Moreover, at no point reference was made to supplementary protection certificates during the parliamentary process.

In Liechtenstein patented inventions for pharmaceuticals and agrochemicals are subject to Swiss federal approval before they can be marketed. As it may take up to ten years to get approval, supplementary protection certificates purpose to extend the period of protection provided by patents for a maximum of five more years. Such certificates thus recognise the fact that in these industries the lengthy regulatory approval process reduces the effective lifespan of patents[940].

According to article 2 of the Supplementary Agreement of 2 November 1994 with Switzerland to the Patent Treaty of 22 December 1978 ("Supplementary Agreement")[941], supplementary protection certificates granted by Switzerland under the provisions applicable therein also apply to Liechtenstein, subject to article 3 paragraph (2) and article 4 of the Supplementary Agreement. It follows that supplementary protection certificates, including paediatric extensions[942], for IP box purposes can be seen as sui generis, patent-like IP rights. Unlike in other jurisdictions it appears that the Liechtenstein legislator has simply omitted to complement the catalogue of relevant IP rights by supplementary protection certificates.

Other rights than referred to in article 55 paragraph (1) of the Tax Act, such as copyrights other than software, trade names, know-how, technical information,

---

934 See OECD Revised Discussion Draft, p. 20 recital 68; OECD Discussion Draft, p. 12 recital 31; Raysman/Pisacreta/Adler.

935 Liechtenstein Government, Report and Application No 123/2011, p. 24.

936 See Hendrickx, p. 15; Warson/Glaes, p. 320; Van den Berghe/Kelley, p. 375; Warson/Foriers, p. 72; Cops/De Haen, p. 1.

937 See Schaffner/Manhaeve/Trouille, p. 382; O'Neal/Macovei-Grencon/Van Eysinga, p. 14; Administration des contributions directes, Circulaire, p. 17.

938 See article 12b paragraph 3 of the CITA; Sporken/Gommers, The Patents Box, p. 198.

939 See HM Revenue & Customs, Draft Legislation, p. 13 recital 2.23; HM Treasury/HM Revenue & Customs, Consultation, p. 10 recital 2.7.

940 Eidgenössisches Institut für Geistiges Eigentum, SPC.

941 Liechtenstein Law Gazette, Year 1995, No 80, published on 28 April 1995.

942 Eidgenössisches Institut für Geistiges Eigentum, Paediatric Extension.

trade secrets, regulatory data or plant variety rights, in principle, are not eligible for purposes of the IP box[943]. It may be argued that these rights have a weaker or more variable relation to technological and scientific activity and also no parallel regulatory process of independent examination, which would provide clarity that such IP rights create technological innovation[944].

Despite this reservation, following the UK and Belgium IP box concepts and the opinion of a number of authors in Luxembourg, the Liechtenstein IP box should also be available to other rights such as know-how, trade secrets or technical information on the condition that such rights are inherently linked to relevant IP rights and inseparable from it[945]. As far as possible this rationale should also apply to the handling of bundled licenses for IP box purposes. This perspective is supported by the fact that the Tax Ordinance initially excluded other rights such as know-how from the scope of article 55 of the Tax Act. After article 33 paragraph (1) of the Tax Ordinance has been abolished by decision of the Liechtenstein Constitutional Court of 1 July 2011, when reintegrating its contents to article 55 of the Tax Act the legislator has refrained from referring to the refusal of other rights such as know-how[946].

Apart from that, a relevant taxpayer for IP box purposes can acquire relevant IP rights from affiliated or non-affiliated parties. It is irrespective of how such rights are acquired, this can for instance be done by way of sale, contribution in kind or otherwise[947]. Licenses in respect of relevant IP rights are not required to be granted for the entire duration of those property rights, nor is it prohibited that licenses extend beyond the duration of relevant IP rights. In addition, the IP box benefits are also delivered where a taxpayer acquires relevant IP rights which it licensed formerly.

---

943 Felder, Country Survey, chapter 1, 1.3.3; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17; Liechtenstein Government, Report and Application No 123/2011, p. 7, 8; Hosp/Langer, Steuerstandort Liechtenstein, p. 113; For a critical opinion, see: Nicholls/Smith; Roth, p. 62.

944 See HM Treasury/HM Revenue & Customs, Consultation, p. 10 recital 2.9.

945 For UK, see HM Revenue & Customs, Finance Bill 2012, p. 36 recital 3.39; HM Revenue & Customs, Draft Legislation, p. 22 recital 3.29; For Belgium, see: Warson/Glaes, p. 322; Springael/Van de Velden, p. 5; For Luxembourg, see: Muntendam/Chiarella, p. 229; See also OECD Revised Discussion Draft, p. 31 recital 119; OECD Discussion Draft, p. 20 recital 74; Merrill/Shanahan/Tomé Gómez/Glon/Grocott/Lamers/MacDougall/Macovei/ Montredon/Vanwelkenhuyzen /Cernat/Merriman/Moore/Muresan/Van Den Berghe/Linczer, p. 1674; Müller/Gramigna/Linder, p. 808.

946 See also Maute/Senn/König, p. 418.

947 See also Müller/Gramigna/Linder, p. 808.

Where for a tax year a valid relevant IP right has been created or acquired by a relevant taxpayer, the benefits of the IP box for the tax year can be claimed immediately. There is no requirement for a certain period to elapse beforehand.

Article 55 paragraph (1) letter (a) of the Tax Act further stipulates that the IP box in respect of relevant IP rights is not restricted to domestic registers only. Extracts from foreign or international registers are eligible for the purposes of the IP box as well[948]. For practical, administrative and budgetary motives, a retroactive effect of the IP box in respect of relevant IP rights before its entry into force has been excluded by the legislator[949]. Accordingly, article 55 paragraph (1) of the Tax Act holds that the IP box only applies to relevant IP rights created or acquired from 1 January 2011[950].

Against this backdrop, the date where an IP right has been created or acquired by a taxpayer is instrumental in determining whether the IP right falls within the scope of article 55 of the Tax Act. The date of creation of a relevant IP right generally corresponds to the date on which the application for the relevant IP right was filed[951]. The taxpayer must be able to document the existence of the register entry for each relevant IP right[952]. Since copyrights as well as technical and scientific databases are not listed in a register, it is up to the taxpayer to provide evidence of when such relevant IP right has been created[953].

Article 51 (Delimination of the right of taxation) paragraph (3) of the Tax Act lays down that if the domestic right of taxation with respect to profit arises from the sale or use of an asset, the asset is deemed to be acquired or used at the arm's length price. Where applicable, the date where the relevant IP right has been acquired corresponds to the date where the domestic right of taxation arises.

On the condition that certain requirements are met, according to article 52 of the Tax Act the transfer of a relevant IP right may be deemed as a tax-neutral restructuring transaction. One of these requirements set out in paragraph (1) of the said article is that the undertaking that receives the relevant IP right must con-

---

948 Felder, Country Survey, chapter 1, 1.3.3; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 19; Wanger, Kommentar Steuergesetz, p. 181; See also Müller/Gramigna/Linder, p. 808.

949 Liechtenstein Government, Report and Application No 123/2011, p. 24.

950 Felder, Country Survey, chapter 1, 1.3.3; Liechtenstein Government, Statement No 21/2012, p. 8, 23; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17; Lehmann/Zanettin, p. 10; Liechtenstein Government, Report and Application No 123/2011, p. 24; Wanger, Kommentar Steuergesetz, p. 182.

951 Liechtenstein Government, Report and Application No 123/2011, p. 24; See also

952 Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17.

953 See also OECD Revised Discussion Draft, p. 20 recitals 67, 68; OECD Discussion Draft, p. 13 recitals 31, 32.

tinue the values previously relevant to the corporate income tax. In this case, the date where a relevant IP right has been created or acquired in principle corresponds to the date on which the undertaking who contributes the relevant IP right has filed the application for such right[954].

Furthermore, if a tax-exempt or tax-privileged undertaking waives or loses its tax status and the domestic or foreign undertaking becomes subject to unrestricted tax liability in Liechtenstein, then such adjustment in principle has no impact on the date where the relevant IP right has been created or acquired. The same rationale in principle also applies where a relevant IP right is shifted to a domestic permanent establishment by a domestic or foreign undertaking or where a non-resident undertaking becomes a Liechtenstein resident merely for tax purposes[955].

a) Patents

In accordance with article 55 paragraph (1) letter (a) of the Tax Act, the IP box applies to patents[956].

With the exception of patent law and plant variety rights, which are applicable jointly with Switzerland, all other aspects of intellectual property in Liechtenstein have been governed nationally since 1928, including in the Trademark Protection Act of 12 December 1996, the Design Act of 11 September 2002 and the Copyright Act of 19 May 1999[957]. Pursuant to the Patent Treaty of 22 December 1978 and the Supplementary Agreement on the Protection of Invention Patents of 2 November 1994 with Switzerland as well as the European Patent Convention of 5 October 1973, which Liechtenstein joined, patents for Switzerland and Liechtenstein are granted uniformly by the Swiss Federal Institute of Intellectual Property or the European Patent Office. For this reason uniform law applies to both territories with, in principle, the same effects. In international proceedings the two countries can be named only jointly so that no isolated protection can be realised for either of the two territories. The accession of Liechtenstein to the EEA resulted in certain changes to this uniformity, but the uni-

954 See Loyens & Loeff, p. 2; O'Neal/Macovei-Grencon/Van Eysinga, p. 13, 14; Administration des contributions directes, Circulaire, p. 16 to 18.

955 Idem.

956 Felder, Country Survey, chapter 1, 1.3.3; Felder/Harmann, p. 75; Liechtenstein Government, Statement No 21/2012, p. 23; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17; Lehmann/Zanettin, p. 10; Liechtenstein Government, Report and Application No 123/2011, p. 4, 7, 22, 24; Hosp/Langer, Steuerstandort Liechtenstein, p. 113; Liechtenstein Government, Statement No 83/2010, p. 45; Liechtenstein Government, Report and Application No 48/2010, p. 141.

957 Harmann, Immaterialgüterrechte in Liechtenstein, p. 9; Gey-Ritter, p. 84.

formity largely persists and the changes concern only special aspects that are not relevant to taxation[958].

By virtue of articles 1, 7 and 8a of the Swiss Patent Act of 25 June 1954 ("Patent Act"), as amended, a patent may be defined as a protective right for a technical invention. An invention in the legal sense is a solution to a technical problem. Inventions include products and processes and are patentable where an invention is novel, non-obvious to a person skilled in the art and commercially applicable[959].

Articles 8 and 14 of the Patent Act further stipulate that the owner of a patent is provided with the exclusive right to prevent others from commercially using an invention for up to 20 years. This implies that during this period the patent owner can prohibit others from producing, using, selling or importing the invention without permission. Against this backdrop, a patent owner may recapture the funds invested in the development of the invention and possibly make a profit. In return, the patent owner is required to provide an exact description of the invention and to disclose it to the public. This provides researchers with an essential source of information for further development and innovation[960]. Due to these disclosure requirements when filing a patent, which are based on article 49 et seq. of the Patent Act, the IP box may not be a suitable option where discretion is required regarding a new technology[961].

Moreover, in accordance with article 41 of the Patent Act, as of the fifth year renewal fees are due which must be paid in order to maintain the validity of a patent. After 20 years, the invention of the patent becomes common property and may be used by third parties.

aa) Utility models

Utility models, also referred to as "short-term patents", do not exist either in Liechtenstein or Switzerland. These property rights do however exist in Germany and Austria, for instance, though the registration is made without an examination of the content and the maximum term of protection is shorter than that of patents[962].

---

958 Harmann, Immaterialgüterrechte in Liechtenstein, p. 4, 6.

959 Eidgenössisches Institut für Geistiges Eigentum, First Steps; See also Rouenhoff, p. 654; OECD Revised Discussion Draft, p. 17 recital 53; OECD Discussion Draft, p. 9 recital 15.

960 Eidgenössisches Institut für Geistiges Eigentum, First Steps; See also OECD Revised Discussion Draft, p. 17 recital 53; OECD Discussion Draft, p. 9 recital 15; Kaufer.

961 See Maute/Senn/König, p. 416; Philipps/Danes, p. 9; Warson/Foriers, p. 72.

962 Harmann, Immaterialgüterrechte in Liechtenstein, p. 9; WIPO, Handbook, chapter 2, p. 17 recital 2.2.

Since a national Liechtenstein and Swiss patent is likewise not examined in terms of content by virtue of article 59 paragraph (4) of the Patent Act and thus with respect to novelty and inventive step, the differences between patents and utility models are minimal, so that no need has arisen so far in Liechtenstein to introduce a register for utility models[963].

It should be emphasised that utility models dropped out of the catalogue of relevant IP rights due to an editorial mistake. After the Constitutional Court in its judgment of 1 July 2011 voided article 33 paragraph (1) of the Tax Ordinance, the entire content of the rule set out in article 33 of the Tax Ordinance was incorporated into article 55 of the Tax Act. In doing so the term "models and utility models" has been replaced by "designs". As no material alteration of the rule was intended, the outcome of the incorporation must be regarded inappropriate, at least from a formal point of view[964]. Although not expressly listed in the catalogue of relevant IP rights, it follows that utility models are relevant IP rights for IP box purposes[965].

b) Supplementary protection certificates

According to article 2 of the Supplementary Agreement to the Patent Treaty[966], supplementary protection certificates granted by Switzerland under the provisions applicable therein also apply to Liechtenstein, subject to article 3 paragraph (2) and article 4 of the Supplementary Agreement. Although not expressly listed in the catalogue of relevant IP rights, supplementary protection certificates clearly are relevant IP rights for IP box purposes.

Patented inventions for medicines and agrochemicals require Swiss federal approval before they can be brought to market. This may take up to ten years and the lengthy regulatory approval process acts to reduce the effective lifespan of patents. For that reason, supplementary protection certificates act to extend the protection period provided by relevant patents for up to five more years[967]. In this regard, the two core requirements in order to get a supplementary protection certificate are a valid patent and regulatory authorisation[968].

---

963 Harmann, Immaterialgüterrechte in Liechtenstein, p. 9.

964 Liechtenstein Government, Statement No 21/2012, p. 16; Liechtenstein Government, Report and Application No 123/2011, p. 4, 7, 22, 24; See also section 2 (II) (2) (B) (d) (Designs) of this Part.

965 Felder, Country Survey, chapter 1, 1.3.3; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17; Lehmann/Zanettin, p. 10.

966 See Supplementary Agreement to the Patent Treaty.

967 Eidgenössisches Institut für Geistiges Eigentum, SPC; Kohler/Friedli, p. 92.

968 Eidgenössisches Institut für Geistiges Eigentum, SPC; Eidgenössisches Institut für Geistiges Eigentum, After Granting; Kohler/Friedli, p. 95.

Although supplementary protection certificates have the same effects throughout the uniform protection area of Liechtenstein and Switzerland and in principle can be granted, transferred or voided only for the joint protection area, the accession of Liechtenstein to the EEA nevertheless required derogation from the unrestricted uniformity.

In accordance with EEC Regulation 1768/92, which entered into effect for the EEA in 1994, the duration of the protection granted by such a supplementary protection certificate is calculated as the period between the application for a patent and the first authorisation of the medicinal product in the EEA area, with a maximum term of 5 years. In the past, the question arose whether a medicinal product or plant protection product placed on the market in Liechtenstein pursuant to a Swiss authorisation would have an effect on calculation of the duration of the protection under the EEC regulation. Since in many cases the Swiss authorisation occurred earlier than in the EEA, recognition of the Swiss authorisation for purposes of the EEC regulation would reduce the duration of the protection achievable by a supplementary protection certificate in the EEA, especially in the EU countries, given the earlier authorisation date in Switzerland[969].

On 21 April 2005, the judgment of the ECJ in the joined cases C-207/03 and C-252/03 clarified matters in this regard[970]. The proceedings arose from a dispute between Novartis AG, University College of London, and the Institute of Microbiology and Epidemiology and the UK Patent Office on the calculation of the duration of the protection granted by supplementary protection certificates. The most important question to be decided concerned the resulting duration of the protection granted by supplementary protection certificates for medicinal products if such products are authorised in Switzerland earlier than in the EEA and the authorisation is accepted in Liechtenstein[971]. The judgment recognised the possibility in principle of the parallel existence of two different authorisations on EEA territory, which for Liechtenstein includes the acceptance of the Swiss authorisation of the medicinal product. In the view of the ECJ, however, the automatic recognition of the Swiss authorisation pursuant to the Customs Treaty amounts to a first marketing authorisation for purposes of EEC Regulation 1768/92[972]. For this reason, an earlier Swiss date would automatically trigger an authorisation relevant to the EEA and accordingly also the EU. Due to the time discrepancy this would de facto reduce the duration of the protection in the EEA, which theoretically could be longer. Since this would affect a significant share of Swiss medicinal products, an appropriate adjustment of the rules was

969 Harmann, Immaterialgüterrechte in Liechtenstein, p. 7.
970 ECJ, Joined Cases C-207/03 and C-252/03.
971 Harmann, Immaterialgüterrechte in Liechtenstein, p. 7.
972 Idem.

prepared by Liechtenstein and Switzerland in advance and rapidly implemented after the judgment was issued[973].

Supplementary protection certificates are thus indeed likewise uniform and have the same effect in the joint protection area in accordance with article 3 of the Supplementary Agreement. Any exhaustion or nullity under EEA law though has effect only for Liechtenstein and does not affect the Swiss share. Already at the time with Liechtenstein's accession to the EEA in 1995, this adjustment took proper account of the special situation obtaining between the EEA and Switzerland with regard to certain questions[974]. The previously obtaining uniformity is also derogated from in light of the voidability of the supplementary protection certificate according to article 4 of the Supplementary Agreement, since any effect of nullity is now territorially limited[975]. To ensure the functioning of the uniform economic area, an exchange of notes between Liechtenstein and Switzerland in April 2005 amended the previous rule governing the application of Swiss medicinal product legislation to Liechtenstein and was extended in April 2012[976].

Moreover, there are not many safe, high quality and effective medicinal products available, which are specifically developed for children. Global efforts are thus undertaken in order to increase the commercialisation of formally approved medicinal products designed for children. Against this backdrop, the Regulation (EC) No 1901/2006 on medicinal products for paediatric use became effective in 2007. In accordance with article 36 of Regulation (EC) No 1901/2006, the holder of a patent or supplementary protection certificate is entitled to a 6 month extension, where the results of all studies conducted in compliance with an agreed paediatric investigation plan are complied with and in particular the results of the studies conducted are reflected in the summary of product characteristics and, if appropriate, in the package leaflet of the medicinal product concerned[977].

The main objectives of Regulation (EC) No. 1901/2006 on medicinal products for paediatric use are also to be implemented in Switzerland, as part of the upcoming revision of the Therapeutic Products Act. In particular, it is proposed to grant a six-month extension to the duration of a granted supplementary protection certificate, provided that authorisation to place the product in the market as a medicinal product in Switzerland has been granted, and the results of all stud-

973 Idem.

974 Idem, 8.

975 Idem.

976 See Announcement regarding Swiss provisions applicable in Liechtenstein because of Patent Treaty; Harmann, Immaterialgüterrechte in Liechtenstein, p. 8.

977 Eidgenössisches Institut für Geistiges Eigentum, Paediatric Extension; Kohler/Friedli, p 96.

ies that have been carried out in compliance with an agreed paediatric investigation plan are available[978].

c) Trademarks

In accordance with article 55 paragraph (1) letter (a) of the Tax Act, the IP box applies to trademarks[979]. Luxembourg is the only Benelux jurisdiction that qualifies trademarks as relevant IP rights for IP box purposes. In addition, the IP box of the Swiss canton of Nidwalden extends to trademarks as well.

In the domain of trademark law, Liechtenstein has had its own trademark system ("Trademark Protection Act") independent of Switzerland since 1928. The Trademark Protection Act, which was totally revised in 1997, has been adjusted to the EC Trademark Directive. This is why Liechtenstein's trademark law is largely harmonised.

Furthermore, the Liechtenstein Trademark Protection Act follows Switzerland's Trademark Protection Act to a large extent, so that in principle the two laws are not materially different. Nevertheless, the membership of Liechtenstein in the EEA does entail differences in certain essential points[980]. The existing differences are primarily procedural, especially in regard to the procedure for opposing to trademarks, which exists in Switzerland but not in Liechtenstein. These differences are however not relevant to taxation[981].

Article 1 of the Trademark Protection Act defines a trademark as a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises. Trademarks may consist, in particular, of words, letters, numerals, graphic representations or combinations of such elements. It is possible for such signs to be represented two- or three-dimensionally or also acoustically[982].

Article 2 of the Trademark Protection Law then sets out that a trademark must not:

– Be in the public domain;

---

978 Eidgenössisches Institut für Geistiges Eigentum, Paediatric Extension.

979 Felder, Country Survey, chapter 1, 1.3.3; Felder/Harmann, p. 76; Liechtenstein Government, Statement No 21/2012, p. 23; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17; Lehmann/Zanettin, p. 10; Liechtenstein Government, Report and Application No 123/2011, p. 4, 7, 22, 24; Hosp/Langer, Steuerstandort Liechtenstein, p. 113.

980 Harmann, Immaterialgüterrechte in Liechtenstein, p. 9.

981 Harmann, Immaterialgüterrechte in Liechtenstein, p. 9; For a detailled overall view of the Liechtenstein Trademark Protection Act see: Wanger, Kommentar Markenschutzgesetz.

982 See also OECD Revised Discussion Draft, p. 17 recital 55; Maute/Senn/König, p. 417; Rouenhoff, p. 654; OECD Discussion Draft, p. 9 recital 17.

– Be misleading. Marks that might mislead with regard to the characteristics of the goods are barred from registration;

– Be contrary to public policy, morality or applicable law.

A trademark has therefore a protective or defensive function. It embodies the right of the owner to prevent the use of identical or similar trademarks. Furthermore, a trademark includes a guarantee function. This means that misleading trademarks are excluded from protection if expectations evoked by the trademark cannot be fulfilled, for instance regarding the geographic origin of the goods or services or the quality thereof[983].

Article 10 of the Trademark Protection Act stipulates that registration of a trademark is valid for ten years as from the filing date. The registration is extended multiple times for further ten-year periods where a request has been submitted and the extension fee and any applicable class fee have been paid.

Apart from that, Liechtenstein is a member of the Paris Convention for the Protection of Industrial Property ("Paris Convention")[984]. Article 6bis (Marks: Well-known marks) of the Paris Convention protects unregistered marks that qualify as well-known within a jurisdiction which is a party to the said convention. It thus provides a certain legal protection to taxpayers that do not want to register their trademarks. Countries that are party to the Paris Convention are obliged to refuse to register, or to cancel if already registered, and prohibit the use within their territory, of marks liable to create confusion with another trademark already well-known in that country for identical or similar goods. Article 55 paragraph (1) of the Tax Act specifies that trademarks are only eligible for the Liechtenstein IP box on the condition that they are protected by entry in a domestic, foreign or international register. As a result, the fact that a taxpayer enjoys a certain amount of legal protection with respect to its non-registered trademark by reason of the Paris Convention is irrelevant for the purposes of the IP box.

In addition to the legal protection provided by the Trademark Protection Act and the Paris Convention there is a European protection of trademarks governed by the Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trademark. It is an autonomous system of registrations which confers a uniform protection all over the territory of the European Union. The registration of Community trademarks is managed by the Office for Harmonisation in the Internal Market ("OHIM") in Alicante[985]. A registration of trademarks with the

983 Amt für Volkswirtschaft, Marken.

984 See Paris Convention revised at Stockholm on 14 July 1967.

985 O'Neal/Macovei-Grencon/Van Eysinga, p. 8; Administration des contributions directes, Circulaire, p. 10.

OHIM allows obtaining legal protection that is valid in all 27 countries of the European Union[986].

The registration if desired may be extended beyond the single market based on the Madrid Protocol which Liechtenstein is a member of. It is not possible to limit the geographic scope of protection to certain EU Member States. A Community trademark is valid for 10 years and can be renewed indefinitely for periods of ten years[987]. Obviously, a registration of a trademark with the OHIM and with the World Intellectual Property Organization ("WIPO") qualifies for the purposes of article 55 of the Tax Act.

In the light of the above, a trademark can fulfil protective, defensive, guarantee and in particular marketing functions. It should however be emphasised that trademarks frequently also accomplish critical functions in respect of R&D. In research-oriented industries, a trademark and trade name are vital components in securing sufficient income to reward past research and undertake new projects, particularly as patents are time-limited. Building up trademark recognition and brand confidence is thus vitally important to ensure that the product continues to be commercially viable after the patent expires or even in cases where no patent was developed[988].

One example in this regard would be Intel, which invested heavily in developing cutting edge microprocessor technology and in assuring its performance and reliability. A stronger brand helped Intel to communicate these technical characteristics to computer producers and consumers. Adding the Intel logo on computers finally achieved in conveying assurance that their systems were powered by the latest technology[989]. The example illustrates that while an undertaking builds a competitive advantage through technology, it can also use this early period to build significant brand equity at limited marketing costs. In turn, the brand equity may become increasingly important as the technology life-cycle unfolds. When the next technological era begins, trademarks and brands may serve as a shield to help the meanwhile well-established undertakings survive through the change[990].

It should be emphasised that the current IP box framework based on article 55 of the Tax Act takes into account profits in respect of trademarks irrespective of the fact whether or not they are linked to technology and science. Accordingly,

---

986 Office for Harmonization in the Internal Market; Harmann, Immaterialgüterrechte in Liechtenstein, p. 11.

987 WIPO, Trademarks Gateway; Office for Harmonization in the Internal Market; Harmann, Immaterialgüterrechte in Liechtenstein, p. 11.

988 OECD TP Guidelines, p. 195 recital 6.12.

989 Intel Inside Program.

990 Jennewein/Durand/Gerybadze, p. 73; See also Müller/Gramigna/Linder, p. 808 Fn 37; Zimmermann.

it is considered to be of secondary importance that the relation of marketing intangibles to technological and scientific based R&D can sometimes be weaker and more variable compared to trade intangibles. This also implies that currently there is no need for a parallel regulatory process of independent examination, which would provide executive bodies with clarity that trademarks have attributes significantly relating to technological and scientific innovation[991].

d) Designs

In accordance with article 55 paragraph (1) letter (a) of the Tax Act, the IP box applies to designs[992].

The Liechtenstein Design Act was revised in 2002, taking into account the requirements under Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, so that material Liechtenstein law in this regard has largely been harmonised[993]. It is also the case with regard to designs that the corresponding Swiss law originally served as a model, and that the most recent revision undertook only several minor EEA relevant amendments. For this reason, there are no significant material differences from the situation in Switzerland[994].

While the German title of the earlier law on the protection of the appearance of a product used the older term "Muster- und Modellgesetz", the revision in 2002 changed the title to "Designgesetz"[995]. Article 1 paragraph (1) of the Design Act specifies that the Design Act protects designs through registration, and that it grants designers or their legal successors exclusive rights. Article 2 paragraph (1) of the Design Act then sets out that "design" means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation. A "product" is defined as any industrial or handicraft item, including inter alia parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs. It should be noted, however, that while design law formally

---

991 For a proposed change in the law, see: Section 3 (II) (2) (Relevant IP profits) of this Part; See also section 4 (II) (B) (a) (bb) (R&D declarations) of Part 1; HM; Treasury/HM Revenue & Customs, Consultation, p. 10 recital 2.9.

992 Felder, Country Survey, chapter 1, 1.3.3; Felder/Harmann, p. 76; Liechtenstein Government, Statement No 21/2012, p. 23; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17; Lehmann/Zanettin, p. 10; Liechtenstein Government, Report and Application No 123/2011, p. 4, 7, 22, 24; Hosp/Langer, Steuerstandort Liechtenstein, p. 113.

993 Harmann, Immaterialgüterrechte in Liechtenstein, p. 9; See article 1 paragraph (2) of the Design Act.

994 Harmann, Immaterialgüterrechte in Liechtenstein, p. 9.

995 Idem.

excludes software, it still does encompass the protection of screen displays generated by software, such as graphical user interfaces and their components, including icons[996].

Article 3 paragraph (1) of the Design Act specifies that a design is eligible for protection to the extent that it is new and has individual character. Additionally, intellectual creations may only enjoy design protection if they are neither unlawful nor of an offensive nature[997].

Design rights arise with entry in the design register. Article 7 of the Design Act further holds that protection applies for five years from the day the design has been filed. Protection may be extended by four protection periods of five years each. The maximum duration of the protection is thus 25 years from the filing day. In addition, article 25 of the Design Act lays down that the competent authority, namely the Office of Economic Affairs, does not examine whether the design is new and sufficiently distinguished from existing designs. Third parties can thus contest the novelty of a design at any time in court[998].

Article 27 of the Design Act sets out that the person filing the design may request in writing that publication be deferred by at most 30 months from the date of filing or priority. During the deferral, the right holder may at any time demand immediate publication. The registration office keeps the filed design confidential until the end of the deferment. Confidentiality is unlimited in time if the filed design is withdrawn before the end of the deferment. Article 33 of the Design Act then specifies that anyone filing a design internationally obtains protection under the Act as if the design had been filed in Liechtenstein. To the extent the provisions of the Hague Agreement of 6 November 1925 are more favourable to the holder of the international filing than the Design Act, those provisions trump the Act.

Similarly to trademarks, in addition to the legal protection provided by the Design Act there is a European protection on designs and models governed by the Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs. It constitutes an autonomous system of registrations which confers a uniform protection up to a maximum of 25 years throughout the entire territory of the European Union. The registration of Community designs and models is managed by the OHIM in Alicante[999]. A registration of a design with the OHIM obviously qualifies for IP box purposes. In addition, an international registration with WIPO is possible based on the Hague System for the International Registration of Industrial Designs which Liechtenstein is a member of. The Hague

---

996 WIPO, International Classification; See also Maute/Senn/König, p. 417.

997 Amt für Volkswirtschaft, Design.

998 Idem.

999 Office for Harmonization in the Internal Market.

System offers the owner of an industrial design a means of obtaining protection in several countries by simply filing one application with the international bureau of WIPO. An international registration generates the same effets in each of the designated countries, as if the design had been registered directly with each national office, unless protection is refused by the national office of that country[1000].

Both technological and design features of a product frequently are closely interrelated and inseparable from each other. For instance, technical and aesthetic aspects in the optimal aerodynamic design of vehicle components are closely interlinked. Such components must equally fulfil both the criteria relating to reduction of air resistance and those relating to attractive appearance. The assessment as to whether a design reasonably contributes to technological and scientific based R&D should therefore be taken on an overall impression.

e) Software

In accordance with article 55 paragraph (1) letter (b) of the Tax Act, the IP box applies to software[1001] Other than for patents, utility models, trademarks and designs, in order the IP box to apply there is no requirement for software copyrights to be protected by entry in a domestic, foreign or international register.

According to the commentary on article 12 paragraph (12.1) of the OECD Model Tax Convention ("OECD MC"), software can be described as a programme or series of programmes, containing instructions for a computer required either for the operational processes of the computer itself, referred to as operational software, or for the accomplishment of other tasks, referred to as application software[1002]. Software can be transferred through a variety of media, for instance in writing or electronically on a magnetic tape or disk, or on a laser disk or CD-Rom. It can be standardised with a wide range of applications or be tailor-made for single users. It can further be transferred as an integral part of computer hardware or in an independent form available for use on a variety of hardware[1003].

The rights in computer programs are a form of IP. Almost all OECD Member countries protect software rights either explicitly or implicitly under copyright law. The term "computer software" is normally used to describe both the program, in which the copyright and thus the IP right exist, and the medium on which it is embodied. The copyright laws of many countries however recognise

---

1000 WIPO, Hague System.

1001 Felder/Harmann, p. 76; Liechtenstein Government, Statement No 21/2012, p. 23; Lehmann/Zanettin, p. 10.

1002 OECD MTC, p. 227 recital 12.1.

1003 Idem.

a distinction between the copyright in the program and software which incorporates a copy of the copyrighted program[1004].

The transfer of rights in relation to software takes place in many ways ranging from the sale of the entire rights in the copyright in a program to the disposal of a product which is subject to restrictions on the use to which it is put[1005]. The scope of transferability of copyrights can however differ considerably from country to country. In some jurisdictions, all rights can be transferred, while in others only the special exploitation rights can be transferred.

Apart from Liechtenstein, also Luxembourg, the Netherlands and the Canton of Nidwalden qualify computer software as relevant IP rights for the purposes of their IP box regimes. For most technologies and industries, software has become an absolutely essential component of products, and it can make an important contribution to economic success due to subsequent software updates and the resulting income. In some industries, the dominant business models offer hardware at or even below cost, while the actual income is generated by the subsequent software licenses[1006]. Since the pricing prevalent in individual industries cannot always be influenced, such enterprises would be at a disadvantage compared with other industries where, for instance, the bulk of income could be realised from the licensing of patented hardware[1007].

In light of the promotion of R&D intended by article 55 of the Tax Act, it must be considered that the Copyright Act meanwhile also encompasses areas that cannot always be unproblematically subsumed under the classical understanding of copyright in a systematic sense. Specifically, this concerns the protection of software, which may be of great importance in the context of R&D activities[1008].

The copyright on computer software in Liechtenstein is governed by the Copyright Act of 19 May 1999 ("Copyright Act"). Like the copyright laws of many other countries, article 2 (Definition of works) paragraph (3) of the Copyright Act defines computer software as literary and artistic works protected by copyrights[1009]. Article 16 (Restricted acts pertaining to computer programs) of the Copyright Act specifies that the right holder has the exclusive right to perform or permit the following acts:

– The permanent or temporary reproduction of a computer program by any

---

1004 OECD MTC, p. 227 recital 12.2; See also Müller/Gramigna/Linder, p. 808 Fn 31.

1005 OECD MTC, p. 227 recital 12.2.

1006 Harmann, Immaterialgüterrechte in Liechtenstein, p. 18.

1007 Idem.

1008 Harmann, Immaterialgüterrechte in Liechtenstein, p. 17; See also Müller/Gramigna/Linder, p. 808.

1009 See also Maute/Senn/König, p. 417; EFTA Surveillance Authority, 480/12/COL, p. 4 recital 15; OECD MTC, p. 228 recital 13.1.

means and in any form, in part or in whole. Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts are subject to authorisation by the right holder;

– The translation, adaptation, arrangement or any other alteration of a computer program and the reproduction of the results thereof. The rights of the person who alters the program remain unaffected;

– Any form of distribution of the original of a computer program or of copies thereof, including rental.

Furthermore, article 24 (Decompilation of computer programs) paragraph 1 of the Copyright Act specifies the code of a computer program may be reproduced and its form may be translated, provided that the following conditions are met:

– The acts are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs;

– The acts are performed by a person having the right to use a copy of a program or on his behalf by a person authorised to do so;

– The information necessary to achieve interoperability has not previously been readily available; and

– The acts are confined to the parts of the program which are necessary to achieve interoperability.

Renunciation of the right of decompilation in this context is without effect[1010]. The information obtained under article 24 (Decompilation of computer programs) paragraph (1) of the Copyright Act may not:

– Be used for purposes other than to achieve the interoperability of the independently created program;

– Be given to others, except where necessary for the interoperability of the independently created program;

– Be used for the development, reproduction or distribution of a program substantially similar in its expression or for other acts that infringe copyright.

Liechtenstein is a member of the Berne Convention for the Protection of Literary and Artistic Works of 14 July 1967 ("Berne Convention")[1011]. By virtue of article 1 of the Berne Convention the author of an original work is protected

[1010] Article 24 (Decompilation of computer programs) paragraph (3) of the Copyright Act.

[1011] Liechtenstein Law Gazette, Year 1986, No 71, published on 26 November 1986.

from the moment the work has been developed, without any other formality, in the member states of the Berne Convention. No recording system is envisaged. Irrespective of the availability of the IP box, online filing or other official filings are thus regarded as optional evidence.

With respect to software, the date at which the software was developed refers to the point in time on which all work has been completed and the software is ready to be marketed. Since software copyrights are not registered it is up to the taxpayer to provide evidence of when the software has been created[1012].

f) Technical and scientific databases

In accordance with article 55 paragraph (1) letter (b) of the Tax Act, the IP box applies to technical and scientific databases[1013].

Unlike other relevant IP rights of the IP box, there is no requirement for technical and scientific databases to be protected by entry in a domestic, foreign or international register. It should be noted that copyright law meanwhile encompasses areas that cannot always be unproblematically subsumed under the classical understanding of copyright in a systematic sense. On legal policy grounds, data that in principle can also be used for technical purposes as well as the associated software can be protected by copyright law. This does not bring about any material affiliation with the domain of literature and art, which originally was the object of copyright law[1014].

The protection in question also covers databases, which can be of great importance in the context of R&D activities. The difference between the protection of databases as a collection under article 4 of the Copyright Act and the protection of the producer of a database under article 45 of the Copyright Act consists in the fact that the producer must merely make a significant investment in order to obtain sui generis protection. The protection of databases as a collection, however, in most cases is likely to make comparatively greater demands on the individual nature of a creation with regard to selection or arrangement[1015]. For an enterprise engaged in research, both databases falling within the scope of protection defined in article 4 of the Copyright Act and those falling within the scope of sui generis protection defined in article 45 of the Copyright Act can constitute a key realisable investment, which may be used by way of licensing

---

1012 See Schaffner/Manhaeve/Trouille, p. 382; O'Neal/Macovei-Grencon/Van Eysinga, p. 14; Administration des contributions directes, Circulaire, p. 17.

1013 See Article 55 paragraph (1) letter (b) of the Amended Tax Act; Felder/Harmann, p. 77; Liechtenstein Government, Statement No 21/2012, p. 23.

1014 Harmann, Immaterialgüterrechte in Liechtenstein, p. 17, 18.

1015 Liechtenstein Government, Statement No 21/2012, p. 9, 10; Harmann, Immaterialgüterrechte in Liechtenstein, p. 17, 18; See also EFTA Surveillance Authority, 480/12/COL, p. 4 recital 16.

together with the software that accesses it. Depending on the area of technology, the database can in fact be the actual investment and constitute the core domain of the business model[1016].

An example of a protected collection under article 4 of the Copyright Act are scientific databases, whose linking of data for diagnosis purposes, such as medical histories and corresponding data of persons as comparative values, already contains extensive medical expertise. Pure investment protection of the maker of the database under article 45 of the Copyright Act would obtain if, for instance, a database were created for the chemical-pharmaceutical compositions of medicinal products for special diseases[1017]. Similar observations can be made in regard to enterprises offering systems for image processing, traffic planning and management, or controlling of complex industrial processes[1018].

In the technical field, collections may be realised by many different databases, for instance where they provide complete solutions for special technical problems[1019]. One example could be a database for optical components with special characteristics. Such characteristics are often realised through coatings which either have a special uniform composition or are constituted as a series of mutually harmonised layers that are specially selected on the basis of their thickness and composition, for instance semiconductor structures in the form of distributed Bragg reflectors. The design of such layer compositions cannot always be derived straightforwardly and immediately from specifications. It rather necessitates certain design rules and practical knowledge, so that they must be considered original intellectual creations. A database with many different coating solutions for concrete optical parameters, such as wavelength-dependent transmission or reflection behaviour, may thus constitute a collection in the technical field whose compilation requires extensive expertise.

An example of pure investment protection can be a database containing a collection of technical data and layout plans for electronic semiconductor components. For instance, it can thereby offer specialists a way to find information including about older components that may no longer be supported by the manufacturer. It can further offer a way to select the correct integrated circuit for a special application from the current offerings of all manufacturers.

Another example of pure investment protection can be a database with components from the construction industry. For instance, it could contain data on all

---

1016 Maute/Senn/König, p. 417; 418; Liechtenstein Government, Statement No 21/2012, p. 9, 10; Harmann, Immaterialgüterrechte in Liechtenstein, p. 17, 18.

1017 Harmann, Immaterialgüterrechte in Liechtenstein, p. 18.

1018 Idem.

1019 Thanks to Mr. Harmann of Kaminski Harmann Patentanwälte AG, Vaduz, for his support in the creation of the examples set out below.

lift systems ever realised, so that all relevant data – including electrical connection information, suitable lubricant and hydraulic oil types, replacement part types etc – could be accessed when lifts in historic building are maintained. Other content can include facade elements and their mountings, so that an architect or construction engineer could research the technical realisability of his drafts using existing components already on the market. In a similar way, databases could be compiled with information on varnishes and paints as well as their compositions, mutual incompatibilities, areas of application and dangers.

Scientific collections can for instance be databases enumerating plant varieties and their vulnerability to pests and tolerance of plant protection products, which for instance have been determined in the database maker's own trials.

Article 45 of the Copyright Act sets out that protected databases can for instance consist of physical data on substances, such as spectral lines, ionisation energies, melting and boiling points etc, permitting applications in many areas of research and teaching, laboratory diagnostics, or even manufacturing or chemical industry. In animal breeding, for instance, genetic databases or breeding books may require substantial investments during their compilation, and their use in agriculture may be extremely varied.

As is the case of designs, the corresponding Swiss law also served as the model for the Copyright Act, and a few minor EEA-relevant additions were made only where called for. In principle, therefore, no material difference exists between the Liechtenstein Copyright Act and the corresponding Swiss law. It is however important to note that there is a tax-relevant difference with respect to the Liechtenstein Copyright Act. This is because the Swiss model does not include the sui generis protection of databases under article 45 of the Copyright Act as required under EEA law. As already mentioned above, this provision covers databases which may entail high investments for their compilation, but due to their lack of qualification as a collection otherwise would not fall within the scope of copyright protection[1020].

Against this backdrop, a closer look at the following provisions of the Liechtenstein Copyright Act can be of interest when it comes to technical and scientific databases. For illustration purposes, article 4 (Collections) of the Copyright Act specifies that:

– Collections enjoy independent protection where they are intellectual creations of an individual nature with regard to their selection or arrangement;
– The protection of works included in a collection remains unaffected;
– Databases likewise are deemed collections, provided they constitute original intellectual creations by reason of the selection or arrangement of the

[1020] Harmann, Immaterialgüterrechte in Liechtenstein, p. 17, 18.

material. Rights existing in respect of their content are not affected thereby.

Article 17 (Restricted acts pertaining to databases) of the Copyright Act lays down the holder of the right has the exclusive right to perform or permit the following acts with respect to the form of expression eligible for copyright protection:

– The temporary or permanent reproduction by any means and in any form, in part or in whole;
– The translation, adaptation, arrangement or any other redesign and also any reproduction or public distribution, rendition, presentation or performance of the results of these acts;
– Any form of public distribution of the database or of copies thereof;
– Any public rendition, presentation or performance.

Article 45 (Sui generis protection) specifies that:

– The producer of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents has the right to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database;

  This right may be transferred, assigned or granted under contractual license. Furthermore, this right applies irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it applies irrespective of eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right provided is without prejudice to rights existing in respect of their contents;
– Moreover, the repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the producer of the database is not permitted.

Based on article 49 (Term of protection) of the Copyright Act, the right to the database runs from the date of completion of the making of the database. It expires 15 years after completion of the making of the database. Yet, any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, qualifies the database resulting from that investment for its own

term of protection. The said article further stipulates that in the case of a database which is made available to the public in whatever manner before expiry of the period mentioned above, the term of protection by that right expires 15 years from the date when the database was first made available to the public.

Since collections and databases are not registered it is up to the taxpayer to provide evidence of when such rights have been created.

C) Development condition

The principle aim of the development condition under the UK IP box is to limit the regime to persons which have been properly involved in the innovation lying behind the relevant IP rights or the application process for such rights[1021].

Unlike Belgium, the Netherlands and the UK, there is no or a substantially limited development condition with regard to the IP boxes of Liechtenstein, Luxembourg and the Canton of Nidwalden. With respect to the Liechtenstein IP box, there is no development condition. In practice, a taxpayer is thus not required to be the inventor, creator, developer or the initial applicant of a relevant IP right in order to be an eligible taxpayer under article 55 paragraph (1) of the Tax Act[1022].

D) Ownership condition

Unlike the Dutch and UK IP box legislations, the active ownership condition under the Liechtenstein IP box is comparatively weak. A relevant taxpayer is not formally required to perform a significant amount of management activity in relation to the relevant IP rights[1023]

Relevant IP rights can be owned solely or jointly on the basis of ownership, beneficial rights or usufruct[1024]. The provisions of article 55 of the Tax Act do however not require a relevant taxpayer to be the owner or co-owner of relevant

---

1021 HM Revenue & Customs, Finance Bill 2012, p. 21 recital 2.36; HM Revenue & Customs, Draft Legislation, p. 13 recital 2.24

1022 See also Müller/Gramigna/Linder, p. 808; For a critical opinion, see: Sullivan, p. 11.

1023 For the Netherlands, see: Baaijens/Breuer, p. 2933; Paardekooper/Brassem/Gommers, p. 7; Sporken/Gommers, Transfer Pricing Implication, p. 267; For UK, see: Finance (No. 4) Bill, p. 144 at 357BE (2); Consultation draft, p. 6 at 357BD (2).

1024 For Belgium, see: Bal/Offermanns, p. 171; Scheunemann/Dennisen, p. 410; Van den Berghe/Kelley, p. 375; Onkelinx/Van den Berg, p. 2; For Liechtenstein: In accordance with article 216 of the Property Law, usufruct can be defined as a right of enjoyment enabling a holder to derive profit or benefit from property that is titled to another person; See Opilio, p. II-317 recital 006.

IP rights. Alternatively, the relevant taxpayer can also hold a license in respect of relevant IP rights.

Not least of all due to the following considerations, a substance over form and thus an effective economic approach prevails in the practical application of the IP box[1025].

Relevant IP rights can be used or realised in different ways. For one, the relevant IP right can be held by the taxpayer itself. In addition to sole ownership of the right, joint ownership is also possible. The latter form however raises numerous legal questions, which may be answered differently depending on the country. It follows that this constellation either requires comprehensive legal knowledge and experience or should generally be deemed disadvantageous.

Nevertheless, the extent and mode of direct use of a relevant IP right by the owner differs among the various fields of technology. Even in the case of undertakings operating worldwide, legally independent group or other entities which are neither owners nor co-owners of the relevant IP rights usually conduct the operational activities. For this reason, a right to use the relevant IP right as a rule is granted to such legally independent entities. The legal instrument for this purpose is the grant of a license.

In practice, it is common for corporate groups not to choose such a formal arrangement, since the owner of a relevant IP right is unlikely to take action arising from the IP right against one of its own group companies. In terms of taxation, this constellation can be viewed analogously to the grant of a license, and transfer prices should be considered accordingly. It is to be held in this regard that legal registrations and contractual arrangements are the starting point for identifying which undertakings are entitled to RP. The terms of a transaction may, however, also be found in oral agreements between the parties. Where no written terms exist, the contractual relationships of the parties must be deduced from their conduct and the economic principles[1026].

When a license is granted, the legally available leeway is considerable. This is why in practice a wide range of constellations occur. Of relevance to taxation in this regard is that legal and economic attributions frequently diverge, since all gradations of the assignment of rights are possible when licenses are granted. At the one extreme, a simple license may be granted purely as a right to use or real-

---

1025 For Belgium, see: Van Stappen/Delanoy/De Groote, p. 292; Van Stappen, p. 2; For Luxembourg, see: Eynatten/Brauns, p. 4; Loyens & Loeff, p. 2; O'Neal/Macovei-Grencon/Van Eysinga, p. 11; Administration des contributions directes, Circulaire, p. 14; See also OECD Revised Discussion Draft, p. 20 recital 66; Rouenhoff, p. 655, 656; OECD Discussion Draft, p. 12 recital 29, 13 recital 37 et seq.

1026 See OECD Revised Discussion Draft, p. 20 recital 67; OECD Discussion Draft, p. 13 recital 30; See also OECD TP Guidelines, chapter V (Documentation).

ise, with a royalty depending on turnover and without transfer of know-how or a right of action on the part of the licensee, thus leaving economic risks, decision-making powers and costs for the maintenance of the relevant IP right with the licensor, to which the relevant IP right must also be attributed in economic terms. At the other extreme, an exclusive license to use a relevant IP right may be granted, excluding even the owner of the relevant IP right. If the licensee has its own right of action and bears all costs for the maintenance of the relevant IP right, paying a fixed royalty to the owner of the relevant IP right independent of performance, then the owner of the relevant IP right is left solely with ownership and no additional rights. Moreover, the licensee bears the economic risks and enjoys decision-making powers in regard to legal enforcement of the exclusivity right, and consequently the use or realisation of the legal position granted by the relevant IP right. In this constellation, the relevant IP right is attributed economically to the licensee for tax purposes.

Due to the freedom of contract, license contracts can be designed in all possible gradations between these two extreme positions, so that the economic attribution relevant to tax law may not always be simple and without a doubt. On the other hand, this freedom permits an optimally tailored use or realisation of relevant IP rights in light of the economic situation and needs of the parties, and accordingly also generation of income from relevant IP rights.

In the light of these considerations, tax related outcomes in cases involving relevant IP rights should reflect the functions performed, assets used, and risks assumed by the parties. Neither legal ownership, nor the bearing of costs related to intangible development, taken separately or together, entitles an undertaking to retain the returns with respect to intangibles without more[1027]. The following factors should be considered in determining which undertaking is entitled to returns in respect of relevant IP rights or RP respectively[1028]:

– Terms and conditions of legal arrangements including relevant registrations, license agreements and other relevant contracts;

– Alignment of functions performed, assets used, risks assumed and costs incurred by undertakings in developing, enhancing, maintaining and protecting intangibles with the terms and conditions of the legal arrangements; and

– Arm's length compensation under the relevant circumstances of services rendered in connection with developing, enhancing, maintaining and protecting intangibles under the terms and conditions of the legal arrangements.

1027 See Rouenhoff, p. 655, 656; OECD Discussion Draft, p. 12; 15 recital 46.

1028 See Rouenhoff, p. 655; OECD Discussion Draft, p. 12 recital 29.

It is not required that entities claiming entitlement to intangible related returns physically perform all of the functions related intangibles through its own employees. Some of these functions can be outsourced, but important functions remain to be physically performed by own employees[1029].

Apart from that, income derived from the use, realisation or sale of a relevant IP right may be subject to foreign withholding tax. Due to the insignificant development and ownership conditions under the IP box legislation, a taxpayer that has not undertaken significant development or active management activity may be rated being passive, for which reason foreign tax authorities could deny the benefits of their double taxation agreements[1030].

As indicated in Part 2 of this treatise, a proper amount of economic substance is also vitally important in order that the IP box regime at no time will be regarded as a harmful measure under the Code of Conduct for Business Taxation. It follows that the practical application of the Liechtenstein IP box as far as possible requires relevant taxpayers to be actively engaged in the development and/or management of relevant IP rights rather than restricting it to the mere acquisition and passive holding of such rights[1031].

3. Relevant IP profits

A) Calculation of relevant IP profits

a) Determination of assessment basis

By virtue of article 55 paragraph (1) of the Tax Act, 80% of the sum of positive income from relevant IP rights is also considered a commercially justified expense. Article 55 paragraph (2) of the Tax Act specifies that the basis of assessment for the deduction of 80% is the income from the use, realisation or sale of the IP rights, minus the associated tax-relevant expenses, including write-downs on IP rights, even if the expenses arose over several assessment periods.

The tax deduction of 80% does not apply to RIPI but to the RP. This involves the difficulty in identifying what level of profit should be allocated to relevant IP rights in order to get from gross income to net income[1032]. At this point it is critical to understand that for the purposes of the Liechtenstein IP box it is not

---

1029 See Rouenhoff, p. 655, 656; OECD Discussion Draft, p. 14 recitals 39, 40.

1030 See also HM Revenue & Customs, Finance Bill 2012, p. 26 recital 2.70; HM Revenue & Customs, Draft Legislation, p. 16 recital 2.42.

1031 See also PwC, TAXeNEWS BEPS Comprehensive Action Plan, p. 3; OECD Action Plan on BEPS, p. 18 action 5, p. 20 action 8; Rouenhoff, p. 655, 656; Hausmann/Roth/Krummenacher, p. 92; OECD Discussion Draft, p. 17 recital 54; HM Treasury/HM Revenue & Customs, Consultation, p. 6 recital 1.12.

1032 See also Müller/Gramigna/Linder, p. 809.

sufficient to identify RP based on a mere allocation of profits according to the proportion of total income that is RIPI. The application of article 55 of the Tax Act entails RP to match precisely with each relevant IP rights and calls for the determination of RP based on a sophisticated cost accounting approach ("Spartenrechnung")[1033].

Similar to Luxembourg, by virtue of article 16 paragraph (6) of the Tax Act, the provisions of article 55 of the Tax Act not only apply to the determination of corporate profit, but also to the determination of agricultural and forestry profit as well as any profit arising from self-employment in areas such as commerce, trade and industry subject to personal income tax.

It follows that the IP box provides for a partial exemption of 80% of RP of corporate and individual taxpayers. Only 20% of the RP is is subject to tax at the applicable regular income tax rate[1034].

An illustration on how to determine the basis of assessment for the tax deduction by virtue of article 55 paragraph (2) of the Tax Act is set out below[1035]:

Determination of the basis of assessment for the tax deduction under the IP box	
	Income from the use, realisation or sale or relevant IP rights (including notional royalties, mixed sources of income or income before grant of a right)
–	Associated tax-relevant expenses, including write-downs on relevant IP rights
=	Basis of assessment for the deduction of 80%

The tax deduction of 80% under the IP box must be calculated for each relevant IP right separately[1036]. This is important where the associated tax-relevant expenses for a relevant IP right exceed the corresponding income of the right. Would the tax deduction be calculated for the aggregate of relevant IP rights, any excess expense of a relevant IP right would evidently reduce any excess income of other relevant IP rights. From the perspective of a relevant taxpayer this may negatively affect the potential tax performance of the IP box, since any

1033 Idem.

1034 Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17; Lehmann/Zanettin, p. 10; Harmann, Immaterialgüterrechte in Liechtenstein, p. 16; Hosp/Langer, Steuerstandort Liechtenstein, p. 113; See also Müller/Gramigna/Linder, p. 809.

1035 Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 19; Lehmann/Zanettin, p. 11; Hosp/Langer, Steuerstandort Liechtenstein, p. 114.

1036 Steuerverwaltung des Fürstentums Liechtenstein, Wegleitung juristische Personen, p. 18.

excess expense in respect of a relevant IP right, in principle, would reduce the basis of assessment for the deduction of 80%.

Apart from that, article 55 paragraphs (1) and (2) of the Tax Act necessarily imply that income from relevant IP rights qualifies for the IP box only to the extent it is included in the taxable base of the taxpayer. This is why such income must be subject to the Liechtenstein personal or corporate income tax alternatively.

For a taxpayer subject to unrestricted tax liability, the IP box is not available where the income from a relevant IP right is attributable to a foreign permanent establishment whose result is tax-exempt by virtue of article 48 paragraph (1) letter (b) of the Tax Act. By the same token, for a domestic permanent establishment of a non-resident person, the IP box is not available where the relevant IP right and the income derived thereof is not attributable to the domestic permanent establishment, but to the non-resident person outside Liechtenstein[1037].

The wording of article 55 paragraph (3) of the Tax Act further implies that the IP box is available to income from relevant IP rights over legally protected products and processes, or to income from services[1038].

It should further be noted that the sum of positive income extends to income from relevant IP rights and also to IP-derived income. This implies that the basis of assessment for the deduction of 80% takes into account income from relevant IP rights, notional royalties, mixed sources income and income arising before grant of IP rights. From this the associated tax-relevant expenses are deducted, including write-downs on IP rights, even if the expenses arose over several assessment periods[1039].

b) Associated tax-relevant expenses

All expenses that arise in generating the RIPI and are recognised in statutory accounts or deemed a commercially justified expense under domestic tax law are to be precisely attributed against RIPI based on a cost accounting ap-

---

[1037] For example, the non-resident person can be a headquarters, a research centre, a holding company or a self-employed person.

[1038] For Belgium, see: Warson/Van Ende, p. 1; Warson/Glaes, p. 319; For the Netherlands, see: Baaijens/Breuer, p. 2933; Prokisch, p. 221; Groot, p. 39; Sporken/Gommers, The Patents Box, p. 200; For UK, see: HM Revenue & Customs, Finance Bill 2012, p. 39 recital 3.55; HM Revenue & Customs, Draft Legislation, p. 23 recital 3.39; HM Treasury/HM Revenue & Customs, Consultation, p. 14 recitals 3.8, 3.9, 3.10.

[1039] See section 2 (II) (3) (B) (Relevant IP income) of this Part; Section 2 (II) (3) (C) (Notional royalty) of this Part; Section 2 (II) (3) (D) (Mixed sources of income) of this Part; Section 2 (II) (3) (E) (Profits arising before grant of a right) of this Part.

proach[1040]. Towards that end, article 55 paragraph (2) of the Tax Act stipulates that RIPI from the use, realisation or sale from relevant IP rights is to be reduced by associated tax-relevant expenses, including write-downs on the relevant IP rights, even where the expenses arose over several assessment periods.

Associated tax-relevant expenses include, but are not limited to the costs set out below[1041]:

– R&D costs;
– License costs;
– Damages for infringement costs;
– Personnel costs;
– Material and supplies costs;
– Premises costs;
– Plant and machinery costs;
– Professional services costs;
– Administration costs;
– Registration costs;
– Write-down costs;
– Finance costs; or
– Equity costs.

In a second step, these costs are explored in more detail:

aa) R&D costs

R&D costs in respect of relevant IP rights include expenses incurred by a relevant taxpayer for:

– Internal R&D activities, contract R&D arrangements or cost sharing arrangements[1042];
– Developing new and enhanced intangible assets through enhancements,

1040 See HM Revenue & Customs, Finance Bill 2012, p. 60 recital 4.13, 4.13; HM Revenue & Customs, Draft Legislation, p. 35 recitals 4.11, 4.12.

1041 See Steuerverwaltung des Fürstentums Liechtenstein, Wegleitung juristische Personen, p. 18; See also HM Revenue & Customs, Finance Bill 2012, p. 46 recital 3.105; HM Revenue & Customs, Draft Legislation, p. 28 recital 3.77; Müller/Gramigna/Linder, p. 806.

1042 See also Schäuble/Giger, p. 712.

revisions and updates[1043]; or

– Marketing, selling and promotion, trademark and brand development as well as designs that are classified as R&D[1044]

bb) License costs and damages for infringement

License costs include both expenses incurred for the use or realisation of relevant IP rights under a license and damages for infringement which a taxpayer is obliged to pay[1045].

Regarding damages for infringement, article 47 paragraphs (2) and (3) letter (i) of the Tax Act specifies that the taxable net corporate income includes fines, monetary penalties and comparable legal consequences relating to wealth on the condition that the penal nature predominates. This implies that these expenses are not commercially justified expenses and not deductible for tax purposes.

Unlike other jurisdictions, the Liechtenstein legal order does not provide for any possibility of levying supplementary penalties in connection with damages for infringement[1046]. This fact is not of further relevance, however, since claims for damages relating to the commercialisation of relevant IP rights are generally likely to originate from abroad. Damages for infringement paid in connection with relevant IP rights thus generally qualify as associated tax-relevant expenses for purposes of article 55 paragraph (2) of the Tax Act, on the condition that their penal nature does not predominate[1047]. Where the penal nature predominates, based on article 47 paragraph (3) letter (i) of the Tax Act the expenses cannot be deducted for tax purposes.

cc) Personnel costs

Personnel costs include any expenses incurred by the taxpayer in respect of board members or employees. Social insurance contribution costs payable by employers are included in personnel costs, as are share scheme and pension deductions. Personnel costs further include amounts paid in respect of externally provided workers supplied to the taxpayer.

1043 See also OECD Discussion Draft, p. 24 recital 99.

1044 See also HM Revenue & Customs, Finance Bill 2012, p. 50 recital 3.123; HM Revenue & Customs, Draft Legislation, p. 30 recital 3.88; HM Treasury/HM Revenue & Customs, Consultation, p. 20 recital 4.22.

1045 See OECD MTC, p. 222 recital 8.

1046 See Europäisches Patentamt, p. 84 et seq; Benkard, p. 806 et seq; Nieder, p. 62 et seq.

1047 See also Merrill/Shanahan/Tomé Gómez/Glon/Grocott/Lamers/MacDougall/ Macovei/ Montredon/Vanwelkenhuyzen/Cernat/Merriman/Moore/Muresan/Van Den Berghe/Linczer, p. 1674.

dd) Material and supplies costs

Material and supplies costs include expenses incurred by the taxpayer for raw materials and goods purchased for the manufacturing of products or items protected by relevant IP rights.

ee) Premises costs

Premises costs include deductible expenses incurred in respect of land and premises which the taxpayer occupies, such as rent, repair or maintenance.

ff) Plant and machinery costs

Plant and machinery costs include any deductible expenses related to plant and machinery owned or leased by the taxpayer, such as expenses for leasing, constructing, modifying, maintaining, servicing or operating.

gg) Professional services costs

Professional services costs include legal services, financial services including accounting, audit and valuation functions or expenses related to the administration and management of the undertaking.

hh) Administration and registration costs

Administration costs include consultancy and professional expenses, computer costs or telecommunications. Registration costs include expenses for filing, renewal and protection of relevant IP rights.

ii) Write-down costs

According to article 1053 (Capitalisable costs) of the Law on Persons and Companies ("PGR") only certain costs related to intangibles can be capitalised in the balance sheet, such as the establishment and expansion of business operations as well as R&D costs. It should be emphasised that the recognition of these items is subject to very specific and rigid conditions and usually requires a sophisticated and informative cost accounting system. All other costs related to intangibles must not be capitalised. Relevant IP rights may however be developed internally irrespective of whether the underlying R&D costs are capitalised in the balance sheet.

Article 1085 (Valuation of assets and liabilities) of the PGR refers only to those costs that can in principle be capitalised in accordance with article 1052 f. (General rules) of the PGR. Article 1053 (Capitalisable costs) of the PGR specifies that capitalisable costs must be depreciated within five years of the date of their capitalisation.

For tax purposes, article 26 of the Tax Ordinance stipulates that scheduled write downs may be applied to the book value or acquisition value. For scheduled

write-downs on the book value, the write-down rate is 40% for intangible assets, and thus for acquired relevant IP rights, is 40%. Where the write-down is performed on the acquisition value, then the normal write-down rate of 40% is to be reduced by half. Higher write-down rates are recognised by the tax authorities where a relevant taxpayer demonstrates that they are necessary.

In comparison to the PGR, IAS 38 prescribes the accounting treatment for intangible assets and requires an entity to recognise an intangible asset if specified criteria are met[1048]. An intangible asset is defined as an identifiable non-monetary asset without physical substance[1049]. The definition requires an intangible asset to be identifiable to distinguish it from goodwill. An asset is identifiable if it either[1050]:

– Is separable and thus capable of being separated or divided from the entity and sold, transferred, licensed, rented, or exchanged, either individually or together with a related contract, identifiable asset or liability, regardless of whether the entity intends to do so; or

– Arises from contractual or other legal rights, regardless of whether those rights are transferable or separable from the entity or from other rights and obligations.

If an item meets the definition of an intangible asset, it is to be recognised if, and only if[1051]:

– It is probable that the expected future economic benefits that are attributable to the asset will flow to the equity; and

– The cost of the asset can be measured reliably.

Not all IP rights can meet the definition of an intangible asset and thus conform to the criterions of identifiably, control over a resource and existence of future economic benefits. Where an item within the scope of IAS 38 does not meet the definition of an intangible asset, expenditure to acquire it or to generate it internally is recognised as an expense when it is incurred. Attention should however be paid where the IP right is acquired in a business combination, as intangible assets may be recognised that were not beforehand and it thus may form part of the goodwill recognised at the acquisition date[1052]. Where the definition and recognition criteria are met, then the item is recognised as an intangible asset[1053].

1048 European Commission, EU Single Market, recital 1.

1049 Idem, recital 8.

1050 Friedrich/Friedrich/Spector, p. 2.

1051 European Commission, EU Single Market, recital 21; Friedrich/Friedrich/Spector, p. 3.

1052 European Commission, EU Single Market, recital 10; See also B paragraphs of IFRS, B28 – B 40.

1053 Friedrich/Friedrich/Spector, p. 3.

Intangible assets that are acquired are generally considered to satisfy the recognition condition[1054].

Expenditures during the research phase are expensed as incurred, as during such phase, an entity cannot demonstrate that an intangible asset exists that will generate probable future economic benefits[1055]. IAS 38 does therefore not recognise internally generated intangible assets arising from research[1056]. The standard allows however for the recognition of development costs as an intangible asset[1057]. The recognition of development costs is subject to very specific and rigid conditions that inter alia relate to the demonstration of financial and technical feasibility or expected future economic benefit of the intangible asset[1058].

In view of the protection of creditors and the prudence principle related thereto, the PGR is rather stringent regarding the capitalisation of IP rights. It can thus be argued that in this respect the national accounting standard based on PGR largely corresponds to the international accounting standard based on IAS.

It follows that the two accounting standards are not always recognising intangible assets for accounting purposes. Costs associated with developing intangibles internally through expenditures such as R&D and advertising are usually expensed rather than capitalised for accounting purposes. The intangibles resulting from such expenditures are thus not always reflected on the balance sheet. Yet, such intangibles can nevertheless carry significant economic value[1059].

jj) Finance costs

Finance costs include attributable finance expenses such as loan relationships or costs that are economically equivalent to interest[1060].

kk) Equity costs

Equity costs means attributable notional interest deduction expenses, irrespective of the fact that these costs are not recognised in statutory accounts. The notional interest deduction is deemed to be a commercially justified expense according to article 54 of the Tax Act.

1054 European Commission, EU Single Market, recital 25.
1055 Friedrich/Friedrich/Spector, p. 4.
1056 European Commission, EU Single Market, recital 54.
1057 Idem, recital 57.
1058 European Commission, EU Single Market, recital 57; Friedrich/Friedrich/Spector, p. 4.
1059 OECD Discussion Draft, p. 7 recital 6.
1060 See also paragraph 57a (Net license income) subparagraph (3) of the Nidwalden Tax Ordinance.

c) Other features of tax deduction

While in Belgium the tax deduction under the IP box applies before the notional interest deduction[1061], in Liechtenstein the tax deduction set out in article 55 of the Tax Act applies after:

- Adjustments to the taxable net corporate income in conjunction with article 47 (Object of taxation) paragraph (3) of the Tax Act, including:
  - Set-off and deduction of already taxed hidden reserves;
  - Set-off and deduction of non-booked write-downs, value adjustments and provisions; and
  - Set-off and deduction of monetary benefits.
- International tax allocations by virtue of article 48 (Tax-exempt corporate income) paragraph (1) letter (b) of the Tax Act; and
- Notional interest deduction by virtue of article 54 (Notional interest deduction) of the Tax Act.

Yet, the tax deduction under the IP box, amongst others, applies before:

- Compensation of domestic and foreign losses within a corporate group for a tax year with profits generated during the same tax year by virtue of article 58 (Group taxation) of the Tax Act; and
- Offset of losses from a foreign permanent establishment with taxable net corporate income and in principle any other loss for a tax year by virtue of article 57 (Losses) of the Tax Act.

Accordingly, the tax deduction by virtue of article 55 of the Tax Act available for a tax year is limited to the taxable profit for the tax year, which consists of:

[1061] Offermanns/Michel, chapter 1, 1.7.4, 1.7.7; Offermanns/Michel/Vanhaute, chapter 1, 1.9.6, 1.9.7; Hendrickx, p. 20; Cops/Lemaire, p. 14, Warson/Foriers, p. 71, 73; Cops/De Haen, p. 3; Van den Berghe/Kelley, p. 380; Onkelinx/Van den Berg, p. 5.

Maximum amount of tax deduction under the IP box by virtue of article 55 of the Tax Act available for a tax year	
	Balance of the profit and loss statement
+ / –	Set-off (+) and deduction (–) of already taxed hidden reserves
+ / –	Set-off (+) and deduction (–) of non-booked write-downs, value adjustments and provisions
+ / –	Set-off (+) and deduction (–) of monetary benefits
–	International tax allocations
–	Notional interest deduction ("NID")
=	Maximum amount of tax deduction under the IP box available for the tax year

Unlike Belgium[1062], any excess of tax deduction under the IP box that is not deductible from the taxable profit of a taxpayer for a tax year, will not be lost and remains fully tax deductible instead. Such excess tax deduction thus creates or increases a tax loss, which can be carried forward for an unlimited period of time and offset with future taxable profits. A taxpayer can therefore not be worse off because it was applying for the IP box[1063].

Evidently, the tax deduction under article 55 of the Tax Act can be combined with other tax incentives under the Liechtenstein Tax Act.

An example to illustrate the application of article 55 paragraphs (1) and (2) of the Tax Act is set out below. It already takes into consideration the amended loss offsetting rules pursuant to article 57 paragraph (1) of the Tax Act[1064]:

[1062] See Offermanns/Michel, chapter 1, 1.7.7; Offermanns/Michel/Vanhaute, chapter 1, 1.9.7; Vanhaute, chapter 5, 5.1.5; Warson/Van Ende, p. 2; Hendrickx, p. 20; Warson/Glaes, p. 323; Eynatten/Brauns, p. 2; Van den Berghe/Kelley, p. 380; Warson/Foriers, p. 71; Van Stappen/Delanoy/De Groote, p. 291; Van Stappen, p. 1; Cops/De Haen, p. 3; Onkelinx/Van den Berg, p. 5.

[1063] See also Liechtenstein Government, Consultation Report RA 2012/1856-0701, p. 20.

[1064] Felder, Besteuerung von Einkünften; See also Landtag des Fürstentums Liechtenstein, Landtag April 2013; Liechtenstein Government, Statement No 5/2013.

Calculation of the contribution of the IP box to the overall taxable business profit of a taxpayer

Commercial law	**1**	**2**	**3**	**4**	**5**	**6**	**7**
RIPI	0	0	200	300	350	450	600
Other income	200	250	350	350	350	350	350
IP related expenses	-300	-300	-100	-100	-50	-50	-50
Other expenses	-100	-100	-100	-100	-100	-100	-100
Commercial result	-200	-150	350	450	550	650	800
Net RIPI / RP / RL	-300	-300	100	200	300	400	550
Tax law							
Losses brought forward	0	-200	-350	-105	0	0	0
Additional losses / Use of losses	-200	-150	245	105	0	0	0
Losses carried forward	-200	-350	-105	0	0	0	0
Cumulated RP / RL	-300	-600	-500	-300	0	400	550
Tax deduction 80%	0	0	0	0	0	-320	-440
Taxable result	0	0	105	345	550	330	360

Summary	**Commercial law**	**Tax law**
Profits without RP	1.500	1.500
Net RIPI / RP	950	190
Total	2.450	1.690

Taking into account the corporate income tax rate of 12.5%, applying for the IP box results in:

Tax savings of 95 ((2.450 – 1.690) x 12.5%). Expressed in relative terms the tax savings is 31%.

The ETR on RP is 2.5% ((190/950) x 12.5%).

B) Relevant IP income

Relevant IP income ("RIPI") or other income that is deemed to be RIPI can arise from different ways of exploiting relevant IP rights.

It can happen that a taxpayer derives some of its taxable income from the commercialisation of a legally protected innovation or item, but the IP-derived income does not fall into any of the following categories. If so, article 55 paragraph (3) of the Tax Act provides that such IP-derived income is deemed to be RIPI as a notional royalty for the legally protected item[1065].

RIPI may fall within any of the five following categories[1066]:

a) Sales income

To make the IP box competitive for the widest range of undertakings it should have a broad scope. As a result, the regime is supposed to apply to income of products protected by relevant IP rights which is embedded in the sales income[1067].

Inclusion of sales income to the IP box increases the difficulty of identifying in a tax year what level of RP should be attributed to relevant IP rights. Similar to the determination of a notional royalty, the level of RP should correspond to the amount that a relevant taxpayer would pay to an independent third party for the right to use or realise the relevant IP rights in the tax year if the taxpayer were not otherwise able to exploit them[1068].

The application of a rule of thumb to determine the profit in respect of a relevant IP right is discouraged[1069]. This is why relevant taxpayers may be required to perform transfer pricing analyses for each relevant IP right in order to determine the respective share of RP[1070].

An analysis of the wording of article 55 of the Tax Act does not expressly include or exclude the category of sales income from RIPI. Comparative interpretation of article 55 of the Tax Act further indicates that other IP box legislations simply refer to income from relevant IP rights, while at the same time their

---

1065 See also section 2 (II) (3) (C) (Notional royalty) of this Part.

1066 See also Felder/Harmann, p. 82; Müller/Gramigna/Linder, p. 808.

1067 See Sullivan, p. 11; Nicholls/Smith; Krever, p. 756; HM Treasury/HM Revenue & Customs, Consultation, p. 6.

1068 See section 2 (II) (3) (C) (Notional royalty) of this Part; See also Müller/Gramigna/Linder, p. 808.

1069 See OECD Discussion Draft, p. 18 recitals 59 to 61, p. 28 recital 116 et seq.

1070 See also Hausmann/Roth/Krummenacher, p. 89; Müller/Gramigna/Linder, p. 808.

scope extends to income that is embedded in the sales revenue of products incorporating at least one innovation covered by a relevant IP right[1071].

From a conceptual perspective, there is no visible indication why article 55 of the Tax Act should exclude sales income from the scope of the IP box regime. Accordingly, there should be no difference whether a taxpayer generates a certain amount of profit from granting a license in respect of a relevant IP right, or an equivalent amount of profit in respect of the relevant IP right embedded in sales income. In the same way there should be no differentiation where a taxpayer uses the relevant IP right for own purposes, thereby generating an equivalent amount of RP as a notional royalty.

Taking further into account the creative aim and spirit of the legislator regarding the sustainable implementation of the Liechtenstein IP box regime, it can be reasonably concluded that sales income qualifies as RIPI for the purposes of article 55 of the Tax Act. More specifically, this category of RIPI extends to income embedded in the sales income from the sale of any products or items protected by at least one relevant IP right[1072].

Article 55 of the Tax Act does not contain a requirement whereby worldwide sales income in respect of the legally protected innovation must be protected by a relevant IP right in every jurisdiction of sale. This is why worldwide sales income can be treated as RIPI assumed that it is received by a relevant taxpayer[1073]. It should be emphasised, however, that the anti-avoidance provision based on article 3 (Abuse of structuring options) of the Tax Act may have to be taken into account. Pseudo-innovations aiming to deliver unjustified IP box benefits therefore risk to be considered abusive and must be discouraged for that reason[1074].

[1071] For Belgium, see: Offermanns/Michel, chapter 1, 1.7.7; Offermanns/Michel/Vanhaute, chapter 1, 1.9.7; Van den Berghe/Kelley, p. 378; For UK, see: Philipps/Danes, p. 8; Finance (No. 4) Bill, p. 147 at 357CC (2); Consultation draft, p. 8 at 357CB (2); HM Revenue & Customs, Finance Bill 2012, p. 33 recital 3.22; HM Revenue & Customs, Draft Legislation, p. 20 recital 3.16; HM Treasury/HM Revenue & Customs, Consultation, p. 13 recital 3.3 et seq; The Netherlands in their IP box legislation rather refer to "income from intangible assets" instead of "income from IP rights", while all the same extending the tax deduction to income that is embedded in the sales price of products; See Article 12b paragraph (5) of the CITA; Shanahan, Patent Box, p. 6; Sunderman, p. 227; Müller, Sunderman, p. 227; The Netherlands in International Tax Planning, Online Books IBFD, chapter 11.2.3.

[1072] See also HM Revenue & Customs, Finance Bill 2012, p. 33 recital 3.29; HM Revenue & Customs, Draft Legislation, p. 20 recital 3.18.

[1073] See HM Revenue & Customs, Finance Bill 2012, p. 33 recital 3.27.

[1074] See Philipps/Danes, p. 8; HM Revenue & Customs, Finance Bill 2012, p. 12 recit-

For the purposes of sales income, packaging and its contents are generally not to be treated as a single item. This is, for instance, essential where a non-protected product is sold in a legally protected packaging. Despite this, packaging as far as possible should be ignored for IP box purposes and all income arising from the contents to be treated as RIPI[1075]. In addition, if the packaging is legally protected by a relevant IP right and contributes to the sale value of a non-protected product, then the income that can properly be attributed to the packaging also qualifies as RIPI[1076].

If desired, based on article 93 of the Tax Act a taxpayer that deals with difficult tax issues in this context can request a binding advance ruling from the competent tax authorities[1077].

b) License fees

This category of RIPI includes income from any license fee or royalty which a relevant taxpayer receives under an agreement granting another person any of the following rights[1078]:

– A right in respect of any relevant IP right held by the relevant taxpayer; and

– Any other right in respect of a legally protected innovation or process; and

– In the case of an agreement granting any right within the framework referred to above, a right granted to another person for the same purposes as those for which that right was granted to the relevant taxpayer.

It should be emphasised that this definition of license fees also deliberately purposes to cover the granting of sublicenses for IP box purposes.

---

als 1.32, 1.33; HM Revenue & Customs, Draft Legislation, p. 7 recital 1.27; HM Treasury/HM Revenue & Customs, Consultation, p. 13 recital 3.4.

1075 See Finance (No. 4) Bill, p. 148 at 357CC (3); Consultation draft, p. 9 at 357CB (3); HM Revenue & Customs, Finance Bill 2012, p. 34, 35 recitals 3.34 and 3.35; HM Revenue & Customs, Draft Legislation, p. 21 recitals 3.25 and 3.26; See also section 2 (II) (3) (D) (Mixed sources of income) of this Part.

1076 See HM Revenue & Customs, Finance Bill 2012, p. 35 recitals 3.36; HM Revenue & Customs, Draft Legislation, p. 21 recitals 3.27.

1077 See Steuerverwaltung des Fürstentums Liechtenstein, Merkblatt; See also Müller/Gramigna/Linder, p. 810.

1078 See Finance (No. 4) Bill, p. 148 at 357CC (6); Consultation draft, p. 9 at 357CB (7); Vanhaute, chapter 5, 5.1.5.1; Hendrickx, p. 18; Müller/Gramigna/Linder, p. 808; Van den Berghe/Kelley, p. 374; Van Stappen/Delanoy/De Groote, p. 291; Onkelinx/Van den Berg, p. 3.

For the sake of good order it should be mentioned that license fees or royalties qualify as a category of RIPI for the purposes of article 55 of the Tax Act.

In practice, for sound reasons relevant taxpayers may grant licenses in respect of relevant IP rights that further include the right to use other IP rights such as know-how or technical information. As the case may be, the aggregate income from such license can qualify as RIPI. This is because intangibles can be so closely intertwined that it is difficult to separate them from each other[1079]. For instance, in situations where under a license agreement the performance of services and the exploitation of relevant and non-relevant IP rights are closely intertwined, the IP box benefits should be available on the total income from such agreement, provided that the intangibles are inseparable from each other[1080]. With respect to the handling of bundled licenses this rationale should thus apply as far as possible.

Furthermore, license fees can consist of either variable fees, for instance royalties as a percentage on turnover, as well as fixed and/or advance fees, for instance milestone or upfront payments[1081].

Where the license fees for a jointly held relevant IP right are paid separately to different relevant taxpayers, the amounts of income eligible for the IP box are straightforward to determine. Yet, where a global fee is paid to the different relevant taxpayers, a fair formula has to be determined in order to allocate the right amount of RIPI to each of those taxpayers[1082].

A license agreement can extend beyond the protection period of relevant and other IP rights. As the circumstances require, the agreement may turn into a mixed agreement to which section 2 (II) (3) (D) (Mixed sources of income) of this Part applies[1083].

1079 For UK, see: HM Revenue & Customs, Finance Bill 2012, p. 36 recital 3.39; HM Revenue & Customs, Draft Legislation, p. 22 recital 3.29; For Belgium, see: Warson/Glaes, p. 322; Springael/Van de Velden, p. 5; For Luxembourg, see: Muntendam/Chiarella, p. 229; See also OECD Discussion Draft, p. 20 recital 74; Merrill/Shanahan/Tomé Gómez/Glon/Grocott/Lamers/MacDougall/Macovei/ Montredon/Vanwelkenhuyzen/Cernat/Merriman/Moore/Muresan/Van Den Berghe/ Linczer, p. 1674; Müller/Gramigna/Linder, p. 808.

1080 See OECD Discussion Draft, p. 20 recital 74.

1081 See Vanhaute, chapter 5, 5.1.5.3; Bal/Offermanns, p. 171; Warson/Van Ende, p. 2; Hendrickx, p. 18; Scheunemann/Dennisen, p. 410; Warson/Glaes, p. 322; Onkelinx/Rens, p. 3; Cops/Lemaire, p. 13; Van den Berghe/Kelley, p. 377; Warson/Foriers, p. 73; Van Stappen/Delanoy/De Groote, p. 292; Van Stappen, p. 2; Cops/De Haen, p. 2; Onkelinx/Van den Berg, p. 3.

1082 See Warson/Glaes, p. 322.

1083 For Belgium, see: Van den Berghe/Kelley, p. 377; For UK see: See Philipps/Danes, p. 8; Philipps/Danes, p. 8; HM Revenue & Customs, Finance Bill 2012, p. 35 recital

c) Proceeds of sale

This category of RIPI includes any income arising from the sale or other disposal of relevant IP rights[1084].

In accordance with article 55 paragraph (2) of the Tax Act, the basis of assessment for the deduction of 80% includes income from the sale of relevant IP rights[1085]. It should be emphasised that proceeds of sale do not include sales or other disposals of non-relevant IP rights, even where they protect innovations that are also protected by relevant IP rights. Similarly, where non-relevant IP rights are sold or disposed of in the same transaction as relevant IP rights, then only the sale proceeds of the relevant IP rights qualify as RIPI[1086].

Where not a relevant IP right itself, but the underlying innovation is sold or disposed of by a taxpayer, then by virtue of article 55 paragraphs (1) and (2) of the Tax Act the corresponding proceeds of sale of the intangible do not qualify as RIPI.

d) Damages for infringement

Relevant IP rights are regularly contested. Any damages paid by other persons for infringing or alleged infringement can largely be seen as compensation for lost income, which would otherwise have been eligible for the IP box[1087].

Article 55 of the Tax Act does not expressly refer to the question whether damages for infringement qualify as RIPI. An analysis of the wording of article 55 of the Tax Act, however, provides no indication why the Tax Act in general and article 55 of the Tax Act in particular should prevent damages for infringement to qualify as a category of RIPI. It can therefore be reasonably concluded that damages for infringement qualify for the IP box on the condition that the taxpayer receiving the income is a relevant taxpayer.

According to the meaning of relevant taxpayer as outlined in section 2 (II) (2) (A) (Meaning of relevant taxpayer) of this Part, a taxpayer is supposed to qualify as a relevant taxpayer even if damages for infringement are received after expiry

---

3.37, 38 recital 3.53; HM Revenue & Customs, Draft Legislation, p. 21 recital 3.28; HM Treasury/HM Revenue & Customs, Consultation, p. 13 recital 3.3.

1084 See Finance (No. 4) Bill, p. 148 at 357CC (7); Consultation draft, p. 9 at 357CB (8); HM Revenue & Customs, Finance Bill 2012, p. 36 recital 3.40; HM Revenue & Customs, Draft Legislation, p. 22 recital 3.31.

1085 See also OECD Discussion Draft, p. 18 recital 62 et seq; Müller/Gramigna/Linder, p. 808.

1086 See HM Revenue & Customs, Finance Bill 2012, p. 37 recital 3.44.

1087 See HM Revenue & Customs, Finance Bill 2012, p. 10 recital 1.16 (v), 37 recital 3.46; HM Revenue & Customs, Draft Legislation, p. 5 recital 1.12 (iv), 22 recital 3.35; HM Treasury/HM Revenue & Customs, Consultation, p. 13 recital 3.7.

or sale of the relevant IP right, provided that the infringement took place when the right was a relevant IP right and the taxpayer was then entitled to elect for the IP box[1088]. If a taxpayer receives an amount falling under the category of damages for infringement, which relates partly to a period when both the taxpayer and the rights were relevant, and partly to a period when one or both of these were not relevant, then a reasonable apportionment of the remuneration should be made[1089].

Due to considerations of criminal law, the damages in certain jurisdictions can sometimes be increased in the event of intentional infringement of IP rights, in particular for patents. Such supplementary penalties are not known in the Liechtenstein legal order. The question therefore arises whether collected supplementary penalties systematically fall within the scope of article 55 of the Tax Act.

Damages for infringement suffered by a taxpayer by virtue of article 47 paragraph (3) letter (i) of the Tax Act are not deductible for tax purposes provided that their penal nature predominates. Where the penal nature does not predominate, based on article 55 paragraph (2) of the Tax Act damages for infringement may have to be classified as associated tax-relevant expenses.

From a tax-systemic perspective it appears coherent to fully include collected damages for infringement, including supplementary penalties, within the scope of the IP box. On the other hand, article 55 paragraph (4) of the Tax Act stipulates that if payments for the IP rights are agreed which exceed the usual market compensation, then the 80% deduction is calculated on the basis of the usual market price. Litigation relating to the infringement of relevant IP rights relies, however, precisely on the fact that at no point in time was usual market compensation agreed by the involved parties[1090]. It is moreover questionable whether courts with jurisdiction in a case of infringement of property rights would determine the amount of damages for infringement in accordance with the arm's length principle.

It is thus important to note that according to the commentary on article 12 of the OECD MC, the definition of royalties covers both payments made under a license and compensation which a person would be obliged to pay for fraudulently copying or infringing the right[1091]. In addition, the UK IP box legislation clearly refers to "any amount received by the company in respect of an in-

---

1088 See HM Revenue & Customs, Finance Bill 2012, p. 37 recital 3.47; HM Revenue & Customs, Draft Legislation, p. 22 recital 3.36.

1089 See HM Revenue & Customs, Finance Bill 2012, p. 37 recital 3.49; HM Revenue & Customs, Draft Legislation, p. 22 recital 3.37.

1090 See Europäisches Patentamt, p. 84 et seq; Benkard, p. 806 et seq; Nieder, p. 62 et seq; See also OECD TP Guidelines, p. 196 recitals 6.14, 6.15.

1091 See OECD MTC, p. 222 recital 8.

fringement, or alleged infringement" of a relevant IP right held by the company at the time of the infringement or alleged infringement[1092]. In those circumstances even if the total award has some punitive element it is likely that the UK tax authorities would regard it as all arising "in respect of" the infringement.

Against this backdrop, it can be reasonably concluded that article 55 of the Tax Act also extends to supplementary penalties in regard to the damages for infringement collected in proceedings relating to the infringement of relevant IP rights. It should be emphasised, however, that penalties and liquidated damages of differing character and function play a role within each legal order, so that a differentiated consideration should be the subject of additional research in this regard. This conclusion therefore is without prejudice to cases in which the damages can literally be multiplied on considerations of criminal law when the infringement of the property right was intentional[1093].

e) Other compensation

This category of RIPI includes any amount of damages, proceeds of insurance or other compensation, other than an amount in respect of an infringement or alleged infringement of a relevant IP right, which is received by a taxpayer in respect of an event and is[1094]:

– Sales income in accordance with section 2 (II) (3) (B) (a) (Sales income) of this Part; or

– Loss of income which would, if received by the taxpayer at the time of that event, have been RIPI.

Similarly to the category of damages for infringement, article 55 of the Tax Act does not expressly refer to the question whether other compensation qualifies as RIPI. Again, an analysis of the wording of article 55 of the Tax Act provides no indication why the Tax Act in general and article 55 of the Tax Act in particular should prevent other compensation to qualify as a category of RIPI. It can therefore be reasonably concluded that other compensation qualifies for the IP box on the condition that the taxpayer receiving the income is a relevant taxpayer[1095].

If a taxpayer receives an amount falling under the category of other compensation, which relates partly to a period when both the taxpayer and the rights were

---

1092 Finance (No. 4) Bill, p. 148 at 357CC (8); Consultation draft, p. 9 at 357CB (9).

1093 See Lowensohn; United States District Court, Northern District of California, San José Division, 24 August 2012, Case No. 11-CV-01846-LHK, Verdict Form, Apple Inc v. Samsung Electronics Co Ltd.

1094 See Finance (No. 4) Bill, p. 148 at 357CC (9).

1095 See HM Revenue & Customs, Finance Bill 2012, p. 37 recital 3.50, 38 recital 3.53.

relevant, and partly to a period when one or both of these were not relevant, then a reasonable apportionment of the remuneration should be made[1096].

C) Notional royalty

If in accordance with article 55 paragraph (3) of the Tax Act the IP rights are used by a legal person or permanent establishment itself in the course of its production or by a third party acting as its contractor, or in the course of services, then the deduction is to be applied to the income arising from the IP that would have been generated if the use had been assigned to a third party against payment[1097].

The principle purpose of the notional royalty provision is thus to deliver IP box benefits to a relevant taxpayer using its relevant IP in a way that does not generate RIPI under section 2 (II) (3) (B) (Relevant IP income) of this Part, but does enable the taxpayer deriving income and profits, which can be referred to as IP-derived income[1098]. The exclusion of income that is RIPI in the calculation of the notional royalty aims to preclude double-counting to the disadvantage of the relevant taxpayer[1099].

It should be emphasised that notional royalties cover relevant IP rights, primarily patents, which are used in processes that create non-protected products, or to perform services alternatively[1100]. For instance, a technical instrument protected by a relevant IP right used in the roasting process of non-protected items such as coffee beans that are sold by the taxpayer may generate IP-derived income. The concept of notional royalty provides for such IP-derived income to be eligible for the IP box[1101]. In the same way, the concept extends to relevant IP rights used in the performance of services that creates non-RIPI income, which for the purposes of the notional royalty rules qualifies as IP-derived income. For in-

---

1096 See HM Revenue & Customs, Finance Bill 2012, p. 37 recital 3.49; HM Revenue & Customs, Draft Legislation, p. 22 recital 3.37.

1097 Felder, Country Survey, chapter 1, 1.3.3; Liechtenstein Government, Statement No 21/2012, p. 23; Lehmann/Zanettin, p. 11; Liechtenstein Government, Report and Application No 123/2011, p. 24, 31; Wanger, Kommentar Steuergesetz, p. 181.

1098 See Philipps/Danes, p. 8; Finance (No. 4) Bill, p. 149 at 357CD (2), 150 at 357CD (9); Consultation draft, p. 10 at 357CC (2), 11 at 357CC (9); HM Revenue & Customs, Finance Bill 2012, p. 39 recital 3.54; HM Revenue & Customs, Draft Legislation, p. 23 recital 3.38.

1099 See HM Revenue & Customs, Finance Bill 2012, p. 40 recital 3.67; HM Revenue & Customs, Draft Legislation, p. 24 recital 3.49;

1100 See HM Revenue & Customs, Finance Bill 2012, p. 39 recitals 3.55; HM Revenue & Customs, Draft Legislation, p. 23 recital 3.39; HM Treasury/HM Revenue & Customs, Consultation, p. 14 recital 3.8, 3.9, 3.10.

1101 See HM Revenue & Customs, Finance Bill 2012, p. 39 recitals 3.56; HM Revenue & Customs, Draft Legislation, p. 23 recital 3.39.

stance, this may be IP-derived income from professional medical or scientific training services related to the application of surgical equipment protected by a relevant IP right which are performed by the taxpayer[1102].

Despite the wording of the law pursuant to article 55 paragraph (3) of the Tax Act, in practice IP-derived income for a tax year which is treated as RIPI ideally corresponds to the amount that a relevant taxpayer would pay to a third party ("TP") for the right to use or realise the relevant IP rights in the tax year if the taxpayer were not otherwise able to exploit them[1103]. For the purposes of calculating the notional royalty it is assumed that[1104]:

– The relevant taxpayer and the notional IP owner ("TP") are dealing at arm's length;
– The relevant taxpayer, or any other person authorised by it, have the right to exploit the relevant IP rights to the exclusion of any other person including TP;
– The relevant taxpayer will have the equivalent rights in relation to the relevant IP rights as it actually has;
– The right to exploit the relevant IP rights is conferred on the first day of the tax year, or if later, the day on which the relevant taxpayer first began to hold the right or license;
– The notional royalty figure for the tax year is determined at the beginning of the tax year;
– The notional royalty figure for the tax year may apply for each succeeding tax year for which the relevant taxpayer has the right to exploit the relevant IP rights; and
– No income other than IP-derived income will arise from anything done by the relevant taxpayer that involves the exploitation by the taxpayer of the relevant IP rights.

It is in the responsibility of the taxpayer to elect whether to calculate a notional royalty for a tax year. By virtue of article 49 (Arm's length principle) of the Tax Act, the notional royalty should be calculated in accordance with article 9 of the

---

1102 Idem.

1103 See Finance (No. 4) Bill, p. 149 at 357CD (5); HM Revenue & Customs, Finance Bill 2012, p. 39 recital 3.58; HM Revenue & Customs, Draft Legislation, p. 23 recital 3.41; Consultation draft, p. 10 at 357CC (5).

1104 See Finance (No. 4) Bill, p. 149 at 357CD (6), 150 at 357CD (7); Consultation draft, p. 10 at 357CC (6), 11 at 357CC (7); HM Revenue & Customs, Finance Bill 2012, p. 40 recitals 3.62 to 3.68; HM Revenue & Customs, Draft Legislation, p. 23 recitals 3.42 to 3.50.

OECD Model Tax Convention and the OECD's Transfer Pricing Guidelines[1105]. Accordingly, the notional royalty is supposed to correspond to the full amount that the relevant taxpayer would be willing to pay to be able to use the relevant IP right in an arm's length situation. While all provisions of the OECD guidelines should be considered in determining the notional royalty figure, there is no need to identify the price at which any particular counterparty would be willing to sell or to take into account the relative bargaining positions of the two parties[1106].

It should generally not be required in practice to calculate a new notional royalty figure for each new tax year, provided that none of the relevant facts and circumstances from a previous tax period has altered[1107]. The notional royalty is deemed to be granted for a period matching the period for which the relevant taxpayer actually holds the relevant IP rights. This is important to acknowledge and allows the notional royalty figure to properly reflect the actual value of the relevant IP rights. Thereafter, a longer term license is normally more valuable, on an annual basis, than a shorter term but otherwise equivalent license[1108].

It is critical to understand that the notional royalty for tax purposes takes the form of an appropriate percentage. Such fixed-rate periodic notional royalty is determined as a percentage of the IP-derived income from the relevant IP rights for their remaining life. Lump-sum upfront or milestone payments as well as tiered, front-loaded or back-loaded notional royalties are likely to distort the IP box calculation in particular tax years and are thus precluded in this regard[1109]. From what is said it follows that the notional royalty in absolute and relative terms can never be greater than the IP-derived income from which it is calculated[1110].

It should eventually be noted that operating leases, where a taxpayer retains ownership of the leased item, do not give rise to RIPI. A taxpayer may, however, be allowed to compute a notional royalty subject to the condition that the

---

1105 See HM Revenue & Customs, Finance Bill 2012, p. 39 recital 3.59; Lehmann/Zanettin, p. 11.

1106 See HM Revenue & Customs, Finance Bill 2012, p. 39 recital 3.61.

1107 See HM Revenue & Customs, Finance Bill 2012, p. 40 recital 3.64; HM Revenue & Customs, Draft Legislation, p. 24 recital 3.46.

1108 See HM Revenue & Customs, Finance Bill 2012, p. 40 recital 3.65; HM Revenue & Customs, Draft Legislation, p. 24 recital 3.47.

1109 See HM Revenue & Customs, Finance Bill 2012, p. 40 recital 3.66; HM Revenue & Customs, Draft Legislation, p. 24 recital 3.48.

1110 See HM Revenue & Customs, Finance Bill 2012, p. 40 recital 3.68; HM Revenue & Customs, Draft Legislation, p. 24 recital 3.50.

amount of the notional royalty is not exceeding the corresponding leasing receipts[1111].

D) Mixed sources of income

Mixed sources of income means mixed income or income that is paid under a mixed agreement and arises where[1112]:

– Legally protected products or processes, or services, some of which give rise to RIPI and some of which give rise to other income, are sold together, as single unit or as part of a single unit for a single price; or

– A mixed agreement that covers the sale of legally protected products or processes, or services, or the grant of rights some of which would give rise to RIPI and some of which would give rise to other income.

Income arising in these circumstances is designated as either mixed income or income paid under a mixed agreement. Based on a cost accounting approach, such income for IP box purposes is to be allocated between RIPI and other income on a just and reasonable basis[1113].

In cases where the proportion of other income to RIPI is insignificant, the cost and expense of trying to make a cost accounting allocation seems to be disproportionate to the likely impact on the IP box calculation[1114]. As a suggestion, a proportion of RIPI below 5% (non-RIPI / RIPI x 100 < 5%) is likely to be insignificant. This frequently applies for packaging around a legally protected product that normally is minimal in value. On the other hand, figures in excess of 5% are likely to be significant[1115].

1111 See HM Revenue & Customs, Finance Bill 2012, p. 38 recital 3.52.

1112 See Finance (No. 4) Bill, p. 150 at 357CF (1); HM Revenue & Customs, Finance Bill 2012, p. 42 recital 3.75; HM Revenue & Customs, Draft Legislation, p. 25 recital 3.54; Consultation draft, p. 12, at 357CE (1).

1113 For Belgium, see: Hendrickx, p. 19; Eynatten/Brauns, p. 1; Van den Berghe/Kelley, p. 377; Warson/Foriers, p. 73; Cops/De Haen, p. 3; Onkelinx/Van den Berg, p. 3; For UK, see: HM Revenue & Customs, Finance Bill 2012, p. 42 recital 3.76; HM Revenue & Customs, Draft Legislation, p. 25 recital 3.55; See also OECD MTC, p. 226 recital 11.6.

1114 See Finance (No. 4) Bill, p. 151 at 357CF (6); Consultation draft, p. 12 at 357CE (6); See HM Revenue & Customs, Finance Bill 2012, p. 42 recital 3.77; HM Revenue & Customs, Draft Legislation, p. 25 recital 3.56; See also OECD MTC, p. 226 recital 11.6.

1115 See HM Revenue & Customs, Finance Bill 2012, p. 42 recital 3.78; HM Revenue & Customs, Draft Legislation, p. 25 recital 3.57.

E) Profits arising before grant of a right

Certain relevant IP rights are granted with preliminary effects after publication. This particularly applies for patents[1116]. Because there can be long pending periods between the application and the grant date of a relevant IP right, such preliminary effects particularly in respect of patents should be taken into account for IP box purposes.

Article 55 paragraph (1) of the Tax Act merely requires patents, utility models, trademarks and designs to be protected by entry in a domestic, foreign or international register in order to fall into the scope of the IP box[1117]. The said article however does not expressly refer to the handling of profits arising before grant of a relevant IP right.

A more detailed analysis to reconcile this situation shows that there is no visible indication that prohibits the IP box regime from applying to profits arising before the grant of a relevant IP right. It can therefore be reasonably concluded that article 55 of the Tax Act allows a relevant taxpayer to claim additional relief in the tax year in which the relevant IP right is granted. This is why the IP box is available to any RP produced prior to the grant of that relevant IP right[1118]. Similarly to the UK IP box legislation, such practice reduces administrative burdens caused by recalculating taxable income for multiple years due to the fact that additional relief is only available in the tax year when the relevant right is granted[1119].

With respect to article 55 paragraph (1) of the Tax Act it should be noted that the determination of profits arising before the grant of a relevant IP right does evidently not take into account any periods before 1 January 2011 and thus the time before entering into effect of the IP box regime. Moreover, the recapture rule by virtue of article 55 paragraph (2) of the Tax Act remains applicable. This implies that for the determination of profits arising before the grant of a relevant IP right, a taxpayer is required to offset any retained RL for the relevant IP right with the corresponding RP of the tax year[1120].

1116 See Article 14 of the Patent Act; Prokisch, p. 221.

1117 Felder, Country Survey, chapter 1, 1.3.3; Liechtenstein Government, Statement No 21/2012, p. 4, 14; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17; Lehmann/Zanettin, p. 10; Liechtenstein Government, Statement No 21/2012, p. 23; Liechtenstein Government, Report and Application No 123/2011, p. 4, 7, 8, 22, 24; Hosp/Langer, Steuerstandort Liechtenstein, p. 113; Roth, p. 62.

1118 See HM Revenue & Customs, Finance Bill 2012, p. 57 recital 3.164; HM Revenue & Customs, Draft Legislation, p. 32 recital 3.102; HM Treasury/HM Revenue & Customs, Consultation, p. 15 recital 3.16.

1119 See HM Treasury/HM Revenue & Customs, Consultation, p. 15 recital 3.16.

1120 See HM Revenue & Customs, Finance Bill 2012, p. 58 recital 3.172; HM Revenue

The IP box should also apply in situations where a taxpayer for the tax year in which a relevant IP right was granted, but for the fact that the taxpayer disposed of that right before it was granted. In these situations the taxpayer is to be treated as if it were a relevant taxpayer for that tax year in respect of the period, in which the IP right was pending up to and including the moment prior to the day of disposal of that right[1121].

As opposed to this, article 55 paragraph (1) of the Tax Act does not require software as well as technical and scientific databases to be protected by entry in a domestic, foreign or international register. Profits derived from software are always eligible for the IP box from the date on which the software has been created and thus from the moment all work is completed and the software ready to be marketed. Since software copyrights are not registered, it is up to the taxpayer to provide evidence of when the software has been created[1122]. The same rationale applies to technical and scientific databases. As collections and databases are not registered, it is up to the taxpayer to provide evidence of when such rights have been created.

It should be emphasised that the proposed handling of profits arising before the grant of a right results in a more equal treatment of the different relevant IP rights in the practical application of the IP box. While next to the UK the IP box regimes of Luxembourg and the Netherlands offer similar concepts regarding profits arising before the grant of IP rights, the Belgian model does not and is subject to criticism for that reason[1123].

In the implementation of the proposed practice, it is to be considered that the profits arising before grant of a relevant IP right have already been booked according to commercial law. In the year of first application of the IP box, the sum of these booked profits should thus be deducted on the tax return. The deduction on the tax return can result in a tax loss for the tax year in question.

& Customs, Draft Legislation, p. 33 recital 3.111.

1121 See Finance (No. 4) Bill, p. 161 at 357CQ (9); Consultation draft, p. 21 at 357CN (9); HM Revenue & Customs, Finance Bill 2012, p. 58 recital 3.171; HM Revenue & Customs, Draft Legislation, p. 33 recital 3.110.

1122 See Schaffner/Manhaeve/Trouille, p. 382; O'Neal/Macovei-Grencon/Van Eysinga, p. 14; Administration des contributions directes, Circulaire, p. 17.

1123 For Belgium, see: See Hendrickx, p. 15, 16; Eynatten/Brauns, p. 5, 6; Springael/Van de Velden, p. 7; For Luxembourg, see: Muntendam/Chiarella, p. 226; For the Netherlands, see: Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7; Bal/Offermanns, p. 170; Van Eck/Schreuders; For UK, see: Philipps/Danes, p. 8; HM Revenue & Customs, Finance Bill 2012, p. 57 recital 3.163; HM Revenue & Customs, Draft Legislation, p. 32 recital 3.101; HM Treasury/HM Revenue & Customs, Consultation, p. 15 recital 3.15.

Where a taxpayer predominantly generates operating profits other than profits from the commercialisation of relevant IP rights, IP box-derived tax losses may ideally be offset in the short term by the deductions included on the tax return. Yet, where a taxpayer predominantly generates profits from the commercialisation of relevant IP rights under article 55 of the Tax Act, offsetting with the deductions to be included on the tax return is only possible in the medium or long term. The reason is that the deduction of already-booked profits on the tax return affects the tax assessment basis at a level of 100%. At the same time, however, application of the IP box means that only 20% of the RPs contribute to the overall tax assessment basis of the taxpayer, with which any tax loss carried forward can be reduced over time.

4. Relevant IP losses

Particularly in the early stages of commercialisation of relevant IP rights, taxpayers may derive RIPI but not yet RP. If so, the calculation of RP results in a negative figure which is referred to as relevant IP loss ("RL")[1124].

It should be emphasised that any RL remains fully tax deductible from taxable profits at the regular tax rate[1125]. Where otherwise a RL within the IP box would be given immediate effect, the tax payable by a relevant taxpayer in that year would increase compared with a situation where a taxpayer has not opted for the regime. A taxpayer is however not supposed to be worse off because it was applying for the IP box regime[1126].

Similar to Luxembourg, by referring to "even if the expenses arose over several assessment periods" in fact article 55 paragraph (2) of the Tax Act contains a loss recapture rule[1127]. To correctly apply the recapture rule, net RIPI for each tax year has to be determined in respect of each relevant IP right separately[1128]. Net RIPI can result in a RP or a RL figure.

If for a tax year there is an RP a taxpayer is entitled to make a tax deduction under the IP box regime, unless there is a RL carried forward that may have

---

1124 See HM Revenue & Customs, Finance Bill 2012, p. 69 recital 5.1; HM Revenue & Customs, Draft Legislation, p. 39 recital 5.1.

1125 For Luxembourg, see: Clifford Chance, p. 2; Muntendam/Chiarella, p. 226; For the Netherlands, see: Offermanns, Netherlands Country Analysis, chapter 1, 1.9.7; Bal/Offermanns, p. 170; Shanahan, Patent Box, p. 6; Munting/Brassem, p. 1482 et seq; Groot, p. 39; Merks/Postmus, p. 721; See also Müller/Gramigna/Linder, p. 810.

1126 See also HM Treasury/HM Revenue & Customs, Consultation, p. 21 recital 4.26.

1127 See Evers/Miller/Spengel, p. 15; Clifford Chance, p. 2; Muntendam/Chiarella, p. 226.

1128 See Steuerverwaltung des Fürstentums Liechtenstein, Wegleitung juristische Personen, p. 18.

arisen over several assessment periods[1129]. If such RL carried forward exceeds the RP, then the balance of the RL is to be reduced by not more than 70% of RP at any one time. Any RP that is used to reduce the carried forward amount of RL is no longer eligible for the IP box deduction[1130]. Any RL that still remains unreduced is carried forward and reduced by RP of future tax years[1131]. It follows that the tax deduction by virtue of article 55 of the Tax Act in respect of a relevant IP right becomes only effective from the tax year in which the aggregate sum of profits in respect of the relevant IP right exceeds the corresponding aggregate sum of losses.

5. Anti-avoidance

Article 55 of the Tax Act does not contain any targeted anti-avoidance provision in order to maintain the intended scope of the IP box regime. It should however be noted that any non-taxable income may artificially boost the basis for assessment for the tax deduction of 80%. This might result in excessive tax deduction for the purposes of the IP box. Any non-taxable income thus cannot be RIPI and is excluded from the scope of article 55 of the Tax Act.

Apart from that, article 3 of the Tax Act (Abuse of structuring options) contains a general anti-avoidance rule aiming to counteract abuse of structuring options, which extends to the IP box regime as well. Thereafter, legal or actual structures that appear inappropriate to the economic circumstances and whose sole economic purpose consists in attaining tax advantages are considered abusive if:

– The granting of this tax advantage would violate the object and purpose of the Tax Act; and

– The taxpayer is unable to present any economic or other substantial reasons for the choice of this structure and if the structure does not yield any independent economic consequences.

Where an abuse within such meaning exists, the taxes are levied in the way they would be if the legal structure were appropriate to the economic processes, facts, and circumstances.

1129 See Finance (No. 4) Bill, p. 165 at 357E; Consultation draft, p. 24 at 357E; HM Revenue & Customs, Finance Bill 2012, p. 69 recital 5.3; HM Revenue & Customs, Draft Legislation, p. 39 recital 5.3.

1130 See Article 57 paragraph (1) of the Amended Tax Act; Landtag des Fürstentums Liechtenstein, Landtag April 2013; Liechtenstein Government, Statement No 5/2013; See also HM Revenue & Customs, Finance Bill 2012, p. 70 recital 5.13; HM Revenue & Customs, Draft Legislation, p. 40 recital 5.11.

1131 See HM Revenue & Customs, Finance Bill 2012, p. 70 recital 5.14; HM Revenue & Customs, Draft Legislation, p. 40 recital 5.12.

The tax authorities, as a last consequence, may apply anti-avoidance rationale in IP box areas such as[1132]:

– Artificial attribution of associated tax-relevant expenses to RIPI. Such scheme keeps expenses in any way outside the IP box subject to regular tax rate. At the same time, income is allocated to the IP box subject to lower effective tax rate;

– Inclusion of legally protected innovations in products, or combinations of legally protected and non-protected products, which are not functionally interdependent. Such scheme secures income from the sale of a product to be allocated to the IP box where it would not otherwise have qualified;

– Inclusion of pseudo-innovations in products or combinations of products. Such scheme secures income from the sale of a product to be allocated to the IP box where it would not otherwise have qualified; or

– Transfer of relevant IP rights to an affiliated undertaking. Such scheme aims to circumvent the application of the loss recapture rule.

The anti-avoidance provision by virtue of article 3 of the Tax Act, however, does not affect any reasonable commercial choice[1133]. The provision further does not relate to the choice of whether to apply for a relevant IP right or which relevant IP rights to apply for. For instance, where a taxpayer previously chose to rely on secrecy to protect its innovative technology, but now decides otherwise and is able to obtain a relevant IP right in order to benefit from the IP box, anti-avoidance measures do not apply[1134].

6. Supplementary

A) Making of election for the IP box

As outlined in section 2 (II) (1) (A) (Election for special treatment of profits from relevant IP rights) of this Part, a precondition for the application of the IP box is the existence of a profit in respect of a relevant IP right. Where the relevant taxpayer is subject to corporate income tax, the election for the application of the IP box is made annually with the filing of the corporate income tax return. In this regard, the tax deduction under article 55 of the Tax Act is calculated by

---

1132 See Finance (No. 4) Bill, p. 169 at 357FA (1); Consultation draft, p. 27 at 357FA (1); HM Treasury/HM Revenue & Customs, Consultation, p. 25 recital 5.12.

1133 See Liechtenstein Government, Report and Application No 48/2010, p. 62; See also HM Revenue & Customs, Finance Bill 2012, p. 72 recitals 6.6, 6.7; HM Revenue & Customs, Draft Legislation, p. 41 recital 6.3.

1134 See Liechtenstein Government, Report and Application No 48/2010, p. 62; HM Revenue & Customs, Finance Bill 2012, p. 72 recital 6.8.

using form G, which is considered being an integral part of the corporate income tax return[1135].

Pursuant to article 41 (Tax Return) of the Tax Ordinance, the corporate income tax return must contain the information necessary for purposes of taxation, especially concerning the company, the profit and loss statement, the balance sheet, the appropriation of profits and the beneficial owners taxable in Liechtenstein. The corporate income tax return must be accompanied, inter alia, by detailed annual accounts in accordance with article 21 (Bookkeeping) of the Tax Ordinance.

Article 42 (Extension of submission deadline) paragraph (1) of the Tax Ordinance stipulates that the competent tax authorities may, upon justified written request, extend the submission deadline by six months. The request must be made at the latest 30 days after the general due date. While the competent tax authorities determined the submission deadline with 1 July of the following tax year, in accordance with article 113 (Time at which the tax demand arises and becomes due) paragraph (3) letter (b) of the Tax Act, the general due date has been defined with 31 August of the following tax year[1136]. Article 42 (Extension of submission deadline) paragraphs (2) and (3) of the Tax Ordinance further specify that a deadline extension requires payment of the provisional invoice. In especially justified cases, such as the occurrence of events that cannot be influenced and that delay submission of the corporate income tax return on a sustained basis, the submission deadline may be extended again. The request however must be made before expiry of the first deadline extension. Beyond these submission requirements and the use of form G, a relevant taxpayer is supposed to consult the competent tax authorities with respect to the necessary documentation when first applying the IP box in respect of a relevant IP right[1137].

Similarly, where a relevant taxpayer is subject to personal income tax, the election for the application of the IP box by way of article 16 (Determination of taxable income) paragraph (6) of the Tax Act is made annually with the filing of the personal income tax return. The personal income tax return so far does not contain a specific form for IP box purposes. In addition, there is no specific guidance for individual taxpayers that exclusively refers to the proceeding concerning the tax deduction under the IP box. Article 55 of the Tax Act and form G of the corporate income tax return apply however mutatis mutandis.

1135 See Steuerverwaltung des Fürstentums Liechtenstein, Wegleitung juristische Personen, p. 18.

1136 Steuerverwaltung des Fürstentums Liechtenstein, Steuererklärungen.

1137 Steuerverwaltung des Fürstentums Liechtenstein, Wegleitung juristische Personen, p. 18.

Article 39 (Tax return) paragraph (1) of the Tax Ordinance specifies that the personal income tax return must contain the information necessary for purposes of taxation, especially concerning the taxpayer, wealth, and income. Paragraph (2) of the said article further stipulates that the personal income tax return must be accompanied by corresponding documentation, provided that entries are made on the tax return with respect certain positions. The corresponding documentation with respect to these positions inter alia includes detailed annual accounts (computer balance sheet and profit and loss statement) and evidence of individual deductions claimed, such as the deduction for income from relevant IP rights under the IP box.

Generally, the annual submission deadline for the purposes of personal income tax is mid-April. Subject to the payment of the provisional tax invoice, in accordance with article 40 (Extension of submission deadline) of the Tax Ordinance the competent municipal tax authority may, upon justified written request, extend the submission deadline by at most five months. The request must be made before expiry of the regular submission deadline[1138]. It should be noted that with respect to article 113 (Time at which the tax demand arises and becomes due) paragraph (3) letter (a) of the Tax Act, for self-employed persons subject to wealth tax and personal income tax there is no general due date[1139]. Beyond these submission requirements and the analogous use of form G, which is an integral part of the corporate income tax return, also an individual taxpayer is supposed to consult the competent tax authorities regarding the necessary documentation when first applying the IP box in respect of a relevant IP right[1140].

There is no special form of words for an initial or recurring election for the IP box. A personal income or corporate income tax computation on the basis of form G is taken to be an election where it is clear for the tax authorities that this is what is intended, provided it is made within the time limits referred to above[1141].

B) Revocation of election made for the IP box

From a conceptual perspective, for each relevant IP right an annual election for the IP box regime has to be made. There is thus no necessity for a revocation of an earlier election made into the IP box. Waiving an election for the IP box in

---

1138 Steuerverwaltung des Fürstentums Liechtenstein, Wegleitung natürliche Personen, p. 8, 9.

1139 See article 113 paragraph (3) of the Amended Tax Act.

1140 Steuerverwaltung des Fürstentums Liechtenstein, Wegleitung juristische Personen, p. 18.

1141 See HM Revenue & Customs, Finance Bill 2012, p. 75 recital 7.6.

respect of a relevant IP right is simply done by not electing for the tax deduction in respect of the relevant IP right for a tax year.

Where a relevant taxpayer is waiving an election for the IP box in respect of a relevant IP right and tax year, it is appropriate simply not to complete form G in respect of the relevant IP right when submitting the corporate income tax return, or mutatis mutandis, submitting the personal income tax return.

C) Application of the IP box in relation to partnerships

Section 2 (II) (1) (A) (Election for special treatment of profits from relevant IP rights) makes it clear that article 55 of the Tax Act applies to taxpayers subject to corporate income tax, and mutatis mutandis, to taxpayers subject to personal income tax as well.

Where in Liechtenstein relevant IP rights are held or commercialised on a collaborative basis using partnership arrangements, then by virtue of[1142]:

– Article 6 (Joint provisions, personal tax liability) paragraph (5) letter (b) of the Tax Act;

– Article 9 (Wealth tax, objective tax liability) paragraph (2) of the Tax Act;

– Article14 (Personal income tax, objective tax liability) paragraph (4) of the Tax Act; and

– Article 16 (Determination of taxable income) paragraph (6) of the Tax Act;

the IP box regime applies to partnerships as well.

Against this backdrop, the resident partners of a partnership may further be allowed to be taxed as if the partnership itself had elected into the IP box regime. Consequently, because of such deemed election the profit of the partnership for a tax year allocated to partners resident in Liechtenstein is reduced through the IP box calculation such that the effect will be that only 20% of the RP is charged at the regular tax rate[1143]. In principle, it is up to the taxpayer and thus to a resident partner of a partnership whether to elect for such advantageous tax treatment[1144].

[1142] See HM Revenue & Customs, Finance Bill 2012, p. 76 recital 7.14; HM Revenue & Customs, Draft Legislation, p. 43 recital 7.11.

[1143] See HM Revenue & Customs, Finance Bill 2012, p. 76 recital 7.16; HM Revenue & Customs, Draft Legislation, p. 43 recital 7.13.

[1144] See HM Revenue & Customs, Finance Bill 2012, p. 76 recital 7.17; HM Revenue & Customs, Draft Legislation, p. 43 recital 7.14.

D) Application of the IP box to cost sharing arrangements

Cost sharing arrangements ("CSA") are a framework agreed among undertakings to share the costs and risks of developing, producing or obtaining assets, services or rights, and to determine the nature and extent of the interests of each participant in those assets, services or rights. Rather than necessarily a distinct legal entity or permanent establishment, a cost sharing arrangement is a contractual arrangement of all the participants[1145].

The proportionate contribution of a relevant taxpayer to the arrangement, also in view of articles 49 (Arm's length principle) and 55 paragraph (4) of the Tax Act, should be consistent with the proportionate share of the relevant taxpayer to the expected benefits under the arrangement. Some benefits of a cost sharing arrangement activity are known in advance, whereas other benefits are uncertain. Over time, however, a cost sharing arrangement is expected to generate benefits in favour of each of the participants[1146]. Furthermore, the interest of each participant in the results of the cost sharing arrangement activity should be established from the outset, even where the interest is inter-linked with that of other participants. Interests can be inter-linked because legal ownership of developed intangibles is vested in only one of the participants, but all of them have economic ownership interests[1147]. It follows that where a relevant taxpayer has contributed to the development of an IP under a cost sharing arrangement and is entitled to a share of the income from that contribution as a result, to the extent that such income is derived from a relevant IP right it should qualify for the IP box[1148].

If the cost sharing arrangement establishes a separate legal entity, permanent establishment or partnership subject to personal or corporate income tax, then the IP box calculation applies to such entity[1149]. Otherwise, it can be reasonably concluded that the entitlement for a relevant taxpayer to claim the benefits of article 55 of the Tax Act flows from the cost sharing arrangement itself[1150]. As

---

1145 See OECD TP Guidelines, p. 220 recital 8.3; European Commission, TP Forum, retical 7; For the Netherlands, see: Sporken/Gommers, Transfer Pricing Implication, p. 268; For UK, see: HM Revenue & Customs, Finance Bill 2012, p. 77 recitals 7.20, 7.23, 7.24; HM Revenue & Customs, Draft Legislation, p. 43 recital 7.16, 44 recitals 7.19, 7.20.

1146 See OECD TP Guidelines, p. 220 recital 8.4.

1147 See OECD TP Guidelines, p. 220 recital 8.4; Paardekooper/Brassem/Gommers, p. 6.

1148 See HM Revenue & Customs, Finance Bill 2012, p. 77 recital 7.25; HM Revenue & Customs, Draft Legislation, p. 44 recital 7.21.

1149 See HM Revenue & Customs, Finance Bill 2012, p. 77 recital 7.21, 78 recital 7.27; HM Revenue & Customs, Draft Legislation, p. 43 recital 7.17, 44 recital 7.24; See also OECD TP Guidelines, p. 220 recital 8.3.

1150 See HM Revenue & Customs, Finance Bill 2012, p. 77 recital 7.26; HM Revenue &

to this point of view, it should be kept in mind that it is in principle indifferent to which participant legal ownership of developed intangibles is vested in. This is because for IP box purposes effective or economic ownership and thus a substance over form approach prevails[1151].

In light of the arm's length principle based on articles 49 and 55 paragraph (4) of the Tax Act, the proportionate share that a relevant taxpayer receives from its contribution to the cost sharing arrangement should as far as possible reflect the functions performed, the assets used, the risks assumed and the costs incurred in developing, producing or obtaining the intangible assets. The ultimate income to be paid to the relevant taxpayer should thus not differ substantially from the income that would be obtained by the relevant taxpayer were it to exploit relevant IP rights without the cost sharing arrangement in place[1152].

It should be noted that article 55 of the Tax Act does not apply where a cost sharing arrangement produces for a taxpayer a return, which may be considered as economically equivalent to interest[1153]. This is because the IP box is not available to finance income subject to taxation at the regular tax rate.

E) Transfer pricing

Article 49 (Arm's length principle) of the Tax Act sets out that where corporate income or expenses of a taxpayer arising from a business relationship with persons with a close relationship are changed in such a way that other conditions are taken as a basis than mutually independent third parties would have agreed under otherwise identical circumstances, the determination of taxable net corporate income assumes corporate income and expenses as would have applied in a relationship between independent third parties.

Article 16 (Determination of taxable income) paragraph (6) of the Tax Act extends the arm's length principle to businesses subject to personal income tax. It follows that all transactions between affiliated persons must be concluded on arm's length terms. Otherwise, the tax authorities can adjust profits and assess the various taxes concerned on the adjusted basis of assessment[1154].

In addition to the general arm's length provision based on article 49 of the Tax Act, the IP box legislation based on article 55 paragraphs (3) and (4) of the Tax

---

Customs, Draft Legislation, p. 44 recital 7.22.

1151 See Section 2 (II) (2) (D) (Ownership condition) of this Part.

1152 See Rouenhoff, p. 655; OECD Discussion Draft, p. 12 recital 29; 13 recital 37 et seq; Sunderman, p. 228.

1153 See Finance (No. 4) Bill, p. 173 at 357GC (3); Consultation draft, p. 31 at 357GC (3).

1154 Felder, Country Survey, chapter 7, 7.2.

Act contains two targeted arm's length provisions[1155]. Article 55 paragraph (3) of the Tax Act is dealing with notional royalties and is further elaborated in section 2 (II) (3) (C) (Notional royalty) of this Part. Article 55 paragraph (4) of the Tax Act specifies that if payments for IP rights are agreed which exceed the usual market remuneration, then the deduction of 80% is to be calculated on the basis of the usual market price[1156]. Thereafter, the arm's length requirement mainly purposes to prevent affiliated persons from artificially boosting the basis for assessment for the tax deduction of 80% by manipulating transfer pricing terms.

Article 49 in conjunction with article 55 of the Tax Act may call for complex transfer pricing studies to determine the proper amount of profit in respect of relevant IP rights. This is particularly true when it comes to sales income, notional royalties or cost sharing arrangements.

In order to determine arm's length conditions for IP box purposes it is important to consider as part of the comparability and functional analysis what is set out below[1157]:

– Identification of relevant and other IP rights;
– Identification of persons that are entitled to retain the return derived from the use, realisation or sale of relevant IP rights;
– Nature of the controlled transactions and whether they involve the use or realisation of relevant IP rights and/or lead to the sale of relevant IP rights between the persons involved; and
– Amount that would be paid between independent third parties for the use, realisation or sale of relevant IP rights.

Where a taxpayer licenses relevant IP rights to independent third parties, such license fee may possibly serve as a reference level in determining an arm's length income. Otherwise, a more in-depth transfer pricing analysis will be re-

1155 Felder, Country Survey, chapter 1, 1.3.3; Liechtenstein Government, Statement No 21/2012, p. 24; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 19; Liechtenstein Government, Report and Application No 123/2011, p. 25; Hosp/Langer, Steuerstandort Liechtenstein, p. 95, 114; Roth, p. 62; Wanger, Kommentar Steuergesetz, p. 181, 182.

1156 Liechtenstein Government, Report and Application No 123/2011, p. 25; Wanger, Kommentar Steuergesetz, p. 181, 182.

1157 See OECD Discussion Draft, p. 6 recital 4.

quired[1158]. Moreover, a proper transfer pricing documentation may be critical to supporting the tax deduction on the basis of article 55 of the Tax Act[1159].

Article 49 (Arm's length principle) in conjunction with article 55 of the Tax Act allows for various methods be applied to ensure that transfers between affiliated persons comply with the arm's length principle. The tax authorities have not issued guidelines in this regard, nor do safe harbour rules with respect to intangibles exist. This is why a relevant taxpayer can rely on internationally accepted methods, such as set out in article 9 of the OECD Model Tax Convention or in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations[1160].

F) Double taxation relief

Article 63 (Avoidance of double taxation) of the Tax Act stipulates that article 22 of the Tax Act applies mutatis mutandis for the purposes of corporate income tax. Thereafter:

– If the income has been generated in a country with which an agreement for the avoidance of double taxation ("DTA") has been concluded, where such agreement provides for tax exemption with respect to that income, or in cases where reciprocity is granted, that income is exempted; and

– If the income has been generated in a country with which a double taxation agreement has been concluded, where such agreement provides that a foreign tax applicable to that income is allowable against domestic taxes, or in cases where reciprocity is granted, then the tax of that country corresponding to the corporate income tax is allowed against the domestic tax levied on a national and municipal level applicable to that income.

Against this backdrop, the credit method by virtue of articles 22 and 63 of the Tax Act implies that a taxpayer can credit the foreign tax against its income tax, up to an amount equivalent to the domestic income tax calculated on the foreign gross income reduced by the associated tax-relevant expenses, including write-downs, on relevant IP rights[1161].

The requirement to consider foreign gross income emerges from article 16 paragraph (5) letter (d) and article 47 paragraph (3) letter (f) of the Tax Act. With

---

[1158] See Hendrickx, p. 19; Onkelinx/Rens, p. 3; Warson/Foriers, p. 77; Van Stappen/Delanoy/De Groote, p. 293; Van Stappen, p. 3; Onkelinx/Van den Berg, p. 3.

[1159] See Steuerverwaltung des Fürstentums Liechtenstein, Wegleitung juristische Personen, p. 18; OECD TP Guidelines, chapter V (Documentation); Warson/Foriers, p. 77.

[1160] See OECD MTC; OECD TP Guidelines; See also Haase, p. 618 et seq; OECD Discussion Draft; Weber; Kuebart.

[1161] See also Müller/Gramigna/Linder, p. 810; Felder, Perspektiven, p. 148.

respect to the determination of taxable income subject to personal or corporate income tax, the two provisions stipulate that all direct and indirect taxes must not be deducted as an expense from taxable income. Any excess of foreign tax credit can not be carried forward or deducted as an expense from taxable income either. It will therefore be lost. In addition, the allowance of foreign tax credits can only be available in respect of foreign taxes that have been assessed and paid[1162].

The per-item method is the only available method in Liechtenstein for calculating the amount of foreign tax credit, which is allowable against the corresponding amount of domestic income tax. The calculations based on the per-item method always refer to a given transaction. Both the universal and per-country methods do not apply. It is thus not possible to allow a foreign tax credit that corresponds to a certain category of income against domestic income tax, which corresponds to another category of income. For instance, a foreign tax credit that corresponds to income from a license fee is not allowable against domestic income tax, which corresponds to income from an interest payment. In other words, the foreign tax credit for the license fee received is only allowable against the domestic amount of income tax, which corresponds to the net income from that license fee. In the same way, it is not possible to allow a foreign tax credit that corresponds to income from a given country for domestic income tax, which corresponds to income from another country. In particular, it is not possible to allow a universal amount of foreign tax credit against domestic income tax, which corresponds to any or all of the domestic income[1163].

Where the calculation of a foreign tax credit results in a negative net income or a loss respectively, due to the per-item limitation the allowable foreign tax credit is nil. Any excess credit cannot be carried forward and is lost.

Similar to Luxembourg, where the calculation of a foreign tax credit for a given transaction results in a positive net income, due to the tax deduction of 80% by virtue of article 55 paragraphs (1) and (2) of the Tax Act, only 20% of the foreign tax is allowable against the corresponding domestic income tax[1164]. Since the effective tax rate in respect of RP only amounts to 2.5%, in a far majority of cases the foreign tax credit, if any, exceeds the corresponding domestic income tax and results in an effective tax rate of nil.

An example of a double taxation relief ("DTR") calculation including the IP box is set out below[1165]:

1162 See Eynatten/Brauns, p. 4; Muntendam/Chiarella, p. 228.

1163 See Muntendam/Chiarella, p. 228.

1164 See O'Neal/Macovei-Grencon/Van Eysinga, p. 17; Administration des contributions directes, Circulaire, p. 20.

1165 See HM Revenue & Customs, Finance Bill 2012, p. 79 recital 8.6; HM Treas-

Double taxation relief calculation	
A corporate taxpayer has income from a license fee of 4.000 with respect to one of its relevant IP rights. The taxpayer has suffered a total of 200 of WHT. The taxpayer incurs costs of 2.500, including write-down of the relevant IP right, to generate the income from license fee. It is a relevant taxpayer and has elected for the IP box.	
Income from license fees	4.000
Associated tax-relevant expenses including write-down	2.500
Basis of assessment	1.500
IP box tax deduction of 80% (1.500 x 0.80)	1.200
RP	300
Corporate tax at 12.5%	38
Foreign WHT	200
The taxpayer's DTR is thus limited to 38. The corporate income tax calculation will look like this:	
Income from license fees	4.000
Associated tax-relevant expenses including write-down	2.500
Basis of assessment	1.500
IP box tax deduction of 80% (1.500 x 0.80)	1.200
Corporation income tax profit	300
Corporate tax at 12.5%	38
DTR	38
Corporation income tax payable	0

G) Notional interest deduction

In the same way as Belgium, by virtue of article 54 of the Tax Act Liechtenstein has implemented a notional interest deduction with effect from 1 January 2011. The notional interest deduction is a general tax measure that intends strengthening the equity capital of taxpayers by reducing the discrimination between equity and debt financing[1166].

ury/HM Revenue & Customs, Consultation, p. 46 recital 7.33.

1166 See also Cops/Lemaire, p. 16; Van Stappen/Delanoy/De Groote, p. 296; Van Stappen, p. 4.

Article 16 paragraph (2) letter (b) subparagraph (2) of the Tax Act extends the notional interest deduction to businesses of taxpayer subject to personal income tax.

In accordance with article 54 of the Tax Act, reasonable interest paid on the modified equity capital in the amount of the notional income is also deemed a commercially justified expense. Since 1 January 2013 the notional interest deduction can no longer give rise to or increase a current loss[1167]. The modified equity capital encompasses paid-in nominal capital, capital stock or share capital and the reserves constituting own assets. Own shares, participations in legal persons, net assets in foreign real estate and permanent establishments and assets not operationally necessary must be deducted. Valuation is to be performed as of the beginning of the business year; accruals and decreases in assets during the current business year must be taken into account. If the modified equity capital is negative, the notional interest deduction is nil.

Article 2 of the Finance Act of 22 November 2012 for the Year 2013 stipulates the amount of the notional income with 4%. It has been envisaged to significantly reduce this amount to 2% or even less[1168]. It seems, however, that his political initiative has been dropped for the time being.

The Government has provided further details by ordinance. Thereafter, in accordance with article 32 paragraph (4) of the Tax Ordinance, equity capital increases during the current year by way of open and hidden deposits as well as equity capital decreases during the current year by way of capital reductions and repayments and by way of open or hidden distributions are to be taken into account pro rata temporis when calculating modified equity capital. Increases and decreases in a given quarter are to be aggregated and deemed occurred in the middle of the quarter[1169]. In addition, pursuant to article 32 paragraph (6) of the Tax Ordinance “assets not necessary for business operations" means assets that do not predominantly serve the actually object of the business.

The interaction of the notional interest deduction by virtue of article 54 and the IP box tax deduction by virtue of article 55 of the Tax Act for a tax year can be illustrated as follows:

1167 See article 54 paragraph (1) of the Amended Tax Act; Liechtenstein Government, Consultation Report RA 2012/1856-0701, p. 20.

1168 See Liechtenstein Government, Consultation Report RA 2012/1856-0701, p. 19.

1169 See article 32 paragraph (4) of the Amended Tax Ordinance.

Interaction of notional interest deduction and IP box tax deduction	
Commercial law for the tax year	
RIPI	100
IP related expenses	-80
Net RIPI / RP	20
Tax law for the tax year	
Modified equity capital	1.000
Amount equivalent to relevant IP rights thereof	200
If the NID figure amounts to 4% of the modified equity capital, then the equity costs which are attributable to NID in absolute terms are 8 (4% of 200).	
Associated tax-relevant expenses also include equity costs of 8 and thus amount to 88 (80 + 8).	
Against this backdrop, the determination of the basis of assessment for the tax deduction by virtue of article 55 of the Tax Act is:	
Income from the use, realisation or sale or relevant IP rights	100
Associated tax-relevant expenses, including write-downs on relevant IP rights and equity costs	-88
Basis of assessment for the deduction of 80%	12
From a conceptual perspective it follows that the calculation of the basis of assessment for the tax deduction of 80% takes into account a pro rata reduction, which equally affects the calculation of the modified equity capital. As a result, no double dips occur due to the interaction of the NID by virtue of article 54 of the Tax Act and the IP box tax deduction by virtue of article 55 of the Tax Act.	
For clarification it should be noted that the commentary in section 2 (Commentary) of this Part uses the term "basis of assessment for the tax deduction of 80%" as a synonym for the terms "sum of positive income from relevant IP rights" and "RP". This fact, however, is different in section 3 (Areas for potential improvement) of this Part.	

As suggested by a number of Belgian authors, the notional interest deduction may be applied to further reduce the effective tax rate on the RP of a taxpayer. This scheme requires the contribution of other IP rights, which themselves do not qualify for the IP box but predominantly serve as actually object of the business, into share capital of the taxpayer. Accordingly, the basis of assessment for

the notional interest deduction will be increased. With respect to the taxation of RP this may result in an effective tax rate even lower than 2.5%[1170].

3. Areas for potential improvement

I. Overview

In March 2012, the Government stated that the IP box in its current version is internationally competitive[1171]. Contrary to this statement, article 55 of the Tax Act requires further clarifications and amendments in various areas. Especially its scope of application as well as the rules of the IP box on the determination of profits should be subject to further improvements.

In addition, Liechtenstein should lose no time in enriching its Tax Act with additional input tax incentives to promote domestic R&D beyond article 55 of the Tax Act. An internationally attractive and competitive R&D location necessarily needs to combine such input tax incentives with output tax incentives such as the IP box at its disposal. Liechtenstein would then offer a tax framework encouraging technological and scientific R&D activities and the commercialisation of the achievements thereof.

Finally, the availability of experienced or even specialised jurisdiction in the field of IP rights is advocated. Fast, qualified and uncomplicated legal proceedings pose a challenge especially for a small state like Liechtenstein, since the national caseload relating to IP rights is light.

An outline summary of the structure of the analysis is set out below:

[1170] See Warson/Van Ende, p. 3¸ Van Stappen/Delanoy/De Groote, p. 296; Van Stappen, p. 3.

[1171] Liechtenstein Government, Statement No 21/2012, p. 15.

Which additional IP rights should apply for IP box?	Section 1 specifies:	– Type of IP rights that should be listed in the catalogue of relevant IP rights – Extension of the IP box to relevant IP rights created or acquired before 1 January 2011
How should the relevant IP profits ("RP") be calculated?	Section 2 specifies: **Main calculation approach**	– Calculation of positive income from relevant IP rights based on cost accounting – Calculation of relevant residual IP profit ("RRP") by removing a routine return from positive income from relevant IP rights through mark-up of certain costs – These costs generate a return 10% (assumption). Consequently, the routine return is to be deducted in calculating RRP – Calculation of RP by removing a marketing assets return ("MAR") from RRP, which is independent from the underlying technology – MAR is equivalent to a notional marketing royalty ("NMR") for relevant marketing intangibles, independent from the underlying technology, less any actual marketing royalty ("AMR") paid in relation to these intangibles
How can the IP box be even further improved?	Section 3 proposes:	– Adherence to OECD Transfer Pricing Guidelines – Further expansion of DTA network – Introduction of input tax incentives to stimulate R&D activities – Establishment of jurisdiction over IP matters

II. Analysis

The following analysis extends to possibilities for improving the current Liechtenstein IP box legislation even where such improvements are not currently reconcilable with the legal foundations.

The analysis concludes with recommendations for adjustments to the legislative foundations in order to implement useful clarifications and improvements. In addition, it addresses related policy issues concerning the promotion of front-end R&D incentives and jurisdiction over IP matters.

1. Rights to which the IP box applies

One of the core questions in the conception of IP boxes is which rights should fall within their scope of application. In this regard, the desires of business associations and interest groups for a scope that generally is as extensive as possible must necessarily be balanced against limitations resulting from budgetary considerations as well as European and international realities[1172].

In the original conception of the Liechtenstein IP box, the first idea was merely to allow for patent income deductions[1173]. Immediately, business associations and interest groups intervened during consultations and demanded an expansion of this deduction to include all IP rights[1174]. After evaluating comparable rules in other European countries, the Government decided that, in addition to patent income, other income from IP rights should be covered by the IP box. Additional details, such as especially the more precise delineation of IP rights benefiting from the regime, were to be governed by an ordinance[1175].

On the basis of understandable considerations, the Constitutional Court in its judgment of 1 July 2011 voided article 33 paragraph (1) of the Tax Ordinance, finding it unconstitutional and unlawful[1176]. The voided provision defined which IP rights should qualify for a deduction under article 55 of the Tax Act. The Constitutional Court justified its decision essentially with reference to the fact that article 55 of the Tax Act did not envisage a material restriction of IP rights;

1172 Liechtenstein Government, Statement No 21/2012, p. 13, 14; See also Merrill/Shanahan/Tomé Gómez/Glon/Grocott/Lamers/MacDougall/Macovei/ Montredon/Vanwelkenhuyzen/Cernat/Merriman/Moore/Muresan/Van Den Berghe/ Linczer, p. 1672; Shaheen; Roth, p. 62; Schweizer Parlament, Motion Noser; Müller/Gramigna/Linder, p. 808.

1173 Liechtenstein Government, Report and Application No 48/2010, p. 141.

1174 Liechtenstein Government, Statement No 83/2010, p. 45.

1175 Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17; Lehmann/Zanettin, p. 10; Liechtenstein Government, Report and Application No 123/2011, p. 7, 8; Liechtenstein Government, Statement No 83/2010, p. 45.

1176 Liechtenstein Constitutional Court, StGH 2011/13.

such a restriction would have to be undertaken by the legislator itself and not merely by way of a Government ordinance[1177]. Even if the intent of the legislator had been to delegate to the Government the decision regarding which IP rights should be covered by the deduction option, the rule would not be reconcilable with the principle of lawfulness of taxes. According to the Constitutional Court, the question of what income from IP rights should be taxed to what degree is a highly political one that must be decided by the democratic legislator[1178].

After hearing the business associations and interest groups again, Parliament followed the Government's proposal on 25 April 2012. The entire content of the rule set out in article 33 of the Tax Ordinance was thus incorporated without any material changes into article 55 of the Tax Act, effective 1 January 2012[1179]. At the same time, the catalogue of relevant IP rights applicable to the IP box was expanded to include software as well as technical and scientific databases created or acquired on or after 1 January 2011[1180]. This is why the amended rule governing the IP box, again, required notification to the ESA[1181]. On 12 December 2012 the authority found article 55 of the Tax Act to be a general measure and thus not to constitute state aid within the meaning of EEA law[1182].

Regarding the rights to which the IP box applies the proposed adjustments to the legislative foundations set out below aim claryfing and further improving article 55 of the Tax Act:

A) Utility models

Utility models are not referred to in the current wording of article 55 paragraph (1) of the Tax Act. When considering the legislative history of article 55 of the Tax Act it becomes evident that utility models have been omitted in the present

---

1177 Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17, 18; Lehmann/Zanettin, p. 10; Liechtenstein Government, Report and Application No 123/2011, p. 4, 8.

1178 Liechtenstein Government, Report and Application No 123/2011, p. 8.

1179 Landtag des Fürstentums Liechtenstein, Landtag April 2012; Liechtenstein Government, Statement No 21/2012, p. 4, 8, 23; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 18; Liechtenstein Government, Report and Application No 123/2011, p. 4.

1180 Article 55 paragraph (1) letter (b) of Amended Tax Act; Liechtenstein Government, Statement No 21/2012, p. 10, 14; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 19.

1181 Liechtenstein Government, Report and Application No 123/2011, p. 4, 23.

1182 EFTA Surveillance Authority, State Aid; EFTA Surveillance Authority, 480/12/COL, p. 7 recital 28.

catalogue of relevant IP rights owing to an editorial oversight[1183]. This is why article 55 paragraph (1) of the Tax Act is to be adjusted accordingly in due time.

B) Supplementary protection certificates

Although not referred to in the current wording of article 55 paragraph (1) of the Tax Act either, as demonstrated in section 2 (II) (2) (B) (b) (Supplementary protection certificates) of this Part, due to their patent-like nature supplementary protection certificates undoubtedly are to be considered relevant IP rights. Again, article 55 paragraph (1) of the Tax Act should be adjusted accordingly in due course[1184].

C) Topographic rights

According to article 1 paragraph (1) of the Topography Act, the Topography Act protects the topographies of semiconductor products in so far as they satisfy the conditions that they are the result of their creator's own intellectual effort and are not commonplace in the semiconductor industry. Article 2 of the Topography Act stipulates that a semiconductor product is the final or an intermediate form of any product:

– Consisting of a body of material which includes a layer of semiconducting material; and
– Having one or more other layers composed of conducting, insulating or semiconducting material, the layers being arranged in accordance with a predetermined three-dimensional pattern; and
– Intended to perform, exclusively or together with other functions, an electronic function.

The topography of a semiconductor product is a series of related images, however fixed or encoded:

– Representing the three-dimensional pattern of the layers of which a semiconductor product is composed; and
– In which series, each image has the pattern or part of the pattern of a surface of the semiconductor product at any stage of its manufacture.

The duration of the protection of topographies is governed by article 10 of the Topography Act. The protection of topographies expires ten years after the final application for registration or the day on which the topography was disseminat-

---

[1183] Felder, Country Survey, chapter 1, 1.3.3; Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 17; Lehmann/Zanettin, p. 10; Liechtenstein Government, Report and Application No 123/2011, p. 4, 7, 22, 24; See also section 2 (II) (2) (B) (a) (aa) (Utility models) of this Part.

[1184] Felder/Harmann, p. 78.

ed for the first time, whichever is earlier. The protection of topographies not covered by an application for registration, however, expires two years after the day on which the topography was disseminated for the first time. In any event, the protection ends 15 years after development of the topography.

Pursuant to article 14 of the Topography Act, the Office of Economic Affairs maintains a register of topographies. This is why topographies may, similarly to patents, utility models, trademarks and designs, be entered in a special registry. Yet, the scope of protection of topologies is reduced in time if they are not entered in the topography registry. Topographies represent a hybrid form in this regard.

Although topographies are of subordinate economic importance, this type of IP right clearly falls within the scope of article 55 paragraph (1) of the Tax Act. The Tax Act should thus be adjusted accordingly in due time[1185]. For the sake of simplified legislative drafting, topographies could be subsumed under article 55 (1) letter (a) of the Tax Act. This would however necessarily entail mandatory registration in order for income from topographies to be included within the scope of the IP box.

D) Know-how and trade secrets

In section 2 (II) (2) (B) (Rights to which the IP box applies) of this Part it is held that any IP right including know-how, trade secrets or technical information benefits from the IP box regime provided that the right is inherently linked to a relevant IP right or inseparable from it[1186].

In the light of the OECD discussion draft concerning the revision of the special considerations for intangibles, know-how and trade secrets are classified as trade intangibles. They are further described as proprietary information or knowledge that assist or improve a commercial activity, but that are not registered for protection in the manner of a patent or trademark. Know-how and trade secrets normally consist of undisclosed information of an industrial, commercial or scientific nature arising from previous experience, which has practical application in the operation of an undertaking. The value of know-how and trade secrets often depend on the ability of the undertaking to preserve the confidentiality of the know-how or trade secret[1187].

1185 Felder/Harmann, p. 78; See also Müller/Gramigna/Linder, p. 808.

1186 For Belgium, see: Warson/Glaes, p. 322; Springael/Van de Velden, p. 5; For Luxembourg, see: Muntendam/Chiarella, p. 229.

1187 OECD Revised Discussion Draft, p. 17 recital 54; Rouenhoff, p. 654; Hausmann/Roth/Krummenacher, p. 88; OECD Discussion Draft, p. 9 recital 16.

Much in the same way, on the basis of the OECD Transfer Pricing Guidelines know-how and trade secrets can be trade intangibles or marketing intangibles. The term know-how is however referred to as a less precise concept[1188].

The commentary on article 12 paragraph (11) of the OECD MC eventually specifies that know-how generally corresponds to undivulged information of an industrial, commercial or scientific nature arising from previous experience, which has practical application in the operation of an undertaking and from the disclosure of which an economic benefit can be derived. The commentary then holds that know-how may include secret processes or formulae or other secret information concerning industrial, commercial or scientific experience that is not covered by patent. Any disclosure of know-how or a trade secret could substantially reduce the value of the property. Know-how and trade secrets are acknowledged to frequently play a significant role in the commercial activities of MNE groups[1189].

Among the jurisdictions examined in this treatise, the Dutch IP box regime most obviously applies to technology-related scientific know-how and trade secrets by means of R&D declarations[1190]. The Belgian IP box as well covers know-how to the extent that it is inherent to a patent or inseparable from it. If so, an appropriate portion of sales or license income is eligible for the purposes of its IP box regime[1191]. Under the UK IP box, know-how, technical information or trade secrets are not themselves relevant IP rights. But they can be other rights licensed for the same purpose as the right over the patented invention. If so, license fees in respect of know-how, technical information and trade secrets qualify as RIPI in the same way as license fees received in respect of the license over the patent[1192]. Otherwise it is required to use the mixed income rules to subdivide the license income between patented and non-patented products[1193]. It is interesting to note that compared to the Dutch IP box concept, the Belgian and UK couterparts only apply to know-how and/or trade secrets in conjunction with at least one valid patent.

1188 OECD TP Guidelines, p. 193 recital 6.5.

1189 OECD MTC, p. 225 recital 11; OECD TP Guidelines, p. 193 recital 6.5.

1190 See Hosp/Langer, Steuerstandort Liechtenstein, p. 115; Baaijens/Breuer, p. 2933; Prokisch, p. 221; Groot, p. 39; Sporken/Gommers, The Patents Box, p. 200; For Spain, see also: Matute, p. 1; Commission Decision, Intangible Assets, p. 1 recital 3.

1191 See Warson/Glaes, p. 322; Springael/Van de Velden, p. 5.

1192 See HM Revenue & Customs, Finance Bill 2012, p. 36 recital 3.39; HM Revenue & Customs, Draft Legislation, p. 22 recital 3.30, For a critical opinion, see: Krever, p. 756.

1193 See HM Revenue & Customs, Finance Bill 2012, p. 36 recital 3.39; HM Revenue & Customs, Finance Bill 2012, p. 36 recital 3.39.

The Luxembourg IP box does not encompass other rights such as know-how or trade secrets[1194]. This implies in practice that the income of relevant IP rights and other IP rights based on bundled license agreements regularly is to be split resulting in mixed sources of income[1195].

It may be the case that know-how or trade secrets do not always have a strong and straightforward relation to science or high-tech activity. There is further no regulatory process of independent examination which would provide the competent tax authorities with clarity that know-how or trade secret are closely related to technological innovation[1196]. Despite this reservation, a legislative amendment could foresee that the scope of the IP box is expanded to technological and scientific know-how as well as trade secrets[1197]. The legislative amendment should, however, be subject to a caveat. Thereafter, know-how and trade secrets are required to be closely related to scientific or technological R&D. In addition, the OECD Transfer Pricing Guidelines is supposed to be taken into account properly when determining the profits in respect thereof[1198]. Both this conditions should be emphasised in the legislative materials.

E) Regulatory data and plant variety rights

Plant variety rights are not provided for under national Liechtenstein law. Article 108 of the Liechtenstein Introductory Law for the Customs Treaty ("EGZV") may however turn out to be applicable as a legal foundation for this purpose. Article 108 EGZV governs the interim application of Swiss property rights to Liechtenstein territory with unrestricted effect. According to this provision, Swiss plant variety rights therefore probably apply to Liechtenstein territory as well. In this respect, the international obligations would in principle guarantee the existence of a suitable property right.

As indicated in section 2 (II) (2) (B) (Rights to which the IP box applies) of this Part the list of relevant IP rights as laid down in article 55 paragraph (1) of the Tax Act is, in principle, exhaustive[1199]. Plant variety rights are not included in the exhaustive enumeration of article 55 paragraph (1) of the Tax Act, and they can likewise not be subsumed under one of the other rights. This is why income from such property rights currently does not fall within the scope of the IP box.

1194 See O'Neal/Macovei-Grencon/Van Eysinga, p. 12; Administration des contributions directes, Circulaire, p. 13.

1195 See Muntendam/Chiarella, p. 229.

1196 See HM Treasury/HM Revenue & Customs, Consultation, p. 10 recital 2.9.

1197 See also Felder/Harmann, p. 86; Krever, p. 756; For a contrary opinion, see: Müller/Gramigna/Linder, p. 808.

1198 See OECD Discussion Draft, p. 9 recital 15; OECD TP Guidelines, p. 194 recitals 6.8 to 6.12.

1199 Liechtenstein Government, Report and Application No 123/2011, p. 24.

Apart from that, Liechtenstein is also member state to the WTO-TRIPS Agreement. The TRIPS Agreement requires member states to adopt policies for IP protection that meet certain minimum standards[1200]. Patents do not constitute marketing authorisations for medicinal, veterinary and plant products. Nor do they provide data protection benefits. It may be argued, however, that medicinal and veterinary products with marketing authorisations and marketing or data protection as well as plant protection products with data protection fall into the scope of article 55 of the Tax Act, not least based on the impact of the TRIPS Agreement[1201]. Shedding light on this complex legal question goes however beyond the scope of this contribution and may be subject to a separate treatise.

The UK IP box legislation is dealing extensively with medicinal and veterinary products with marketing authorisations and marketing or data protection[1202]. The same applies to plant protection products with data protection benefits[1203]. Next to the UK IP box, the Dutch IP box extends to plant variety rights as well[1204]. At this point in time, it should be emphasised that the catalogue of relevant IP rights under article 55 paragraph (1) of the Tax Act should be complemented by regulatory data and plant variety rights.

From a Liechtenstein perspective the following table provides a first overview regarding the implementation status of various EU directives and regulations related therewith[1205]:

Reference	Title	Part of EEA	Publication in Offical Law Gazette
Official Journal		Joint Committee Decision	National implementation
(EC) No 469/2009	Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concern-	No – Ongoing endorsement procedure	N/A

1200 Reichmann, p. 351.

1201 See Leskien/Flitner, p. 1 et seq; Reichmann, p. 358 et seq.

1202 See Finance (No. 4) Bill, p. 141 at 357BB (4); HM Revenue & Customs, Finance Bill 2012, p. 19, 20 recital 2.33.

1203 See Finance (No. 4) Bill, p. 141 at 357BB (5); HM Revenue & Customs, Finance Bill 2012, p. 19, 20 recital 2.33.

1204 See Sporken/Gommers, The Patents Box, p. 198; See also Müller/Gramigna/Linder, p. 808.

1205 Thanks to Mr. Bischof of the EEA Coordination Unit, Vaduz, for his support in the preparation of the table.

OJ L 152 of 16.6.2009, p. 1–10	ing the supplementary protection certificate for medicinal products (Codified version)	N/A	N/A
(EC) No 1610/96	Regulation (EC) No 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products	Yes – Annex XVII – 6a.01	1998 No 52
ABl. L 198 of 8.8.1996, p. 30–35		No 59/1997	EU regulation – implementation not required
(EC) No 1901/2006	Regulation (EC) No 1901/2006 of the European Parliament and of the Council of 12 December 2006 on medicinal products for paediatric use and amending Regulation (EEC) No 1768/92, Directive 2001/20/EC, Directive 2001/83/EC and Regulation (EC) No 726/2004	No – Ongoing endorsement procedure	N/A
OJ L 378 of 27.12.2006, p. 1–19		N/A	N/A
(EC) No 726/2004	Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency	Yes – Annex II - Chapter XII – 15 zb.01	Not yet published
OJ. L 136 of 30.4.2004, p. 1–33		No 61/2009	EU regulation – implementation not required
2001/83/EC	Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community	Yes – Annex II - Chapter XII – 15 q.01	2002 No 117

OJ L 311 of 28.11.2001, p. 67–128	code relating to medicinal products for human use	No 82/2002	EEA-AMG and corresponding ordinance

(EC) No 141/2000	Regulation (EC) No 141/2000 of the European Parliament and of the Council of 16 December 1999 on orphan medicinal products	Yes – Annex II - Chapter XII – 15 m.01	2001 No 143
OJ L 18 of 22.1.2000, p. 1–5		No 68/2001	EU regulation – implementation not required

2001/82/EC	Directive 2001/82/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to veterinary medicinal products	Yes – Annex II - Chapter XII – 15 p.01	2002 No 117
OJ L 311 of 28.11.2001, p. 1–66		No 82/2002	EEA-AMG and corresponding ordinance

(EC) 1107/2009	Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC	No – Ongoing endorsement procedure	N/A
OJ L 309 of 24.11.2009, p. 1–50		N/A	N/A

F) Extension to relevant IP rights created or acquired before 1 January 2011

The temporal limitation of article 55 paragraph (1) of the Tax Act to IP rights created or acquired on or after 1 January 2011 has been deemed neither appropriate nor workable by business associations and interest groups and has accordingly been criticised. Especially in the case of older trademarks, this temporal demarcation can no longer be performed, and also the development of patents is

often based on already existing technologies that are then further developed. The demand has thus been expressed to eliminate the temporal limitation[1206]. It should be noted, however, that other countries such as Belgium, the Netherlands, Luxembourg, Spain and Ireland also created comparable rules when introducing their IP box legislations, providing time limitations in connection with relevant IP rights[1207].

Some authors do not believe an additional expansion of the deduction for IP rights under article 55 of the Tax Act to include, for instance, know-how, trade secrets or commercial designations would entail a risk of state aid, since the expansion of the catalogue of relevant rights necessarily is accompanied by a reduction of material selectivity. In Liechtenstein, the view is therefore sometimes expressed that the legislator limited the catalogue of relevant IP rights to patents, utility models, trademarks, designs, software as well as technical and scientific databases not out of concern that the EEA Agreement might be violated, but rather that the current legal situation is instead due to fiscal considerations[1208]. This view must largely be supported, although the Liechtenstein Government has always also justified the introduction of time limitations with the desire to avoid a reduction in tax revenues. Additionally, arguments of administrative economy have been cited, which in principle affect both taxpayers and tax authorities[1209]. Nevertheless, a closer look shows that the fiscal arguments in favour of the material and temporal limitations of article 55 paragraph (1) of the Tax Act are not convincing on the whole.

A further alternative to ensure a sustainable orientation of the Liechtenstein IP box legislation in terms of its material, temporal and financial effects would be to design the rules for determining profits under article 55 of the Tax Act more closely in accordance with article 179 paragraph (1) of the TFEU, so that only RP from the exploitation of relevant IP rights would benefit from the tax deduction of 80% if it demonstrably derives from a technological and scientific basis. As stipulated in article 179 paragraph (1) of the TFEU the Union has the objective of strengthening its technological and scientific bases. The debate conducted in Liechtenstein in connection with the IP box, however, tended to be motivated by the view that the basis of assessment for the tax deduction by virtue of article 55 of the Tax Act essentially consists of all income from the commercialisation of relevant IP rights reduced by the associated tax-relevant expenses. The Government thus feared – rightly so, given the lack of differentiation in the wording of the law – that especially large and internationally operating enter-

---

1206 Liechtenstein Government, Statement No 21/2012, p. 11, 12.

1207 Liechtenstein Government, Statement No 21/2012, p. 15; See also Müller/Gramigna/Linder, p. 808, 809 Fn 43.

1208 Hosp/Langer, Besteuerung von Immaterialgüterrechten, p. 18.

1209 Liechtenstein Government, Statement No 21/2012, p. 15.

prises domiciled in Liechtenstein would include significant profits, for instance from existing trademarks, within the scope of the IP box and would thus create substantial burdens on the tax base.

It was not further considered in this regard that profits from relevant IP rights such as trademarks are not connected exclusively with technology and science, but if at all only certain parts thereof can be derived directly or indirectly from technological and scientific foundations. It should thus be kept in mind that a trademark is a unique name, symbol, logo or picture that the owner may use to distinguish its products and services from those of other entities. Trademarks thus play a role especially in marketing[1210]. Interestingly, the view expressed here has already been implemented to a certain extent in the form of article 55 paragraph (1) letter (b) of the Tax Act. According to this provision, databases – unlike trademarks, designs and software in particular – have been expressly limited to technical and scientific databases.

Apart from trade intangibles such as patents and utility models, marketing intangibles such as trademarks can also have vital points of contact with R&D activities. Trade intangibles, however, as a general rule rely more strongly on technological and scientific R&D activities[1211]. For these reasons, jurisdictions like the UK limit their IP box regime inter alia on technologies covered by patents and patent-like IP rights, and exclude the sometimes substantial returns from marketing assets[1212]. The same logic in principle also applies to profits attributed to routine manufacturing. It is a widely accepted way to determine an arm's length return that might be expected from an undertaking without access to unique IP[1213].

Hypothetically, these considerations might have allowed the Liechtenstein legislator to:

– Have more latitude in the definition of the catalogue of relevant IP rights;

– Waive the temporal limitation based on article 55 paragraph (1) of the Tax Act; while

---

[1210] Amt für Volkswirtschaft, Marken; OECD Discussion Draft, p. 9 recital 17; OECD TP Guidelines, p. 194 recitals 6.8 to 6.12; See also HM Revenue & Customs, Finance Bill 2012, p. 52 recitals 3.134 to 3.142.

[1211] OECD Discussion Draft, p. 9 recital 15; OECD TP Guidelines, p. 194 recitals 6.8 to 6.12; See also Gilmore; Intel Inside Program; Zimmermann.

[1212] See HM Revenue & Customs, Finance Bill 2012, p. 50 recital 3.123; HM Revenue & Customs, Draft Legislation, p. 30 recital 3.88; HM Treasury/HM Revenue & Customs, Consultation, p. 20 recital 4.22; For a critical opinion, see: Nicholls/Smith.

[1213] See HM Revenue & Customs, Finance Bill 2012, p. 46 recitals 3.96, 3.97; HM Revenue & Customs, Draft Legislation, p. 28 recitals 3.72, 3.73; HM Treasury/HM Revenue & Customs, Consultation, p. 19 recital 4.18, 20 recital 4.19.

– Phase-in the full benefit of the IP box over a certain number of years following its entry into force on 1 January 2011[1214]; and

– Ease the immediate effects on tax revenue in the current financial environment.

A phase-in is introduced by adapting increasing percentages in the first years of application of the tax deduction under the IP box regime[1215]. At the same time, appropriate percentages recognise the fact that the benefits provided by the IP box regime in its early years are still sufficient to provide an effective incentive to the commercialisation of relevant IP rights[1216].

For the purposes of the Liechtenstein IP box, the appropriate percentages in respect of a phase-in for each tax year may have taken the following values:

Year	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**
Percentage of RP	50%	55%	60%	65%	70%	75%	80%

If a phase-in had been implemented, various current issues would not have arisen in the first place[1217]. For instance, the criterion of temporal limitation under article 55 paragraph (1) of the Tax Act creates the following dilemma in the application of the Liechtenstein IP box for all existing IP structures:

Existing IP structures held offshore by undertakings are to be brought within regular taxation in Liechtenstein, so as to generate additional tax revenue. On the other hand, existing IP structures of undertakings operationally active in Liechtenstein should not create an excessive burden on national tax revenue through their use of the IP box.

Resolving the associated conflict of goals is like trying to square the circle, given the principle of equal treatment. Depending on the existing situation of an undertaking, business restructurings in order to deliver IP box benefits may trigger the taxation of hidden reserves on transfer of intangible assets. If so, especially undertakings operationally active in Liechtenstein that hold valuable intangibles will thus be placed at a serious disadvantage. A step-up of intangi-

---

1214 See HM Revenue & Customs, Finance Bill 2012, p. 81 recital 9.3; HM Revenue & Customs, Draft Legislation, p. 48 recital 9.3; HM Treasury/HM Revenue & Customs, Consultation, p. 27 recital 6.2; See also Philipps/Danes, p. 7; Parillo, p. 771; Shaheen; Krever, p. 756.

1215 See Obuoforibo, p. 3; HM Revenue & Customs, Finance Bill 2012, p. 81 recital 9.4; HM Revenue & Customs, Draft Legislation, p. 48 recital 9.4.

1216 See HM Treasury/HM Revenue & Customs, Consultation, p. 27 recital 6.2.

1217 See Roth, p. 62; Liechtenstein Government, Statement No 21/2012, p. 8.

bles which are shifted from offshore to regular taxation in Liechtenstein, however, is likely to be tax efficient.

Ideally, a phase-in should be provided when an IP box is introduced. This implies that the subsequent implementation of a phase-in is not a valid option. Eliminating the temporal limitation under article 55 paragraph (1) of the Tax Act can now only be justified with implementation of a legislative specification of the profit determination rules. The discussion in this regard will thus be continued seamlessly; a concrete legislative proposal for specifying the profit determination rules will then be presented in section 3 (III) of this Part.

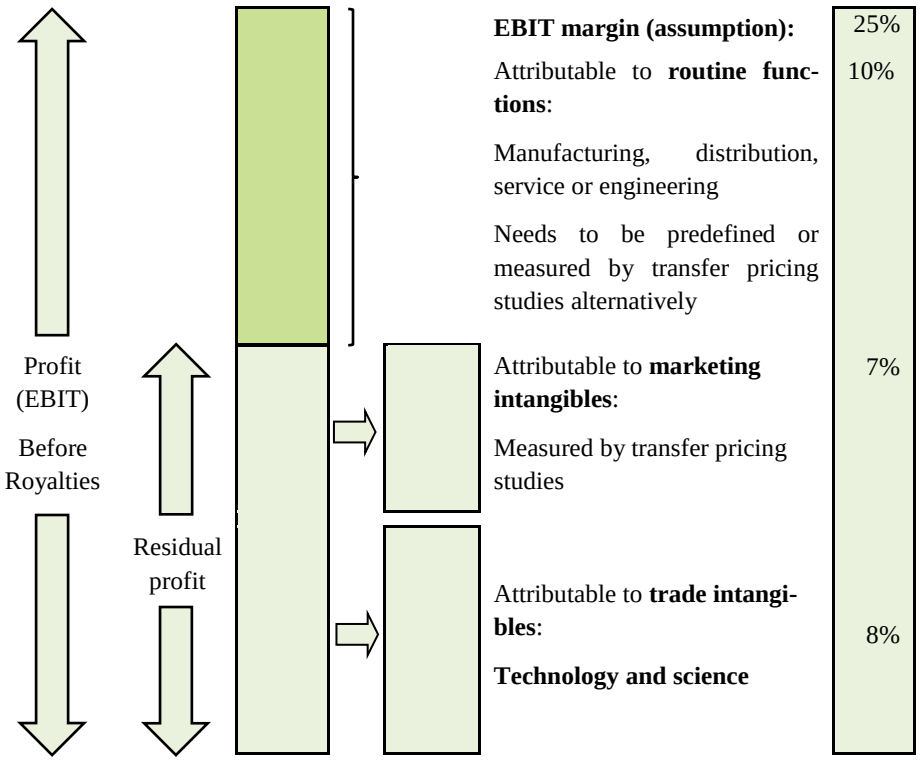
2. Relevant IP profits

The following discussion is largely dealing on how to statutorily and practically improve article 55 of the Tax Act regarding the determination of RP. To this effect, the proposals are based on a comparable uncontrolled price methodology and in particular a residual profit split methodology. Latter entails the elimination of profits arising from routine functions and from marketing intangibles[1218].

The use of these concepts is familiar to transfer pricing practioniers and can be depicted as set out below[1219]:

[1218] See HM Revenue & Customs, Finance Bill 2012, p. 54 recital 3.152.

[1219] Storck; Hickman/Rockall/Hall, p. 10; See also OECD Discussion Draft, p. 30 recital 128, p. 32 recital 141.



IP boxes are unavoidably complex and always impose additional administrative and compliance burden[1220].

An IP box company that derives RP solely from intra-group licensing is still relatively straightforward to administer. Its profits are free from functions such as manufacturing and marketing and are dealt with by transfer pricing rules[1221]. An IP box company that performs a variety of functions, however, is usually more complex to administer since transfer pricing-type rules must be applied to eliminate the profits from routine and marketing functions[1222].

From a Liechtenstein perspective, the consideration of a residual profit split approach would considerably increase the complexity of identifying what level of RP is to be attributed to the respective relevant IP rights[1223]. Smaller under-

1220 See HM Treasury/HM Revenue & Customs, Consultation, p. 30 recital 7.13.
1221 See Hickman/Rockall/Hall, p. 11.
1222 Idem.
1223 See HM Revenue & Customs, Finance Bill 2012, p. 8 recital 1.3; Shanahan, Patent Box, p. 7.

takings do not always have the experience in identifying the relative contribution of marketing intangibles. Beyond form G of the corporate income tax return, there is no flexible formulaic approach available that may reduce the administrative burden to properly calculate the tax deduction of 80% under article 55 of the Tax Act. Relevant taxpayers are thus required to identify their RP by way of cost accounting ("Spartenrechnung"). In addition, relevant taxpayers are supposed to refer to transfer pricing studies where appropriate[1224].

To minimise administrative and compliance burden for taxpayers that opt for the IP box, the RP for many claims should ideally be identifiable by using a flexible formulaic approach[1225]. On closer consideration, however, it becomes apparent that unlike the UK IP box the introduction of a formulaic approach is not a valuable option for the Liechtenstein IP box. This is because the catalogue of relevant IP rights by virtue of article 55 of the Tax Act includes marketing intangibles. In addition, the UK IP box allows the determination of profits based on a simple profit apportionment approach, while the Liechtenstein IP box for the determination of profits invariably entails a sophisticated cost accounting methodology. From a Liechtenstein perspective, both these elements significantly compromise the simplicity and thus the potential endorsement of a formulaic approach.

A) Steps for calculating relevant IP profits

Similar to the UK and Dutch IP boxes, the RP of a relevant taxpayer in the normal course could be determined by way of a three stage model comprising four steps, which is based on a residual profit split method. The residual profit split method is a recognised transfer pricing method for identifying and valuing profits from IP rights[1226].

At this point it must be noted that because of the proposed calculation model, contrary to the commentary, the sum of positive income from relevant IP rights is no longer equivalent to RP.

The different steps of the calculation model are set out below:

1224 See HM Revenue & Customs, Draft Legislation, p. 4 recital 1.4; HM Treasury/HM Revenue & Customs, Consultation, p. 6 recital 1.12, 30 recital 7.15.

1225 See HM Revenue & Customs, Finance Bill 2012, p. 8 recital 1.6; HM Revenue & Customs, Draft Legislation, p. 4 recital 1.4; See also Müller/Gramigna/Linder, p. 810; Linder/Müller, Steuerliche Anreize, p. 152.

1226 See Finance (No. 4) Bill, p. 145 at 357C (1); Consultation draft, p. 6 at 357C (1); HM Revenue & Customs, Finance Bill 2012, p. 29 recital 3.4; HM Revenue & Customs, Draft Legislation, p. 18 recital 3.4; HM Treasury/HM Revenue & Customs, Consultation, p. 17 recital 4.3; See also OECD TP Guidelines, p. 93 et seq.

a) Step 1

The first stage consists of step 1. It deals with the determination of the sum of positive income from relevant IP rights based on a per-relevant IP right cost accounting approach by virtue of article 55 of the Tax Act. It largely corresponds to the practice as laid down in section 2 (II) (3) (Relevant IP profits) of this Part. The determination of positive income from relevant IP rights thus also takes into account[1227]:

– Any notional royalty referred to in section 2 (II) (3) (C) (Notional royalty) of this Part; and

– Mixed sources of income referred to in section 2 (II) (3) (D) (Mixed sources of income) of this Part.

The amount determined under step 1 results in a figure for relevant IP rights to be carried forward to step 2.

b) Step 2

The second stage consists of step 2. The routine return figure must now be deducted from the amount given by step 1, which results in the relevant residual profit ("RRP")[1228]. The predefined routine return figure could amount up to 10% and be applied on certain routine expenses, which have been made by the taxpayer in calculating the positive income from relevant IP rights by virtue of step 1[1229].

c) Step 3

In a third stage consisting of steps 3 to 4, the taxpayer removes the marketing assets return ("MAR") figure from of the RRP[1230]. The remainder is the RP figure, which is subject to the tax deduction of 80% by virtue of article 55 paragraph (1) of the Tax Act[1231].

1227 See Finance (No. 4) Bill, p. 162 at 357DA (1) Step 2; Consultation draft, p. 22 at 357DA (1) Step 2; HM Revenue & Customs, Finance Bill 2012, p. 60 recital 4.11; HM Revenue & Customs, Draft Legislation, p. 35 recital 4.11.

1228 See Philipps/Danes, p. 9; Finance (No. 4) Bill, p. 145 at 357C (1) Step 4; Consultation draft, p. 7 at 357C (1) Step 4; HM Revenue & Customs, Finance Bill 2012, p. 11 recital 1.20, 29 recital 3.7; HM Revenue & Customs, Draft Legislation, p. 6 recital 1.16, 18 recital 3.7.

1229 See Finance (No. 4) Bill, p. 163 at 357DA (4); Consultation draft, p. 22 at 357DA (4).

1230 See Finance (No. 4) Bill, p. 145 at 357C (1) Step 6, 162 at 357DA (1) Step 6, 163 at 357DA (6); Consultation draft, p. 7 at 357C (1) Step 6, 22 at 357DA (1) Step 6, 23 at 357DA (7).

1231 See Philipps/Danes, p. 9; HM Revenue & Customs, Finance Bill 2012, p. 29 recital

d) Step 4

Step 4 of the calculation model takes into account the profits arising before the grant of a relevant IP right in accordance with section 2 (II) (3) (E) (Profits arising before grant of a right) of this Part. Steps 2 and 3 thus apply accordingly to profits arising before the grant of a relevant IP right.

If the result of these calculations is greater than nil, then that amount results in a RP for the tax year[1232]. If the result of the calculations is less than nil, then that amount results in a RL for the tax year[1233].

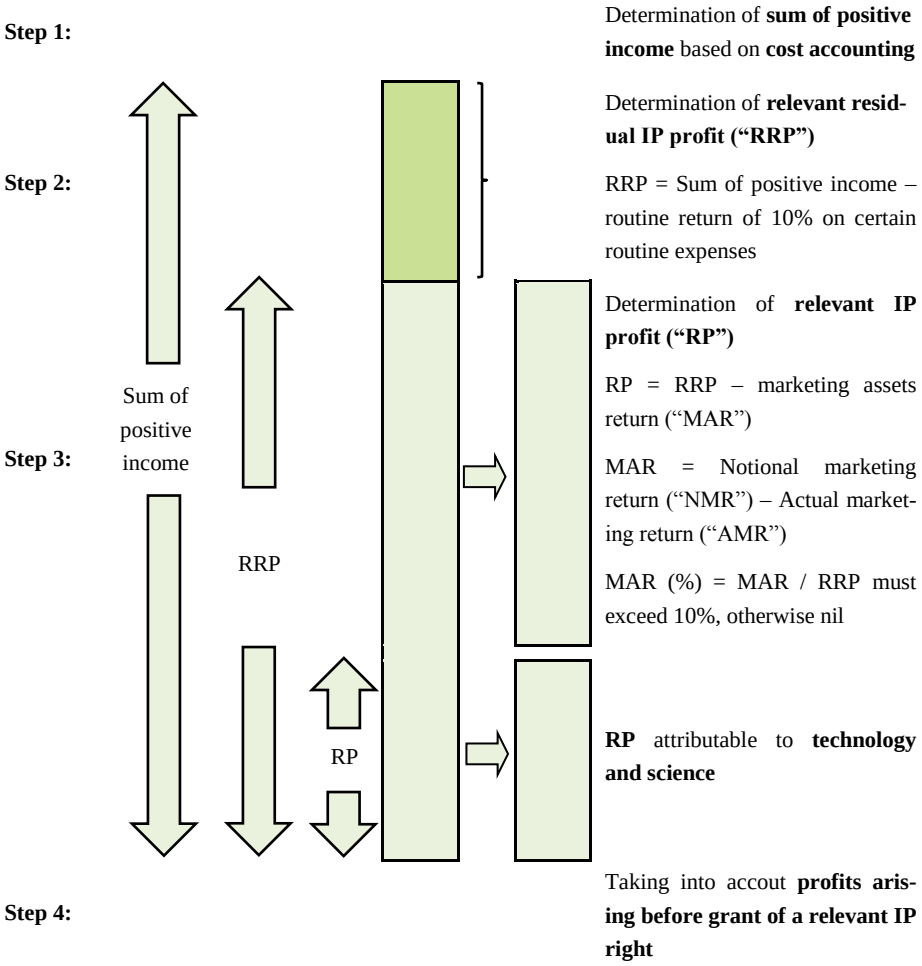
The calculation model can be depicted as follows[1234]:

3.8; HM Revenue & Customs, Draft Legislation, p. 18 recital 3.8; HM Treasury/HM Revenue & Customs, Consultation, p. 17 recital 4.3.

[1232] See Finance (No. 4) Bill, p. 146 at 357C (2), 163 at 357DA (2); Consultation draft, p. 7 at 357C (2), 22 at 357DA (2).

[1233] See Finance (No. 4) Bill, p. 146 at 357C (3), 163 at 357DA (3); Consultation draft, p. 7 at 357C (3), 22 at 357DA (3).

[1234] See also Storck.



B) Routine return figure

The second stage of the calculation model consists of step 2. It purposes to deduct from the positive income from relevant IP rights the routine return in order to arrive at the relevant residual profit ("RRP") figure[1235].

[1235] See HM Revenue & Customs, Finance Bill 2012, p. 46 recital 3.100; HM Revenue & Customs, Draft Legislation, p. 28 recital 3.76; HM Treasury/HM Revenue & Customs, Consultation, p. 19 recital 4.17.

Where an undertaking does not have access to unique IP and other intangible assets it may still have a certain level of profit, which is referred to as routine return or routine profit respectively. Routine return is calculated by using a cost-plus methodology as it is simple to apply and commonly used in a number of commercial situations. Such mark-up is thus applied to certain tax deductible expenses[1236].

While the consultation paper concerning the UK IP box suggested a fixed mark-up rate of 15%, the mark-up rate was lastly specified at 10%[1237]. In any event, the routine return figure on certain specified costs should be a representative return reasonable to apply in respect of businesses across all sectors. It should also take into account the narrow cost base, which includes only the value-adding activities of an undertaking[1238]. A fixed routine return figure would have to be predefined by the Liechtenstein legislator or the competent tax authorites in due time.

While a fixed routine figure avoids the administrative burden of justifying rates for each type of activity, taxpayers should always have the option to demonstrate a lower routine return figure on the condition that such mark-up rate is thoroughly measured based on transfer pricing studies.

C) Routine deductions and non-routine deductions

Deductions that despite falling within section 2 (II) (3) (A) (b) (Associated tax-relevant expenses) of the commentary of this Part may not necessarily be routine deductions. Routine deductions thus exclude a number of deductions from the mark-up calculation, which in respect of the Liechtenstein IP box are the following[1239]:

– R&D costs, including expenses for contract R&D and cost sharing arrangements;

– License costs;

1236 See HM Revenue & Customs, Finance Bill 2012, p. 46 recitals 3.96, 3.97; HM Revenue & Customs, Draft Legislation, p. 28 recitals 3.72, 3.73; HM Treasury/HM Revenue & Customs, Consultation, p. 19 recital 4.18, 20 recital 4.19.

1237 See Finance (No. 4) Bill, p. 154 at 357CI (1), (2); Consultation draft, p. 15 at 357CH (1), (2); HM Revenue & Customs, Finance Bill 2012, p. 46 recitals 3.98, 3.99; HM Revenue & Customs, Draft Legislation, p. 28 recitals 3.74, 3.75.

1238 See HM Treasury/HM Revenue & Customs, Consultation, p. 20 recital 4.20.

1239 See Finance (No. 4) Bill, p. 156 at 357CK (1) to 357CK (7), 157 at 357CK (8); Consultation draft, p. 16 at 357CH (1), (2), (3); HM Revenue & Customs, Finance Bill 2012, p. 47, 48 recital 3.106; HM Revenue & Customs, Draft Legislation, p. 28 recital 3.77, 29 recitals 3.78; HM Treasury/HM Revenue & Customs, Consultation, p. 20 recitals 4.19, 4.20.

– Damages for infringement costs;
– Inventory costs;
– Intra-group services;
– Finance costs; or
– Equity costs.

Material and supplies costs are only excluded from the mark-up calculation where the expenses for raw material and goods purchased for resale qualify as inventory costs[1240].

Intra-group services to an IP box company are not treated as routine deductions on the principle that the profits arise in the other group company[1241]. Associated tax-relevant expenses will further cause mark-up calculations only where costs are based on value-adding and non-outsourced activities or functions[1242].

Where hypothetically a relevant taxpayer incurs no associated tax-relevant expenses subject to mark-up calculation the routine return figure may be nil.

D) Marketing assets return figure

The third stage of the proposed calculation model consists of steps 3 and 4. It purposes to deduct from the RRP figure the MAR figure in order to arrive at RP[1243].

In order to minimise computational complexity while excluding what generally may be the largest source of RRP not directly relating to technological and scientific R&D, the proposed calculation model is restricted to marketing assets[1244] For the determination of the profit attributable to marketing assets the calculation model uses two figures, the notional marketing royalty and the actual marketing royalty[1245].

The marketing assets return in relation to the relevant IP rights of a relevant taxpayer for a tax year is[1246]:

1240 See HM Treasury/HM Revenue & Customs, Consultation, p. 20 recital 4.20.
1241 See Hickman/Rockall/Hall, p. 11.
1242 See HM Treasury/HM Revenue & Customs, Consultation, p. 20 recital 4.20.
1243 See Finance (No. 4) Bill, p. 145 at 357C (1) Step 6, 162 at 357DA (1) Step 6, 163 at 357DA (6); Consultation draft, p. 7 at 357C (1) Step 6, 22 at 357DA (1) Step 6, 23 at 357DA (7).
1244 See HM Revenue & Customs, Finance Bill 2012, p. 50 recital 3.121; HM Revenue & Customs, Draft Legislation, p. 30 recital 3.88.
1245 See HM Revenue & Customs, Finance Bill 2012, p. 51 recital 3.125; HM Revenue & Customs, Draft Legislation, p. 30 recital 3.90.
1246 See Finance (No. 4) Bill, p. 158 at 357CN (1); Consultation draft, p. 18 at 357CK

MAR = NMR – AMR

where:

– MAR is the marketing assets return in respect of the profit from relevant IP rights for the tax year;

– NMR is the notional marketing royalty in respect of the profit from relevant IP rights for the tax year; and

– AMR is the actual marketing royalty in respect of the profit from relevant IP rights for the tax year.

The marketing assets return ("MAR") figure is nil where[1247]:

– AMR is greater than or equal to NMR; or

– MAR for a tax year is less than 10% of the RRP.

This formula aims to avoid the necessity of calculating the MAR figure in cases where it obviously makes only a minor contribution to RRP[1248]:

– Where the marketing activities of a relevant taxpayer are insignificant, any NMR is likely to be minimal and the MAR figure within the threshold of 10% of the RRP[1249];

– Where a relevant taxpayer is paying an AMR in respect of marketing assets which it exploits and there are no significant local marketing assets, then NMR is likely to be equal to AMR and the MAR figure will be nil[1250].

If it is reasonable to assume that either of these situations applies, it is not necessary to undertake a computation of the NMR figure merely to demonstrate that the 10% threshold is not breached[1251]. On the contrary, where valuable marketing assets are involved it is reasonable to assume that a significant proportion of profit derives from marketing activities. Accordingly, the computation of the NMR figure is required[1252].

---

(1).

1247 See Finance (No. 4) Bill, p. 158 at 357CN (2); Consultation draft, p. 18 at 357CK (2).

1248 See HM Revenue & Customs, Finance Bill 2012, p. 51 recital 3.127; HM Revenue & Customs, Draft Legislation, p. 30 recital 3.91.

1249 See HM Revenue & Customs, Finance Bill 2012, p. 51 recital 3.128.

1250 Idem, recital 3.129.

1251 Idem, recital 3.130.

1252 Idem, recital 3.121.

E) Notional marketing royalty

The most critical part of the proposed calculation model for relevant taxpayers is the valuation of the NMR figure for a tax year[1253]. The NMR in respect of the profit from relevant IP rights of a relevant taxpayer for a tax year is the appropriate percentage ("X%") of the RIPI for that tax year[1254]. In other words, the NMR is an absolute amount derived as a percentage of RIPI (X% of RIPI). It is then important to understand that for the lack of any benchmark or comparative figures the valuation of NMR for the aggregate of marketing assets under an arm's length approach starts with the creation of a hypothetical counterparty ("TP")[1255].

The appropriate percentage is the proportion of any RIPI for a tax year which the relevant taxpayer would pay to a third party ("TP"), which does not have equivalent technological and scientific assets, for the exclusive right to exploit the equivalent relevant marketing assets in that tax year if the taxpayer were not otherwise able to exploit them[1256].

It should be emphasised that the definition of NMR deliberately encourages separation of the value of relevant marketing assets between value attributes relating to (1) technology and science and (2) marketing. This is because an actual marketing intangible may well have attributes that derive significantly from technology and science[1257].

a) Marketing assets

A marketing asset is a "relevant marketing asset" in relation to a tax year if the RIPI of the relevant taxpayer for the tax year includes any income arising from things done by the taxpayer that involve the exploitation of that marketing asset[1258].

1253 See Hickman/Rockall/Hall, p. 11; For a critical opinion, see: Nicholls/Smith.

1254 See Finance (No. 4) Bill, p. 159 at 357CO (1); Consultation draft, p. 18 at 357CL (1); HM Revenue & Customs, Finance Bill 2012, p. 51 recitals 3.125, 3.132; HM Revenue & Customs, Draft Legislation, p. 30 recital 3.92; Hickman/Rockall/Hall, p. 12.

1255 See also Rouenhoff, p. 657; OECD Discussion Draft, p. 26 recital 103.

1256 See Finance (No. 4) Bill, p. 159 at 357CO (2); Consultation draft, p. 18 at 357CL (2); HM Revenue & Customs, Finance Bill 2012, p. 51 recitals 3.125, 3.132; HM Revenue & Customs, Draft Legislation, p. 30 recital 3.92; Hickman/Rockall/Hall, p. 12.

1257 See Hickman/Rockall/Hall, p. 12; See also Jennewein/Durand/Gerybadze, p. 73; Gilmore; Intel Inside Program; Zimmermann.

1258 See Finance (No. 4) Bill, p. 159 at 357CO (3); Consultation draft, p. 18 at 357CL (3); HM Revenue & Customs, Finance Bill 2012, p. 53 recital 3.143.

Passive exploitation of a marketing asset should always give rise to the consideration of an NMR. Where a relevant taxpayer thus exploits a marketing asset through licensing, but active exploitation of the marketing asset is performed by the licensee, the taxpayer is required to consider a NMR[1259].

Marketing asset means any of the following, irrespective of whether or not a marketing asset is capable of being transferred or assigned[1260]:

– Anything that corresponds to a marketing asset within the meaning of the Liechtenstein Trademark Protection Act, including registered and unregistered trademarks and signs or indications which may serve to designate the geographical origin of goods or services[1261];
– Anything that corresponds to a marketing asset within the meaning of the Trademark Protection Act and is recognised under the law of a country or territory outside Liechtenstein;
– Any goodwill or reputation attached to the goods or services of the relevant taxpayer;
– Any information about actual or potential customers which is used for marketing purposes.

The valuation of the NMR payable for the marketing assets should include consideration of the value of the goodwill linked to the business, goods and services of the relevant taxpayer[1262].

Depending on the context, the term "goodwill" can be used to refer to a number of different concepts[1263]. This is why the transaction-oriented definition of goodwill in article 1054 (Goodwill) of the PGR is of limited use. Goodwill should thus be understood as[1264]:

– The attractive force which brings in customers;
– The benefit and advantage of the good name, reputation and connection of a business by reason of situation, name and reputation, connection, introduction to old and agreed customers and agreed absence from competition.

1259 See Hickman/Rockall/Hall, p. 12.

1260 See Finance (No. 4) Bill, p. 159, 160 at 357CO (7); Consultation draft, p. 19 at 357CL (7); HM Revenue & Customs, Finance Bill 2012, p. 52 recital 3.133; HM Revenue & Customs, Draft Legislation, p. 30 recital 3.93; See also section 2 (II) (2) (B) (c) (Trademarks) of this Part.

1261 See Trademark Protection Act.

1262 See HM Revenue & Customs, Finance Bill 2012, p. 52 recital 3.138.

1263 See Rouenhoff, p. 654; OECD Discussion Draft, p. 10 recitals 21, 22.

1264 See HM Revenue & Customs, Finance Bill 2012, p. 52 recital 3.135.

Information about customers used for marketing purposes includes the value of databases referring to actual or potential customers and to better designing a product or service to meet the needs of a particular customer or market[1265]. Yet, information about customers which are not used for marketing purposes and in particular the value of technical and scientific databases referred to in section 2 (II) (2) (B) (f) (Technical and scientific databases) are excluded.

b) Assumptions for the notional marketing royalty

For the purposes of determining the NMR, certain assumptions need to be made to set the conditions under which the parties are deemed to transact at arm's length[1266]:

- The relevant taxpayer and the notional IP owner ("TP") are dealing at arm's length;
- The value of the marketing assets is separated between value attributes relating to (1) technology and science and (2) marketing;
- TP does not dispose of technological and scientific assets;
- The relevant taxpayer, or any other person authorised by it, have the right to exploit the relevant marketing assets to the exclusion of any other person including TP;
- The relevant taxpayer will have the equivalent marketing rights in relation to the relevant marketing assets as it actually has;
- The right to exploit the relevant marketing assets is conferred on the first day of the tax year, or if later, the day on which the relevant taxpayer first acquired the relevant marketing asset or the right to exploit the asset;
- The appropriate percentage for the tax year is determined at the beginning of the tax year;
- The appropriate percentage for the tax year applies for each succeeding tax year for which the relevant taxpayer has the right to exploit the relevant marketing assets; and
- No income other than RIPI will arise from anything done by the relevant taxpayer that involves the exploitation by the taxpayer of the relevant marketing assets.

1265 Idem, p. 53 recital 3.142.

1266 See Finance (No. 4) Bill, p. 159 at 357CO (4); Consultation draft, p. 18 at 357CL (4); HM Revenue & Customs, Finance Bill 2012, p. 53 recitals 3.145, 3.146; HM Revenue & Customs, Draft Legislation, p. 31 recitals 3.96, 3.97.

The NMR figure needs to be reassessed for each tax year by using the same assumptions. As the NMR figure is deemed to have an even profile over its life, however, it is expected to stay the same for several years[1267].

Because the valuation of the NMR figure expects that no income other than RIPI arises to the relevant taxpayer through exploitation of the marketing assets, overstating the NMR figure is avoided. It is only necessary to consider the amount that the relevant taxpayer would pay to use the marketing assets, devoid of attributes that relate to technological and scientific R&D, on the products and services that qualify for the IP box, not on the entire product portfolio of the taxpayer[1268].

In determining the NMR figure the relevant taxpayer is supposed to act in accordance with[1269]:

– Article 9 of the OECD Model Tax Convention, and

– The OECD Transfer Pricing Guidelines.

The relevant taxpayer is however not required to ascertain the price at which any counterparty would be willing to sell or to consider the relative bargaining positions of the two parties. All other provisions of the OECD guidelines should be taken into account in determining the level of the NMR though[1270].

F) Actual marketing royalty

The AMR figure in respect of the profit from relevant IP rights of a relevant taxpayer for a tax year is the aggregate of any such sums, which have been allocated to the RIPI stream based on a cost accounting approach under step 1 of the calculation model[1271].

The AMR figure is to be subtracted from the NMR figure to give MAR and thus the deduction from RRP. It follows that the MAR figure is limited to profits

---

1267 See HM Revenue & Customs, Finance Bill 2012, p. 53 recital 3.146; HM Revenue & Customs, Draft Legislation, p. 31 recital 3.97.

1268 See HM Revenue & Customs, Finance Bill 2012, p. 56 recital 3.154.

1269 See Finance (No. 4) Bill, p. 159 at 357CO (6); Consultation draft, p. 19 at 357CL (6); HM Revenue & Customs, Finance Bill 2012, p. 54 recital 3.149; HM Revenue & Customs, Draft Legislation, p. 31 recital 3.97.

1270 See HM Revenue & Customs, Finance Bill 2012, p. 54 recital 3.151.

1271 See Finance (No. 4) Bill, p. 160 at 357CP (1), 163 at 357DA (6); Consultation draft, p. 20 at 357CM (1), 23 at 357DA (7); HM Revenue & Customs, Finance Bill 2012, p. 57 recital 3.159, 61 recital 4.16; HM Revenue & Customs, Draft Legislation, p. 32 recital 3.99, 36 recital 4.16; See also section 3 (II) (2) (A) (a) (Step 1) of this Part.

which accrue to the relevant taxpayer. The AMR is the part of the return to marketing assets which accrues to third parties[1272].

G) Calculation example

The calculation model is illustrated and further explained by the following examples[1273]:

IP box calculation example				
A relevant corporate taxpayer manufactures and sells patented products in Liechtenstein. In addition, it licenses out the right to manufacture the products in other countries using its patented technology, know-how and brand. The taxpayer has registered its own trademark. The taxpayer also uses its excess manufacturing capability to provide manufacturing services on a contract basis to other undertakings. With the exception of R&D costs, all other manufacturing costs qualify as routine expenses and are thus subject to a mark-up of 10%. At the beginning of the tax year, the taxpayer determines the NMR figure for the tax year with 7%. It is further assumed to be reasonable that a significant proportion of profit derives from marketing assets. According to the allocation of associated tax-relevant expenses to the RIPI stream on a cost accounting basis the AMR figure is found to be 38.				
Profit and loss statement				
	RIPI		**Other income**	
	Full-risk manufacturing	Licensing	Contract manufacturing	Total
Income	1.200	200	600	2.000
Cost of goods	580		220	800
Gross profit	620	200	380	1.200
Other manufacturing costs	120		140	260
Profit before R&D costs	500	200	240	940
R&D costs including marketing expenses	240			240
Profits chargeable to corporation tax	460		240	700

[1272] See HM Revenue & Customs, Finance Bill 2012, p. 57 recital 3.158; HM Revenue & Customs, Draft Legislation, p. 31 recital 3.98.

[1273] See HM Revenue & Customs, Finance Bill 2012, p. 62 recital 4.21; HM Revenue & Customs, Draft Legislation, p. 37 recital 4.20.

Calculation of RP	
Step 1:	Determination of the **sum of positive income from relevant IP rights** based on a per-relevant IP right cost accounting methodology: – RIPI is calculated as 1.400 (1.200 + 200); – Total debits of 940 (580 + 120 + 240) are allocated against RIPI; – Debits are deducted from RIPI resulting in the sum of positive income from relevant IP rights of 460 (1.400 – 940).
Step 2:	Determination of **RRP** by deduction of **routine return** from the sum of positive income from relevant IP rights: Routine return of 10% is applied to routine expenses of 700 (580 + 120) and deducted from the sum of positive income of 460 which results in RRP of 390 (460 – 70).
Step 3:	Determination of **RP** by deduction of the **marketing return**, which is equivalent to the **MAR** figure, from RRP: MAR = (X% of RIPI) – AMR = (0.07 x 1.400) – 38 = 60 MAR (%) = MAR / RRP = 60 / 390 = 15% The MAR (%) for the tax year exceeds 10% and thus is greater than nil. The RP, which corresponds to the basis for assessment for the tax deduction of 80% by virtue of article 55 of the Tax Act, results in 330 (390 – 60).

It can be concluded that the tax deduction of 80% under the IP box regime amounts to 264 (330 x 0.8). The taxpayer can thus reduce its overall corporate income tax profit from 700 to 436 (700 – 264). This implies that its corporate income tax payable is reduced from approximately 88 (700 x 12.5%) to 55 (436 x 12.5%).

The overall tax savings for the relevant taxpayer due to the application of the IP box is 37% (1 – (55 / 83)). Eventually, in respect of the per-relevant IP right based tax declaration requirements the applicable marketing return for the tax year is:

MAR (%) for relevant IP rights and tax declaration purposes:

MAR / RRP = 60 / 390 = 15%

3. Supplementary

A) Transfer pricing

The arm's length principle is defined in article 49 of the Tax Act, for which reason the issue of transfer pricing between associated parties is directly addressed.

Despite of this fact, Liechtenstein has not yet accepted the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations[1274]. In contrast, the Federal Tax Administration submitted on 4 March 1997 a circular letter informing the cantonal tax administrations about the contents of the OECD Transfer Pricing Guidelines and instructed the cantonal administrations to follow these Guidelines[1275].

Not least of all due to the practical application of the IP box, which partly requires sound transfer pricing analyses to determine RPs, Liechtenstein should also formally adhere to these OECD guidelines. Moreover, such a step can further reduce the risk of deriving a selective advantage within the context of a state aid investigation of the Liechtenstein IP box, as examined in Part 2 of this treatise.

The consequences of adoption of the OECD Transfer Pricing Guidelines could be harmonised unproblematically with the existing procedural rules of the Tax Act. In accordance with article 93 of the Tax Act, together with the taxpayer, the competent tax authorities determine the actual and legal circumstances relevant to full and correct taxation. To determine the facts relevant to taxation, the tax authorities may consult experts, conduct inspections, demand oral or written information or certifications from taxpayers, and inspect the account books and records of taxpayers. Consequently, the taxpayer is generally required to provide any documentary evidence for properly assessing the taxable income.

With respect to transfer pricing issues, the taxpayer has to demonstrate that the transfer prices used are based on sound economic and commercial reasoning. Documentation such as account books and records of taxpayers, including specific transfer pricing documentation where requested, will normally be required. Similar to Switzerland, due to the lack of sufficient unrelated comparable businesses in a small market such as Liechtenstein, transfer pricing studies may as well refer to other markets and selected jurisdictions in order to demonstrate the arm's length nature of transactions[1276].

1274 OECD TP Country Profile Switzerland.
1275 OECD TP Guidelines; KS ESTV 19 März 2004.
1276 See OECD TP Country Profile Switzerland.

The Liechtenstein tax legislation does not include specific transfer pricing audit procedures or transfer pricing penalties. Where the tax authorities review the tax return in accordance with article 102 paragraph (1) of the Tax Act and carry out the necessary investigations, transfer pricing issues are, if at all, pursued on the basis of these regular tax audit procedures.

Where the taxpayer submits an objection to the competent tax authorities against an assessment decree or other decrees, in accordance with article 116 paragraphs (1) and (2) of the Tax Act its written objection must inter alia contain the applications and the justification thereof with reference to the evidence. Taxpayers who wilfully or negligently fail to comply with or incorrectly comply with an obligation pursuant to the provisions of the tax legislation may be punished for an infraction with a fine.

In the same way as Switzerland, no formal procedure for advanced pricing agreements ("APA") exists in Liechtenstein. Bilateral APAs may however be conducted based on the mutual agreement procedures in the respective double taxation agreements[1277].

B) Double taxation relief

As attractive as a national tax rate of 2.5% on income from relevant IP rights may appear, the success of the IP box by virtue of article 55 of the Tax Act will no doubt be decided by the design and implementation of further double taxation agreements[1278].

In many countries, taxes at source are withheld on royalties, which may end up as final taxation if no double taxation agreement exists. Foreign withholding taxes of up to 30% on royalties are not rare, and can in the end lead to total taxation on royalty income that prevents an internationally competitive commercialisation of IP rights[1279]. The double tax treaties to be concluded by Liechtenstein are thus supposed to provide a zero rate on royalties. This will ensure that the benefits of the IP box will not be taken away by high foreign withholding taxes[1280].

Liechtenstein's network of double taxation agreements, which is still growing, should currently be considered one of the main disadvantages of the Liechtenstein IP box when compared with other countries. It is therefore of crucial importance for Liechtenstein to expand its network of double taxation agreements as quickly and extensively as possible. Such an expansion is one of the declared political goals of Liechtenstein, and attractive double taxation agreements with

---

1277 Idem.
1278 See Lehmann/Zanettin, p. 11.
1279 Idem.
1280 See Krever, p. 756.

countries such as the UK, Germany, Luxembourg, Hong Kong and Singapore have recently been concluded[1281].

One possible structure still worth considering is a Swiss company with a permanent establishment in Liechtenstein. Taking into account all commercial substance requirements, such a structure would ideally allow the IP rights to be attributed to the Liechtenstein permanent establishment, so that the deduction of 80% for income from IP rights under article 55 of the Tax Act would apply. At the same time, this structure would allow access to the extensive Swiss network of double taxation agreements and thus permit a tax-efficient commercialisation of IP rights[1282].

C) Input tax incentives

In the medium to longer term, especially those activities can survive in Liechtenstein and Switzerland that are associated with high added value. These activities include qualified work in the field of R&D[1283]. Against this trend it must be stated that for cost considerations notably large Swiss undertakings today carry out the majority of their R&D by subsidiaries abroad[1284].

R&D is vitally important for small and medium undertakings alike. The desire to invest, however, is held back by the high costs and corresponding financing restrictions. This is why small and medium undertakings cannot afford to perform R&D to the extent that would be optimal for their businesses and for the national economy[1285].

Towards that end, attractive framework conditions encourage innovative undertakings through financial support of their R&D efforts. Instruments that are frequently available are both direct subsidies and input tax incentives[1286]. The two main forms of input tax incentives are increased deductions on R&D ex-

---

1281 Lehmann/Zanettin, p. 11.

1282 Idem.

1283 See Bal, p. 573; Liechtenstein Government, Statement No 21/2012, p. 11; Kachinsky/Medallis/Leibsker, p. 123; Müller/Wenger/Linder, Tax Incentives, p. 8; Keuschnigg/Ribi, p. 8; See also Brodach, p. 5; Novartis, p. 4; Roche.

1284 See Müller/Wenger/Linder, Steuerliche Förderung, p. 846; Müller/Wenger/Linder, Tax Incentives, p. 3, 6; Keuschnigg/Ribi, p. 53; Schweizer Parlament, Motion Hurter; Müller/Gramigna/Linder, p. 803.

1285 See Müller/Wenger/Linder, Steuerliche Förderung, p. 846, 848; Hurter, p. 637; Müller/Wenger/Linder, Tax Incentives, p. 3, 5; Keuschnigg/Ribi, p. 5, 22; Linder/Müller, Steuerliche Anreize, p. 147.

1286 See Robinson; Obrist, p. 650; Matteotti/Roth, p. 62; Bal/Offermanns, p. 168; Müller/Wenger/Linder, Steuerliche Förderung, p. 845; Hurter, p. 637; Müller/Wenger/Linder, Tax Incentives, p. 11, 12; Schäuble/Giger, p. 717; Schweizer Parlament, Motion Noser.

penses ("R&D super deduction") and tax credits. Some jurisdictions have also introduced reduced wage and salary costs for R&D personnel[1287].

Direct subsidies have the advantage of allowing governments to retain a certain control over the nature of R&D conducted. Direct funding of R&D also ensures that industry helps to address important research and public missions, such as basic research, defence, health care and energy development. Direct subsidies may however distort market competition as the decision as to which undertakings receive financial assistance frequently results in benefits, which only favour a limited number of undertakings. In addition, funds from grant programmes often depend on the budget made available by the competent authorities in a particular year[1288].

Tax incentives are more efficient and equitable in delivering state support to commercial R&D activities. By reducing the cost of R&D they can raise the net present value of prospective R&D projects. Tax benefits require less administration and can be accessed easier than grant programmes. In addition, they are more effective in encouraging long-term research. Undertakings that meet the eligibility criteria of a tax incentive can reasonably expect to receive ongoing benefits when multiannual projects are undertaken[1289]. As a result, with the exception of promoting specific areas tax incentives should generally be preferred over direct subsidies[1290].

Against all odds, Liechtenstein needs to follow the example of other countries and not be reluctant to further improve its framework conditions for R&D[1291]. As demonstrated below, only the adoption of input tax incentives supplementing the actual IP box legislation allows Liechtenstein to take up a sustainable positioning[1292]:

1287 See Bal/Offermanns, p. 168; Müller/Wenger/Linder, Steuerliche Förderung, p. 845; Müller/Wenger/Linder, Tax Incentives, p. 11, 12.

1288 See Bal, p. 576; Bal/Offermanns, p. 168; Müller/Wenger/Linder, Steuerliche Förderung, p. 847, 848; Müller/Wenger/Linder, Tax Incentives, p. 11 to 13.

1289 Bal/Offermanns, p. 168; Müller/Wenger/Linder, Steuerliche Förderung, p. 848; Keuschnigg/Ribi, p. 25; Müller/Wenger/Linder, Tax Incentives, p. 11 to 13.

1290 See Bal/Offermanns, p. 168; Müller/Wenger/Linder, Steuerliche Förderung, p. 848; Müller/Wenger/Linder, Tax Incentives, p. 11, 12; Keuschnigg/Ribi, p. 37; Schweizer Parlament, Motion Noser.

1291 Felder/Harmann, p. 86, 87; See also Evers/Miller/Spengel, p. 5; SwissHoldings; Hurter, p. 637; Müller/Wenger/Linder, Tax Incentives, p. 19 et seq; Schweizer Parlament, Motion Hurter; Müller/Gramigna/Linder, p. 804.

1292 Shanahan, Incentives Group, p. 5; See also Kachinsky/Medallis/Leibsker, p. 124.

Country	R&D Tax Credit	R&D Super Deduction	IP Box
Australia	Yes		
Austria	Yes		
Belgium	Yes		Yes
Brazil		Yes	
Canada	Yes		
China		Yes	Yes
Cyprus			Yes
Czech Republic		Yes	
Denmark		Yes	
France	Yes		Yes
Hungary		Yes	Yes
India		Yes	
Ireland	Yes		
Italy	Yes		
Japan	Yes		
Korea	Yes		
Liechtenstein			Yes
Luxembourg			Yes
Mexico			
Netherlands		Yes	Yes
Poland		Yes	
Portugal	Yes		
Romania		Yes	
Russia		Yes	
Singapore		Yes	
South Africa		Yes	
Spain	Yes		Yes

Switzerland (Canton Nidwalden)			Yes
Turkey		Yes	
United Kingdom	Yes	Yes	Yes
United States	Yes		

As presumably the first major country to do so, the UK will be able to comprehensively enrich its R&D framework from a tax perspective with an R&D tax credit, an R&D super deduction and an IP box.

Apart from the UK, the R&D frameworks of Belgium, China, France, Hungary, the Netherlands and Spain are currently likewise endowed with solid tax conditions.

Only by introducing an R&D super deduction or perhaps an R&D tax credit would Liechtenstein be able to offer an R&D framework, at least from a tax perspective, that would be comparable with those countries. For small countries like Liechtenstein technological and scientific R&D is a lifeline for economic advantage and growth. Should, for whatever reason, input tax incentives not be introduced for now, then interest groups, business associations and political decision-makers would have to accept the fact that other countries would be at an advantage in terms of the design of optimal R&D framework conditions[1293].

Irrespective of these general observations, a detailed investigation of input tax incentives and their impact would be the subject of a separate scholarly treatise. Taking account of this proviso, the following R&D tax incentives are likely also of crucial importance to Liechtenstein:

a) R&D super deduction

An R&D super deduction provides for an increased allowability of associated tax-relevant R&D expenses for a tax year[1294]. The R&D super deduction may thus complement all expenses that arise in generating the RIPI and which have been attributed against RIPI based on a cost accounting approach[1295]. The cata-

---

1293 Felder/Harmann, p. 86, 87; See Matteotti/Roth, p. 62; Müller/Wenger/Linder, Steuerliche Förderung, p. 845; Hurter, p. 637; Keuschnigg/Ribi, p. 6; Schweizer Parlament, Motion Noser.

1294 See Müller/Wenger/Linder, Tax Incentives, p. 13; Linder/Müller, Steuerliche Anreize, p. 147, 152.

1295 See also section 2 (II) (3) (A) (b) (Associated, tax-relevant expenses) of this Part; Warson/Van Ende, p. 2; Müller/Gramigna/Linder, p. 806, 807; Schweizer Parlament, Motion Noser; Linder/Müller, Steuerliche Anreize, p. 152.

logue of associated tax-relevant R&D expenses, however, would need to be specified in a binding way. As a suggestion and taking into account the wide cost basis, an R&D super deduction may amount to 130% with no upper limit in absolute terms[1296]. In addition, to specifically encourage the R&D activities of small and medium undertakings, a higher but restricted super R&D deduction can generally apply[1297]. As a suggestion, it could amount to 150% for the associated tax-related R&D expenses of up to CHF 10 million[1298].

R&D super deductions can either target all associated tax-relevant expenses as a way to promote volume, or only such associated tax-relevant expenses that are incurred in addition to expenses in previous years as a way to promote growth. Promotion of volume is clearly preferable[1299]. It should further be emphasised that in order for relevant taxpayers to retain the full benefit of R&D super deductions, these enhancements must be relievable at the regular tax rate. This implies that the amount of an R&D super deduction for the purposes of the IP box would have to be added to the sum of positive income from relevant IP rights[1300]. For instance, where a relevant taxpayer incurred 100 of associated tax-relevant R&D expenses eligible for 30% enhancement under the R&D super deductions tax scheme, it would have a total tax deduction of 130 relating to its R&D spend. Of these, the base cost of 100 would remain within the IP box, but the enhancement of 30 is added back to increase the sum of positive income from relevant IP rights[1301].

Where an R&D super deduction cannot be fully set off against the profits of the tax year, in accordance with articles 16 paragraph (2) letter (b) subparagraph (3) (Determination of taxable income) and 57 (Losses) of the Tax Act the proportion of the tax deduction that has not been used may simply be carried forward without any time limit and set off against the profits of subsequent tax years[1302].

1296 See Müller/Wenger/Linder, Steuerliche Förderung, p. 846, 847; Keuschnigg/Ribi, p. 5, 54, 58; SwissHoldings; Hurter, p. 637; Müller/Gramigna/Linder, p. 807; Müller/Wenger/Linder, Tax Incentives, p. 13; Schweizer Parlament, Motion Hurter.

1297 See Müller/Wenger/Linder, Tax Incentives, p. 14; Keuschnigg/Ribi, p. 5, 55, 58.

1298 See Müller/Wenger/Linder, Steuerliche Förderung, p. 846, 847; Müller/Wenger/Linder, Tax Incentives, p. 13; Keuschnigg/Ribi, p. 5, 55, 58.

1299 See Bal, p. 573; Müller/Gramigna/Linder, p. 806.

1300 See Finance (No. 4) Bill, p. 151 at 357CG (1), (2); Consultation draft, p. 13 at 357CF (1); HM Revenue & Customs, Finance Bill 2012, p. 43 recital 3.80; HM Revenue & Customs, Draft Legislation, p. 25 recital 3.58; see also HM Treasury/HM Revenue & Customs, Consultation, p. 18 recitals 4.5, 4.6.

1301 See HM Treasury/HM Revenue & Customs, Consultation, p. 18 recital 4.6.

1302 See article 57 paragraph (1) of the Amended Tax Act; Warson/Van Ende, p. 3; Müller/Wenger/Linder, Steuerliche Förderung, p. 846, 847; Müller/Gramigna/Linder, p. 805, 807; Müller/Wenger/Linder, Tax Incentives, p. 14; See also Liechtenstein Government, Consultation Report RA 2012/1856-0701, p.

From a conceptual point of view interest should be paid by the tax authorities on tax losses. The practical implementation of such feature may however prove difficult for technical and budgetary considerations[1303].

What matters more is to grant an exception for small and medium undertakings in order to alleviate their financial restrictions. This may be provided through a cash payment for any unused tax incentives. The value of the balance of an unused R&D super deduction would thus be refunded at the end of a certain number of subsequent tax assessment years[1304]. From a conceptual point alike, adhering to the Frascati Manual like many other countries regarding the definition of R&D that qualifies for the super deduction appears to be a sensible approach[1305].

As in the Netherlands, the qualified R&D expenses could be verified by a central office independent of the tax authorities[1306]. In Liechtenstein, this task could be delegated to the Office of Economic Affairs. Should, however, this task be delegated exclusively to a Swiss authority in accordance with the Patent Treaty of 22 December 1978 and the Supplementary Agreement on the Protection of Invention Patents of 2 November 1994 with Switzerland, then the Commission for Technology and Innovation would be a sensible alternative[1307]. In the Netherlands, for illustration, companies with employees who carry out qualifying R&D activities can apply for an R&D declaration at the Agentschap NL. The Agentschap NL is an agency of the Dutch Ministry of Economic Affairs. R&D declarations allow for partial reimbursement of labour costs arising within the framework of R&D in the form of a reduction of the wage tax and social insurance contributions to be paid[1308].

R&D declarations demonstrate the technical and innovative character of a development or an invention[1309]. They also aim to promote smaller R&D projects and activities allowing a greater number of companies to qualify for the benefits

---

20.

1303 See Müller/Wenger/Linder, Tax Incentives, p. 14; Keuschnigg/Ribi, p. 58.

1304 See Müller/Wenger/Linder, Steuerliche Förderung, p. 847; Müller/Wenger/Linder, Tax Incentives, p. 14; Keuschnigg/Ribi, p. 6, 44, 58.

1305 See Prendina Dutler, p. 139; Bal, p. 575; Müller/Wenger/Linder, Steuerliche Förderung, p. 847; Müller/Wenger/Linder, Tax Incentives, p. 15; Müller/Gramigna/Linder, p. 804, 805; Linder/Müller, Steuerliche Anreize, p. 148; OECD Frascati Manual.

1306 See Müller/Wenger/Linder, Steuerliche Förderung, p. 847 to 849; Müller/Wenger/Linder, Tax Incentives, p. 15.

1307 See Müller/Wenger/Linder, Steuerliche Förderung, p. 847 to 849.

1308 See Van Eck/Schreuders; Baaijens/Breuer, p. 2934.

1309 See Prokisch, p. 219.

of the Dutch IP box[1310]. Should some form of R&D declaration be introduced in Liechtenstein and Switzerland at some point, then the catalogue of relevant IP rights under the Liechtenstein IP box could simultaneously be expanded where possible to include such R&D declarations. In no event, however, should the independent office created in this connection be given powers that are directly or indirectly related to taxation. Fragmentation of authorities and supervisory bodies should be avoided to the extent possible. Accordingly, tax powers should be exercised solely by the tax authorities[1311].

Apart from that, an R&D super deduction may reasonably be introduced based on a phase-in approach. As a suggestion, the appropriate percentages for each tax year may take the following values:

Year	**AP**	**AP+1**	**AP+2**	**AP+3**	**AP+4**	**AP+5**	**AP+6**
Super deduction up to CHF 10 million (%)	135%	135%	140%	140%	145%	145%	150%
Super deduction beyond CHF 10 million (%)	115%	115%	120%	120%	125%	125%	130%

b) R&D tax credit

Instead of an R&D super deduction an equivalent R&D tax credit could alternatively be adopted. The R&D tax credit allows an undertaking to directly reduce the operational R&D costs. The credit figure can be calculated using the corresponding amount of R&D super deduction, which is multiplied with the applicable corporate or personal income tax rate[1312]. In case of insufficient tax against which to set off the R&D tax credit, it would be carried-forward to the following tax years. At the end of a certain number of subsequent tax assessment years the balance of the unused tax credit should be refundable[1313].

c) Partial exemption from payment of withholding tax on wages paid to scientific researchers

Article 24 (Income subject to the tax deduction) of the Tax Act stipulates that income from employed work and compensatory proceeds replacing income from

---

1310 See Barten.

1311 See Müller/Wenger/Linder, Steuerliche Förderung, p. 849.

1312 See Bal/Offermanns, p. 171; Warson/Van Ende, p. 3; Scheunemann/Dennisen, p. 410; Cops/Lemaire, p. 15; Eynatten, p. 505; Müller/Gramigna/Linder, p. 806; Linder/Müller, Steuerliche Anreize, p. 147.

1313 See Warson/Van Ende, p. 3; Scheunemann/Dennisen, p. 410; Eynatten, p. 505; Müller/Gramigna/Linder, p. 806; Linder/Müller, Steuerliche Anreize, p. 147.

employed work may be subject to tax deducted at source[1314]. Similarly to Belgium, undertakings in Liechtenstein that employ scientific researchers may thus additionally benefit from a partial exemption from payment of withholding tax on income from employed work. These undertakings would be requested to transfer to the tax authorities only a certain fraction of the withholding tax due on the income from employed work of these researchers while they withhold 100% of the withholding tax that would normally be due[1315]. The measure would have no impact on the personal income tax situation of the researchers, in the hands of which the full amount of wage withholding tax is considered to be transferred[1316].

D) Jurisdiction over IP matters

One important point for the sustainable positioning of an IP box regime is also the availability of appropriately experienced or even specialised jurisdiction over IP matters.

The practical application of an IP box regime generally relies first of all on its contractual design, the contents of which have legal effect vis-à-vis contractual partners and tax authorities and may be enforced in court where necessary. A key point here is the question of how the products and services relevant to tax law are defined, and whether they fall within the scope of protection of IP rights or not. These considerations generally correspond to the questions arising in infringement litigation, and they generally require additional technical or business expertise in addition to knowledge of IP law.

Not least of all because of these concerns, Switzerland established the Federal Patent Court in 2011 as the federal special court for all actions concerning the validity and infringement of patent rights[1317]. Similar courts also exist in other countries, such as the Federal Patent Court and specialised chambers in several regional and higher regional courts in the Federal Republic of Germany[1318]. In Austria, the Commercial Court in Vienna has exclusive jurisdiction in patent infringement proceedings; in light of the revision of administrative jurisdiction, however, the future of the Supreme Patent and Trademark Senate, which has jurisdiction in validity proceedings, has not yet been ultimately decided and is still under discussion[1319].

1314 For Switzerland, see: Müller/Gramigna/Linder, p. 803.

1315 See Bal, p. 575, Bal/Offermanns, p. 171; Warson/Van Ende, p. 2; Cops/Lemaire, p. 17; Eynatten, p. 506; Linder/Müller, Steuerliche Anreize, p. 146; See also IBFD.

1316 Idem.

1317 See Schweizer.

1318 See Grabrucker, p. 35 to 54; Carl Heymanns Verlag Gmbh, 1st edition (2011); Schramm, p. 277.

1319 See Republic of Austria.

The availability of fast, qualified and uncomplicated jurisdiction is likely to pose a challenge especially for smaller states, since the national load of IP-related cases is generally too light to build up the necessary experience or to justify specialised jurisdiction. On the other hand, the legal enforceability of claims represents a key precondition for the use of an IP box, since the necessary investments will hardly be made if it cannot be ensured that they can be secured legally and, where necessary, reversed without major losses.

Especially for smaller states, an option would be to enter into cooperation with other countries that already have specialised jurisdiction at their disposal. Another option would be to build up joint specialised jurisdiction for several states, without strict affiliation with a given national judicial system. Options available for Liechtenstein would for instance include the use of the Swiss Federal Patent Court, a corresponding solution with Austria in connection with the upcoming reforms relating to administrative jurisdiction, or also a "grand solution" entailing the creation of transnational, German-language jurisdiction for Switzerland, Austria and Liechtenstein, for instance.

The option that initially might appear the most attractive, namely the use of the Swiss Federal Patent Court, is not necessarily the optimal solution. This is because the court's jurisdiction is limited to patent cases and accordingly does not extend to trademark and design matters. Furthermore, the court's number of cases is still likely to be low in comparison with other European countries. The two other options, in turn, raise questions in regard to the existing treaty ties with Switzerland. Their realisation would moreover require extensive diplomatic negotiations. The advantage of an Austrian solution would no doubt consist in the compatibility with the requirements resulting from Liechtenstein's EEA membership, as entailed especially in the legal domain due to the incorporation of EU rules. Accordingly, a concrete solution for Liechtenstein currently appears to be up in the air. In the long term, however, access to specialised jurisdiction is a key element that indeed appears absolutely essential for the successful positioning of the IP box.

III. Proposal of change in the law and summary

Taking account of the possibilities presented above to improve the Liechtenstein IP box, the following draft revision of article 55 of the Tax Act could serve as a basis for discussion:

1) 80% of the profit from intellectual property rights shall also be considered a commercially justified expense provided that such profit is based on achievements of technological or scientific research and development and innovation.

2) "Intellectual property rights" means the following intellectual property rights:

a) Patents, utility models, trademarks, designs and topography rights provided that they are protected by entry in a domestic, foreign or international register;

b) Supplementary protection certificates;

c) Software, technical and scientific databases, know-how and trade secrets;

d) Medicinal and veterinary products with marketing authorisations and marketing or data protection;

e) Plant protection products with data protection benefits; and

f) Any other right which is inherently linked with at least one of the intellectual property rights referred to above and inseparable from it.

3) The profit from intellectual property rights constitutes the basis of assessment for the deduction of 80% and shall be determined as follows:

a) Any income from the exploitation of intellectual property rights, including embedded income, license fees, proceeds of sale, damages for infringement and other compensation; minus

b) Any associated tax-relevant expenses which may be attributed to the income from the exploitation of intellectual property rights, even if the expenses arose over several assessment periods; minus

c) Routine return of 10% on associated tax-relevant routine expenses; minus

d) Marketing return which in respect of intellectual property rights shall differentiate between the return from technology and science and the return from marketing.

4) If the intellectual property rights or a license in respect of any such rights are used by a legal person or permanent establishment itself in the course of its production or by a third party acting as its contractor, or in the course of services, but the resulting income is not included in the basis of assessment for the deduction of 80%, then a notional royalty shall be applied.

5) The notional royalty in respect of the profit from intellectual property rights for a tax year shall be the appropriate percentage of the income from the exploitation of intellectual property rights as well as of the IP-derived income for that tax year.

6) Any payment for the intellectual property rights shall correspond to the arm's length principle referred to in article 49. If amounts exceed the usual market compensation, then the 80% deduction shall be calculated on the basis

of the usual market price. The arm's length principle shall also apply to the determination of the appropriate percentage.

7) If the intellectual property rights are subject to grant, then the sum of positive income shall extend to the period from the tax year when the intellectual property rights were applied for until the year preceding the tax year in which the intellectual property rights are granted.

8) The Government shall provide further details by ordinance.

With the implementation of the proposed revision, only profits arising from technological and scientific R&D and innovation would enjoy preferential tax treatment under article 55 of the Tax Act.

The proposal further covers utility models, topography rights, regulatory data and plant variety rights, know-how and trade secrets. Formal consideration of other IP rights on the condition that they are inherently linked with at least one relevant IP right and inseparable from it is included primarily for the sake of clarity.

Although the proposal is a lean one, it contains all important points for an IP box from a conceptual perspective. Further specification would however have to be provided in the Tax Ordinance or some other form of administrative guidance. The further specification would in particular have to cover the definition of the appropriate percentage for the notional royalty and the notional marketing royalty ("NMR") as well as the associated assumptions[1320].

A proposed formulation to that effect could read as follows:

1) For purposes of the notional royalty the "appropriate percentage" means the proportion of any income from the exploitation of intellectual property rights for a tax year which the taxpayer would pay to a third party for the right to exploit the relevant IP rights in that tax year if the taxpayer were not otherwise able to exploit them.

2) For purposes of the notional marketing royalty the "appropriate percentage" means the proportion of any income from the exploitation of intellectual property rights for a tax year which the taxpayer would pay to a third party, which does not have equivalent technological and scientific assets, for the exclusive right to exploit the equivalent relevant marketing assets in that tax year if the taxpayer were not otherwise able to exploit them.

A further significant achievement of the proposed revision of the law consists in the introduction of a calculation model for determining the basis of assessment

---

[1320] For the notional royalty, see section 2 (II) (3) (C) (Notional royalty) of this Part; For the notional marketing royalty see section 3 (II) (2) (E) (Notional marketing royalty) of this Part.

for the deduction of 80%. In this way, the determination of the relevant IP profit under article 55 of the Tax Act would largely correspond to that of the Netherlands and the UK, particularly as the UK IP box legislation resembles the Dutch practice on how to determine the relevant IP profit under the IP box regime. Such a revision would also entail that the Liechtenstein IP box would follow the residual profit split method based on the OECD Transfer Pricing Guidelines.

The first stage of the calculation model is to determine the sum of positive income from relevant IP rights based on a cost accounting approach. Essentially, the associated tax-relevant expenses are allocated against RIPI. The second stage of the calculation model is to remove a routine return on certain specified expenses from the sum of positive income from relevant IP rights. This leaves an amount referred to as relevant residual profit ("RRP"). These expenses include tax deductions made in respect of personnel, material and supplies, premises, plant and machinery, professional services, administration or write-downs. The routine return is to be predefined by the Liechtenstein legislator or the competent tax authorities and may be set at 10% of the relevant expenses. The third stage of the calculation model consist of the removal of a return on marketing assets by deducting the marketing assets return ("MAR") for use of the assets. The result is referred to as relevant IP profits ("RP") which can then benefit from the tax deduction of 80% by virtue of article 55 paragraph (1) of the Tax Act.

For clarification, the proposed changes in the law also include a provision after which the taxpayer can calculate what the RP would have been had the relevant IP right been granted at that time. These amounts are aggregated and then added to the RP of the year in which the relevant IP right is granted when calculating the IP box deduction.

Apart from that, not least of all due to the practical implications of the IP box Liechtenstein should adhere to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations in the same way as Switzerland. The future success of the IP box is further dependent on the access to a wide network of double taxation agreements. It is therefore of crucial importance for Liechtenstein to expand this network as quickly and extensively as possible. Such an expansion is fortunately one of the declared political goals of the Liechtenstein Government.

Increased attention must be paid to the fact that the combination of input and output tax incentives is a primary requirement for Liechtenstein to establish its national and international profile as a location for R&D activities[1321]. One last

[1321] See Obrist, p. 650; Matteotti/Roth, p. 62; Economiesuisse, Steuerstandort Schweiz, p. 27; Bal/Offermanns, p. 172; Müller/Gramigna/Linder, p. 804; Müller/Wenger/Linder, Tax Incentives, p. 8; Krever, p. 757.

point to consider for a sustainable positioning of the Liechtenstein IP box regime is the availability of appropriately experienced or even specialised jurisdiction over IP matters. Fast, qualified and uncomplicated legal proceedings pose a challenge especially for a small state like Liechtenstein, since the national case-load relating to IP rights is light.

4. Conclusion

A comparison of certain tax factors in respect of the current IP box legislation and the proposed IP box legislation is set out below:

Comparison of current and proposed Liechtenstein IP box regime		
Tax factors	**Current**	**Proposed**
ETR	2.5%	2.5%
Election for IP box	Yes	Yes
Relevant IP or IP rights	Patents, utility models, SPCs, trademarks, designs, software, technical and scientific data-bases	Patents, utility models, SPCs, topographic rights, trade-marks, designs, software, know-how, trade secrets, technical and scientific data-bases, regulatory data, plant variety rights and any other right which is inherently linked with at least one of these IP rights and inseparable from it
Application to acquired IP rights	Yes	Yes
Development condition	No	No
Ownership condition	Yes	Yes
Application to RIPI from:		
– Sales income	Yes	Yes
– License fees	Yes	Yes
– Proceeds of sales	Yes, only to sale of relevant IP	Yes, only to sale of relevant IP

	rights	rights
– Damages for infringement	Yes	Yes
– Other compensation	Yes	Yes
Notional royalty	Yes	Yes
Application to mixed sources of income	Yes, proportionate	Yes, proportionate
Application to profits arising before grant of relevant IP right	Yes	Yes
Includes relevant IP losses ("RL") rules	Yes, recapture rule	Yes, recapture rule
Cap on benefit	No	No
Includes anti-avoidance rules	No targeted rule within IP box legislation	No targeted rule within IP box legislation
Application to partnerships	Yes	Yes
Application to cost sharing arrangements	Yes	Yes
Includes transfer pricing rules	Yes	Yes
Double taxation relief	Yes, subject to limitations	Yes, subject to limitations
Application to existing IP rights	No, only IP rights created or acquired from 01.01.2011	Yes, no more temporal limitation

Taking into consideration the findings of Part 1, this overview leads to the conclusion that contrary to other opinions the design of the Liechtenstein IP box is not conservative[1322]. The regime is quite flexible in encompassing all categories of income which relate to relevant IP rights. For instance, IP-derived income from processes or services can qualify for IP box purposes[1323]. It further acknowledges that legal ownership can be centralised for protection reasons and separated from the group entities which have created or acquired the IP. The regime also recognises that undertakings can be involved in the development of relevant IP, including cost sharing arrangements, partnerships or joint ventures.

[1322] See Hosp/Langer, Steuerstandort Liechtenstein, p. 115.
[1323] See Evers/Miller/Spengel, p. 38; Jones/Hickman, p. 11.

To be eligible for the IP box, the tax incentive does therefore not depend on legal ownership of the IP or the rights over it[1324].

Some authors believe that calculating the tax deduction of 80% on the basis of gross income would in principle be more attractive[1325]. An IP box should however apply to profits, not receipts. Or in other words, an IP box regime should apply to net profit from relevant IP rights after associated tax-relevant expenses, including pre-commercialisation expenses, rather than to gross income[1326].

It must be emphasised that the differences for economic operators in tax costs between exploiting the Liechtenstein IP box regime and not exploiting it can be significant. Economic operators will therefore pay increased attention to value-adding IP strategies[1327]. The IP box legislation nonetheless requires further clarifications and improvements in the areas pointed out in this Part. This is especially true with respect to its scope of application and the profit calculation rules. Moreover, policy-makers in Liechtenstein should pay increased attention to the fact that the existence of input and output tax incentives is a precondition to establish a sound international reputation as an attractive R&D location[1328]. The Tax Act currently offers no input R&D tax incentives. In the long term, however, Liechtenstein cannot afford to deprive itself of such instruments to promote innovation. Against this backdrop, no more time should be lost in clarifying and improving the present IP box legislation as well as in adopting supplementary front-end R&D tax incentives[1329].

1324 Jones/Hickman, p. 11.

1325 See Nicholls/Smith; Hosp/Langer, Steuerstandort Liechtenstein, p. 115; See also Evers/Miller/Spengel, p. 13.

1326 See HM Treasury/HM Revenue & Customs, Consultation, p. 6 recital 1.12.

1327 See also Jones/Hickman, p. 11.

1328 See Obrist, p. 649, 650; Felder/Harmann, p. 86, 87; PwC, TAXeNEWS Lizenzboxlösung; Matteotti/Roth, p. 62; Economiesuisse, Steuerstandort Schweiz, p. 27; Bal/Offermanns, p. 172; Atkinson/Andes, p. 2; Müller/Gramigna/Linder, p. 804; Müller/Wenger/Linder, Tax Incentives, p. 3, 4, 8; Krever, p. 757.

1329 See also Schweizer Parlament, Motion Hurter.

Part 4: Swiss IP Box Regimes

1. Introduction

The following contribution to the IP box of the Canton of Nidwalden is largely restricted to a discussion of the material foundations of that IP box. Questions regarding the relationship of the Nidwalden IP box with the Tax Harmonisation Act are not addressed.

Given that the model for introduction at the federal level proposed is based on the Liechtenstein IP box, references can be made to the commentary on the Liechtenstein IP box. This obviates the need for a more detailed commentary on the proposed model itself.

A Swiss IP box regime obviously has to be consistent with fundamental rights. To this end, the analysis properly reflects constitutional issues.

2. Nidwalden IP box regime

I. Overview

Effective 1 January 2011, article 85 paragraph (3) of the Law of 22 March 2000 on Cantonal and Municipal Taxes ("Tax Act") introduced a provision that provides for reduced taxation on net license income ("RP") derived from the use of intellectual property ("IP")[1330]. With the introduction of the "Lizenzbox" ("IP box") the Canton of Nidwalden improved its framework for promoting scientific and economic progress. So far, this is a unique approach in Switzerland aiming to strengthen the position of Nidwalden as an economic and research location[1331].

It should be emphasised that the concept of the Nidwalden IP box, similarly to the Dutch IP box, is based on RP allocated to relevant IP rather than on RP allocated to relevant IP rights[1332].

1330 SwissHoldings; Honold/Zimmermann, p.11.

1331 Kanton Nidwalden, p. 21; Hinny, Lizenzbox des Kantons Nidwalden, p. 140; Schäuble/Giger, p. 711.

1332 Yet, Hinny tends to refer to profit in respect of relevant IP rights; See Hinny,

II. Analysis

1. Reduced taxation of profits from relevant IP

A) Election for special treatment of profits from relevant IP

By virtue of article 85 paragraph (3) of the Tax Act, the fixed income tax on net license income derived from the use of IP is 20% of the regular income tax rate of 6%[1333]. This implies that only 20% of the profit in respect of relevant IP is taxable at the regular income tax rate, resulting in an effective tax rate of 1.2% on a cantonal level[1334].

Accordingly, the contribution of the IP box on a cantonal level to the taxable profit of a relevant company for a tax year is[1335]:

$CB = (RP – C) \times 1.2 / R_{NW}$

where:

– CB is the contribution of the IP box to taxable profits on a cantonal level;

– RP is the net license income or relevant IP profit respectively; and

– C is the correction from previous tax years; and

– R_{NW} is the cantonal tax rate pursuant to article 85 paragraph (1) of the Tax Act.

It should be noted that C generally equals the relevant IP losses of previous tax years that so far have not been offset with RP[1336].

An example to illustrate the contribution of the IP box to the overall taxable profits of a company on a cantonal level is set out below:

Lizenzbox des Kantons Nidwalden.

1333 Thanks to Mr. Huwiler of the Cantonal Tax Office, Stans, for his valuable support in the analysis of the Nidwalden IP box.

1334 Hausmann/Roth/Krummenacher, p. 89; Hinny, Lizenzbox des Kantons Nidwalden, p. 139; Honold/Zimmermann, p.11; Schäuble/Giger, p. 712.

1335 See also 4 (II) (1) (A) (Election for special treatment of profits from relevant IP) of Part 1.

1336 See also Cantonal Tax Office of Nidwalden, p. 2 recital 3.6; Hinny, Lizenzbox des Kantons Nidwalden, p. 141.

Contribution of the IP box to the overall taxable profit of a company ("contribution")	
According to article 85 paragraph (1) of the Tax Act the cantonal corporate income tax rate is 6%.	
Income from elected relevant IP	1.000
Amortisation of relevant IP	400
Attributable interest expense and other cost	200
RP	400
Contribution: (1.2 / 6) x 400 = 80	
Corporate income tax on contribution: 6% of 80 = 4.8	
ETR on a cantonal level: 4.8 / 400 = 1.2%	

If the direct federal tax level is included, then the amount of RP is taxed at an effective rate of 8.8%[1337]. Companies that elect into the IP box thus alter the way they calculate taxable profits for each tax year provided that they are relevant companies for IP box purposes.

The IP box may be elected only by legal persons with their registered office or a branch in the canton of Nidwalden. Foundations and similar entities do not qualify for IP box purposes[1338]. In addition, paragraph 57a (Net license income) subparagraph (1) of the Ordinance to the Law on Cantonal and Municipal Taxes ("Tax Ordinance") specifies that the reduction of the corporate income tax rate for RP from the use of IP is granted only on application and to the extent it does not constitute own use. The reduction of the tax rate excludes taxation as a holding or management company. The taxpayer is responsible for demonstrating license income.

Election to apply the IP box is thus optional and made annually with the filing of the corporate income tax return. The tax deduction figure is calculated by using a cost accounting approach ("Spartenrechnung"), the result of which must be attached to the corporate income tax return. The cost accounting computations have to be included every year when filing the corporate income tax return[1339].

1337 Hausmann/Roth/Krummenacher, p. 89; See Jones/Hickman, p. 9; Hinny, Lizenzbox des Kantons Nidwalden, p. 139; Honold/Zimmermann, p.11; Schäuble/Giger, p. 712.

1338 Cantonal Tax Office of Nidwalden, p. 2 recital 2.2; Schäuble/Giger, p. 714, 716; See also Hinny, Lizenzbox des Kantons Nidwalden, p. 141.

1339 See also Nidwalden corporate income tax return, p. 4 section F (Gesellschaften mit

Although not formally required, the tax deduction under the IP box should be calculated separately for each relevant IP. As a result, the IP box may be applied to one relevant IP, whereas another relevant IP may remain outside the scope of the regime[1340].

Taxation as a holding or management company in accordance with article 28 paragraph (2) or (3) FTHL requires that no business activities or merely subordinate business activities be carried out in Switzerland. In contrast, domestic and foreign license income can be attributed without limit to an IP box company, which is always subject to regular taxation. Moreover, the IP box company can develop normal business activity beyond the active management and exploitation of relevant IP and IP rights and accumulate the capital necessary for that purpose[1341].

It also follows from paragraph 57a subparagraph (1) of the Tax Ordinance that the onus of proving net license income is incumbent on the taxpayer. Taking into account these aspects, it is in principle up to the relevant company when to apply for the IP box. It should finally be noted that unlike other jurisdictions eligibility to the IP box is not subject to a development condition.

2. Relevant companies

A) Meaning of relevant company

For the purposes of article 85 paragraph (3) of the Tax Act, a company is a "relevant company" for a tax year where[1342]:

– The company is subject to regular corporate income tax under the Tax Act;

– The company is not taxed as a holding or management company by virtue of article 28 paragraphs (2) or (3) of the FTHL;

– The company holds at least one relevant IP or a license in respect of the relevant IP;

– The company does not use the relevant IP or the license for own purposes;

– The company satisfies the ownership condition[1343]; and

IP-Boxregelung).

1340 See section 2 (II) (1) (A) (Election for special treatment of profits from relevant IP rights) of Part 3.

1341 Hinny, Lizenzbox des Kantons Nidwalden, p. 139, 140, 141, 159; Honold/Zimmermann, p.11; Schäuble/Giger, p. 712.

1342 See section 2 (II) (2) (A) (Meaning of relevant taxpayer) of Part 3.

1343 See section 2 (II) (2) (D) (Ownership condition) of this Part.

– The company in respect of the relevant IP or the license is entitled to elect for the IP box.

Moreover, if a company[1344]:

– Disposes of a relevant IP but receives income from the disposal only in a later tax year; or

– Receives income as a result of infringement of a relevant IP right but not until after the expiry of the right;

then a company is a relevant company for the purposes of the IP box as well, irrespective whether it satisfies the ownership condition or in respect of the IP it is entitled to elect for the IP box or not. In these situations the company is eligible for the IP box and is taxed in the appropriate tax year on income, which has been derived from an event at that earlier time concerning a then relevant IP. Other than in the situations referred to above for income to qualify for the IP box, the company must hold a relevant IP or a license in respect of such IP at the time the income is recognised for the purposes of the IP box regime.

B) IP to which the IP box applies

Paragraph 57a subparagraph (2) of the Tax Ordinance specifies that license income includes all payments made for the right to use or the use of copyrights to literary, artistic or scientific works. This also includes cinematic films, patents, trademarks[1345], patterns or models, plans and secret formulas as well as the proceeds of trading, commercial and scientific processes or knowledge[1346].

The definition of income from qualifying IP rights is thus identical to article 12 paragraph (2) of the OECD MC[1347]. It follows that the Nidwalden IP box offers the broadest possible catalogue of relevant IP[1348]. Both new and internally generated, acquired and already existing IP qualify for the IP box[1349]. The inclusion of existing IP for IP box purposes prevents unfavourable treatment of Swiss companies compared with foreign companies[1350].

1344 See section 2 (II) (2) (A) (Meaning of relevant taxpayer) of Part 3.

1345 See also Hinny, Markenverwertung, p. 134 et seq; Hinny, Steuerrechtliche Behandlung der Marke im Konzern.

1346 For a description of the different IP rights see section 2 (II) (2) (B) (Rights to which the IP box applies) of Part 3; Section 3 (II) (1) (Rights to which the IP box applies) of Part 3; See also PwC, TAXeNEWS Lizenzboxlösung; Maute/Senn/König, p. 420.

1347 Cantonal Tax Office of Nidwalden, p. 1 recital 2.1.

1348 Jones/Hickman, p. 10; Honold/Zimmermann, p.11.

1349 Honold/Zimmermann, p.11; Schäuble/Giger, p. 712.

1350 Schäuble/Giger, p. 716.

A relevant company can further acquire relevant IP rights from affiliated or non-affiliated parties. It is irrespective of how such rights are acquired, this can for instance be done by way of sale, contribution in kind or otherwise[1351].

C) Development condition

The principle aim of a development condition is to limit the regime to companies which have been properly involved in the innovation lying behind the relevant IP or the application process for such IP[1352]. With respect to the Nidwalden IP box, there is no development condition. In practice, a company is thus not required to be the inventor, creator, developer or the initial applicant of a relevant IP right in order to be an eligible company by virtue article 85 paragraph (3) of the Tax Act[1353].

D) Ownership condition

In line with intercantonal tax law and in order to avoid double taxation, significant operational infrastructure necessary for management of the company must be located at the registered office or branch of the IP box company. This includes especially own and internally used office premises or qualified personnel[1354]. Moreover, the IP box company must demonstrate the license income subject to taxation under article 85 paragraph (3) of the Tax Act by presenting the license agreement[1355].

In spite of these requirements, the active ownership condition under the Nidwalden IP box remains comparatively weak. This is because other than under the Dutch or UK IP box regime a relevant company under the Nidwalden regime is not formally required to perform a significant amount of management activity in relation to the relevant IP[1356]

Relevant IP can be owned solely or jointly on the basis of ownership, beneficial rights or usufruct. Article 85 paragraph (3) of the Tax Act and the provisions of paragraph 57a of the Tax Ordinance do however not require a relevant company to be the owner or co-owner of relevant IP rights. Alternatively, the relevant company can also hold a license in respect of relevant IP[1357].

1351 See Hinny, Lizenzbox des Kantons Nidwalden, p. 159; Müller/Gramigna/Linder, p. 808; See also paragraph 57a subparagraph (2) of the Tax Ordinance; See also Probst, p. 1 et seq.

1352 See section 2 (II) (2) (C) (Development condition) of Part 3.

1353 See Müller/Gramigna/Linder, p. 808.

1354 Cantonal Tax Office of Nidwalden, p. 2 recital 3.1.

1355 Cantonal Tax Office of Nidwalden, p. 2 recital 3.2.

1356 See section 2 (II) (2) (D) (Ownership condition) of Part 3.

1357 Idem.

A substance over form and thus an effective economic approach prevails in the practical application of the IP box[1358].

3. Relevant IP profits

A) Calculating of relevant IP profits

a) Determination of assessment basis

Paragraph 57a subparagraph (3) of the Tax Ordinance sets out that the RP corresponds to the license income minus pro rata finance costs, administrative expenses split proportionally according to income, and pro rata taxes. This is subject to demonstration of actual administrative expenses. Finance costs include interest on debt as well as other costs deemed economically equivalent to interest on debt. Moreover, directly attributable write-downs as well as license payments to other companies (sub-licensing) should be deducted.

It follows that the reduced tax rate does not apply to RIPI but to the RP. This involves the difficulty in identifying what level of profit should be allocated to relevant IP in order to get from gross license income to net license income[1359]. To determine the RP, all commercially justified expenses in connection with the collection of license fees should be taken into account. As enumerated in paragraph 57a subparagraph (3) of the Tax Ordinance, these also include the associated expenses for financing, administration, write-downs and taxes[1360].

An illustration on how to determine the RP in accordance with paragraph 57a subparagraph (3) of the Tax Ordinance is set out below:

Determination of RP under the IP box	
	License income in respect of relevant IP ("RIPI")
–	Associated commercially justified expenses, including finance costs, administration costs, write-downs and taxes
=	Net license income ("RP")

A cost accounting statement must in principle be prepared for the tax assessment of the RP. The statement should be included each year with the corporate in-

1358 See Honold/Zimmermann, p.12; See also section 2 (II) (2) (D) (Ownership condition) of Part 3.

1359 See also section 2 (II) (3) (A) (a) (Determination of assessment basis) of Part 3; Hinny, Lizenzbox des Kantons Nidwalden, p. 141; Schäuble/Giger, p. 712; Müller/Gramigna/Linder, p. 809.

1360 Honold/Zimmermann, p.12; See also Schäuble/Giger, p. 712.

come tax return[1361]. In this connection, the guidelines of the Cantonal Tax Office on the taxation of license income contain additional details. Accordingly, if at least 90% of the total gross income is license income and if other gross income not from license income adds up to at most CHF 50.000, then the cost accounting requirement is waived[1362]. Where license income is less than CHF 50.000, simplified cost accounting suffices. Under this condition, the simplification means simply that finance costs, administrative expenses and tax are subject to a flat-rate deduction of 25%[1363].

The RP should be calculated for each relevant IP separately[1364]. This is important where the attributable expenses for a relevant IP exceed the corresponding income of the IP. Would the contribution to the IP box be calculated for the aggregate of relevant IP, any excess expense of a relevant IP would evidently reduce any excess income of other relevant IP. From the perspective of a relevant company this may negatively affect the potential tax performance of the IP box, since any excess expense in respect of a relevant IP, in principle, would reduce the potential contribution of the IP box to the overall taxable profit.

Apart from that, paragraph 57a subparagraph (3) the Tax Ordinance necessarily implies that license income from relevant IP qualifies for the IP box only to the extent it is included in the taxable base of the company. As a result, such income must be subject to the corporate income tax. For a company subject to unrestricted tax liability in Nidwalden, the IP box is not available where the license income from relevant IP is attributable to a permanent establishment outside Nidwalden, the result of which is tax-exempt by virtue of article 68 paragraph (1) of the Tax Act. In the same way, for a permanent establishment subject to restricted tax liability in Nidwalden of a company whose domicile or effective place of management is located outside Nidwalden, the IP box is not available where by virtue of article 68 paragraph (2) of the Tax Act the license income from relevant IP is not attributable to the permanent establishment, but to the company.

1361 Cantonal Tax Office of Nidwalden, p. 2 recital 2.3; See also Nidwalden corporate income tax return, p. 4 section F (Gesellschaften mit IP-Boxregelung); Müller/Gramigna/Linder, p. 809.

1362 Cantonal Tax Office of Nidwalden, p. 2 recital 3.5; See also Maute/Senn/König, p. 421.

1363 Idem.

1364 See also Hinny, Lizenzbox des Kantons Nidwalden, p. 141; Steuerverwaltung des Fürstentums Liechtenstein, Wegleitung juristische Personen, p. 18.

b) Associated commercially justified expenses

Associated commercially justified expenses include, but are not limited to the costs set out below[1365]:

– R&D costs;
– License costs;
– Damages for infringement costs;
– Personnel costs;
– Material and supplies costs;
– Premises costs;
– Plant and machinery costs;
– Professional services costs;
– Administration costs;
– Registration costs;
– Write-down costs;
– Finance costs; or
– Tax costs.

With the exception of equity costs the comments in section 2 (II) (3) (A) (b) (Associated tax-relevant expenses) of Part 3 apply in principle mutatis mutandis. They explore the above mentioned costs in more detail.

B) Relevant IP income

Relevant IP income ("RIPI") or other income that is deemed to be RIPI can arise from different ways of exploiting relevant IP. RIPI may fall within any of the following categories unless expressed otherwise[1366]:

a) Sales income

Paragraph 57a subparagraph (1) of the Tax Ordinance excludes the own use of IP for purposes of the IP box[1367] As a result, the IP box does not apply to income attributable to the exploitation of relevant IP which is embedded in the sales income of products[1368].

1365 See also section 2 (II) (3) (A) (b) (Associated tax-relevant expenses) of Part 3.
1366 See also Jones/Hickman, p. 10; Müller/Gramigna/Linder, p. 808.
1367 See also Hausmann/Roth/Krummenacher, p. 89.
1368 See also section 2 (II) (3) (B) (a) (Sales income) of Part 3.

b) License fees

License fees or royalties qualify as a category of RIPI for the purposes of article 85 paragraph (3) of the Tax Act. The IP box company must demonstrate the license income subject to taxation under article 85 paragraph (3) of the Tax Act by presenting the license agreement[1369]. The regime applies to worldwide license fees or royalties[1370].

The broad definition of relevant IP based on paragraph 57a subparagraph (2) of the Tax Ordinance allows the application of the IP box to bundled licenses[1371]. Milestone payments are recognised as license income if, at a later time, they can actually be attributed to an exploitable IP or IP right[1372].

c) Proceeds of sale

This category of RIPI includes any income arising from the sale or other disposal of relevant IP[1373]. Paragraph 57a subparagraph (2) of the Tax Ordinance sets out that license income also includes gains on sales. It follows that the benefits of the IP box are delivered to proceeds of sale of relevant IP[1374].

d) Damages for infringement

Relevant IP rights are regularly contested. Any damages paid by other persons for infringing or alleged infringement can largely be seen as compensation for lost income, which would otherwise have been eligible for the IP box[1375].

According to the meaning of relevant company as outlined in section 2 (II) (2) (A) (Meaning of relevant company) of this Part, a company is supposed to qualify as a relevant company even if damages for infringement are received after expiry or sale of the relevant IP right, provided that the infringement took place when the right was a relevant IP right and the company was then entitled to elect for the IP box[1376]. If a company receives an amount falling under the category of damages for infringement, which relates partly to a period when both the company and the rights were relevant, and partly to a period when one or both of

---

1369 Cantonal Tax Office of Nidwalden, p. 2 recital 3.2.

1370 Honold/Zimmermann, p.11.

1371 See also section 2 (II) (3) (B) (b) (License fees) of Part 3.

1372 Cantonal Tax Office of Nidwalden, p. 2 recital 3.3.

1373 See also section 2 (II) (3) (B) (c) (Proceeds from sale) of Part 3.

1374 See Hausmann/Roth/Krummenacher, Lizenzbox als alternatives Steuermodell zur gemischten Gesellschaft, Besteuerung von Lizenzerträgen unter Berücksichtigung linternationaler und europarechtlicher Bestimmungen, Der Schweizer Treuhänder, p. 88; Honold/Zimmermann, p.11.

1375 See also section 2 (II) (3) (B) (d) (Damages for infringement) of Part 3.

1376 Idem.

these were not relevant, then a reasonable apportionment of the income should be made[1377].

Due to considerations of criminal law, the damages in certain jurisdictions can sometimes be increased in the event of intentional infringement of IP rights. This particularly applies for patents. According to the commentary on article 12 of the OECD MC, the definition of royalties covers both payments made under a license and compensation which a person would be obliged to pay for fraudulently copying or infringing the right[1378]. It can therefore be reasonably concluded that article 85 paragraph (3) of the Tax Act also extends to supplementary penalties in regard to the damages for infringement collected in proceedings relating to the infringement of relevant IP rights.

e) Other compensation

This category of RIPI includes any amount of damages, proceeds of insurance or other compensation, other than an amount in respect of an infringement or alleged infringement of a relevant IP right, which is received by a company in respect of an event and is[1379]:

– Sales income in accordance with section 2 (II) (3) (B) (a) (Sales income) of this Part; or

– Loss of income which would, if received by the company at the time of that event, have been RIPI.

It follows that other compensation, with the current exception of sales income, qualifies for the IP box on the condition that the company receiving the income is a relevant company. If a company receives an amount falling under the category of other compensation, which relates partly to a period when both the company and the IP were relevant, and partly to a period when one or both of these were not relevant, then a reasonable apportionment of the income should be made[1380].

C) Notional royalty

Paragraph 57a subparagraph (1) of the Tax Ordinance expressly excludes the own use of relevant IP for IP box purposes[1381]. This implies that the IP box is

---

1377 Idem.

1378 See OECD MTC, p. 222 recital 8; See also section 2 (II) (3) (B) (d) (Damages for infringement) of Part 3.

1379 See also section 2 (II) (3) (B) (e) (Other compensation) of Part 3.

1380 Idem.

1381 See also Hausmann/Roth/Krummenacher, p. 89; Schäuble/Giger, p. 712.

not available to companies using their relevant IP in a way that does not generate RIPI under section 2 (II) (3) (B) (Relevant IP income) of this Part[1382].

D) Mixed sources of income

A certain income stream may give rise to RIPI and other income at the same time. Income arising in these circumstances is designated as either mixed income or income paid under a mixed agreement[1383]. Based on a cost accounting approach, such income for IP box purposes is to be allocated between RIPI and other income on a just and reasonable basis.

E) Profits arising before grant of a right

Certain relevant IP rights are granted with preliminary effects after publication. This particularly applies for patents[1384]. Because there can be long pending periods between the application and the grant date of a relevant IP right, such preliminary effects particularly in respect of patents should be taken into account for IP box purposes.

Article 85 paragraph (3) of the Tax Act does not expressly refer to the handling of profits arising before grant of a relevant IP right. Neither do the provisions of paragraph 57a of the Tax Ordinance nor the guidelines on the taxation of license income published by the Cantonal Tax Office of Nidwalden directly respond to this point[1385]. In order to reconcile this situation it could be argued that there is no visible indication in the wording of the law that prohibits the IP box from applying to profits arising before the grant of a relevant IP right. Article 85 paragraph (3) of the Tax Act should therefore allow a relevant company to claim additional relief in the tax year in which the relevant IP right is granted.

Moreover, in order to identify the amount of profits arising before grant of a relevant IP right both the cost and loss recapture rules should remain applicable. This implies that for the determination of such profits, a company is required to offset any retained RL with the corresponding RP of the tax year[1386]. The IP box should also apply in situations where a company for the tax year in which a relevant IP right was granted, but for the fact that the company disposed of that right before it was granted. In these situations the company is to be treated as if it were a relevant company for that tax year in respect of the period, in which the

---

1382 See also section 2 (II) (3) (C) (Notional royalty) of Part 3.

1383 See also section 2 (II) (3) (D) (Mixed sources of income) of Part 3.

1384 See section 2 (II) (3) (E) (Profts arising before grant of a right) of Part 3.

1385 Cantonal Tax Office of Nidwalden.

1386 See Cantonal Tax Office of Nidwalden, p. 2 recital 3.6; Section 2 (II) (3) (E) (Profts arising before grant of a right) of this Part; Section 2 (II) (3) (E) (Profts arising before grant of a right) of Part 3.

IP right was pending up to and including the moment prior to the day of disposal of that right[1387].

In the implementation of the proposed practice, it is to be considered that the profits arising before grant of a relevant IP right have already been booked according to commercial law[1388]. In the year of first application of the IP box, the sum of these booked profits should thus be deducted on the tax return. The deduction on the tax return can result in a tax loss for the tax year in question.

Where a company predominantly generates operating profits other than profits from the exploitation of relevant IP or IP rights, IP box-derived tax losses may ideally be offset in the short term by the deductions included on the tax return. Yet, where a company predominantly generates profits from the use of relevant IP under article 85 paragraph (3) of the Tax Act, offsetting with the deductions to be included on the tax return is only possible in the medium or long term. The reason is that the deduction of already-booked profits on the tax return affects the tax assessment basis at a level of 100%. At the same time, however, application of the IP box means that only 20% of the RPs contribute to the overall tax assessment basis of the company, with which any tax loss carried forward can be reduced over time.

4. Relevant IP losses

Particularly in the early stages of commercialisation of relevant IP, companies may derive RIPI but not yet RP. As the case may be, the calculation of RP results in a negative figure which is referred to as relevant IP loss ("RL")[1389].

The guidelines on the taxation of license income published by the Cantonal Tax Office of Nidwalden stipulate that at most the total profit is taxed. Net losses from one business segment are offset with net profits from another business segment. These offset segment losses are then carried back again according to segment in the following years[1390].

An example to illustrate the treatment of segment losses is set out below[1391]:

1387 Idem.
1388 Idem.
1389 See section 2 (II) (4) (Relevant IP losses) of Part 3.
1390 Cantonal Tax Office of Nidwalden, p. 2 recital 3.6.
1391 Thanks to Mr. Huwiler of the Cantonal Tax Office, Stans, for his support in the creation of the example.

Treatment of segment losses

Scenario 1		**Total**	**IP box segment 1.2%**	**Regular segment 6%**
AP 1	Profit	100.000	-100.000	200.000
	Loss assumption			-100.000
		100.000	0	100.000
AP 2	Profit	400.000	200.000	200.000
	Loss carryback		-100.000	100.000
		400.000	100.000	300.000
Scenario 2				
AP 1	Profit	100.000	200.000	-100.000
	Loss assumption		-100.000	
		100.000	100.000	0
AP 2	Profit	400.000	200.000	200.000
	Loss carryback		100.000	-100.000
		400.000	300.000	100.000

If for a tax year there is an RP within the IP box segment, a relevant company is entitled to apply the reduced corporate income tax rate based on article 85 paragraph (3) of the Tax Act, unless there is a RL within the regular segment or a RL carried forward within one of the two segments to be considered.

If a RL carried forward within the IP box segment exceeds the RP within that segment, then the balance of the RL is to be reduced by RP. The RP within the IP box segment that is used to reduce the carried forward amount of RL in that segment is no longer eligible for the IP box deduction[1392]. The RL within the IP box segment that still remains unreduced is carried forward and reduced by RP in that segment of future tax years[1393]. Such RL, however, can also be the object of a loss assumption within the regular segment with subsequent loss carryback to the IP box segment in the following

[1392] See section 2 (II) (4) (Relevant IP losses) of Part 3.
[1393] Idem.

years. Analogously, any losses in the regular segment that are used to reduce the RP within the IP box segment are the object of a loss carryback into the regular segment in the following years.

RL is accordingly attributed where possible to the IP box segment over time, and the other losses to the regular segment[1394].

It follows that for a company that has elected into the IP box the reduced corporate income tax rate based on article 85 paragraph (3) of the Tax Act only becomes effective from the tax year in which the sum of RP exceeds the corresponding sum of RL[1395].

It should be emphasised, however, that the Nidwalden IP box legislation does not establish a loss recapture rule[1396]. A loss recapture rule prevents tax privileges on losses. That rule also works against less favourable tax treatment of acquired IP versus internally developed IP[1397]. Accordingly, in the case of acquired IP, RL and RP are attributed to the IP box as soon as the IP box is elected. Both the resulting losses and profits in respect of the relevant IP are from that time on attributed to the IP box segment for tax purposes. Expenses in connection with internally developed IP regularly arise within the regular segment. But as soon as the IP box is elected, losses and profits in respect of the relevant IP are attributed to the IP box segment from that time on. Accordingly, in the case of internally developed IP, losses and profits in respect of relevant IP normally are attributed to different segments.

A loss recapture rule has the effect that losses and profits in respect of the relevant IP are attributed only to one segment. Under the condition that the IP box is elected, all RL and RP generated over the life cycle of the relevant IP are therefore attributed to the IP box segment. Normally, this requires that the RL generated in the regular segment before election of the IP box is recaptured with corresponding RP within the IP box segment. The benefits of the IP box by virtue of article 85 paragraph (3) of the Tax Act should therefore only be delivered to RP that is not covered by a loss assumption rule or the loss recapture rule. From a practical viewpoint it would be sensible for the loss recapture rule to apply in respect of each relevant IP separately[1398].

1394 See also Hinny, Lizenzbox des Kantons Nidwalden, p. 141, 159.

1395 Idem.

1396 See Cantonal Tax Office of Nidwalden, p. 2 recital 3.6; See also Hinny, Lizenzbox des Kantons Nidwalden, p. 141.

1397 See Cavelti, Bemerkungen, p. 2, 3.

1398 See also section 2 (II) (4) (Relevant IP losses) of Part 3; Steuerverwaltung des Fürstentums Liechtenstein, Wegleitung juristische Personen, p. 18; Hinny, Lizenzbox des Kantons Nidwalden, p. 141.

5. Anti-avoidance

The IP box legislation does not contain any targeted anti-avoidance provision in order to maintain the intended scope of the regime. The general clause contained in article 2 paragraph (2) of the Tax Act, however, does not recognise legal constructs that aim to avoid taxes[1399].

Furthermore, in an international context the Federal Council's Decree concerning measures against the unjustified claim to benefit from the Confederation's double taxation agreements, dated 14 December 1962 ("BRB 1962") as well as the explanatory circular letters 1962, 1999/2001 and 2010 may need to be considered[1400].

6. Supplementary

A) Making of election for the IP box

Election to apply the IP box is optional and made annually with the filing of the corporate income tax return. The tax deduction figure is calculated by using a cost accounting approach, the result of which must be attached to the corporate income tax return. The cost accounting computations have to be included every year when filing the corporate income tax return[1401].

B) Revocation of election made for the IP box

From a conceptual perspective, an election for the IP box has to be made every year. There is thus no necessity for a revocation of an earlier election made into the IP box. Waiving an election for the IP box is simply done by not electing for the application of article 85 paragraph (3) of the Tax Act for a tax year[1402].

C) Application of the IP box in relation to partnerships

Article 85 paragraph (3) of the Tax Act only applies to taxpayers subject to corporate income tax. Due to the fact that the IP box is not available to taxpayers subject to personal income tax, the regime does not apply to partnerships either[1403].

1399 Schäuble/Giger, p. 711 to 713; See also section 2 (II) (5) (Anti-avoidance) of Part 3.

1400 See BRB 1962; KS ESTV 31. Dezember 1962; KS ESTV 17. Dezember 1998; KS ESTV vom 1. August 2010.

1401 See also section 2 (II) (1) (A) (Election for special treatment of profits from relevant IP) of this Part; Section 2 (II) (1) (A) (Election for special treatment of profits from relevant IP rights) of Part 3.

1402 See also section 2 (II) (6) (B) (Revocation of election made for the IP box) of Part 3.

1403 See Hinny, Lizenzbox des Kantons Nidwalden, p. 141.

D) Application of the IP box to cost sharing arrangements

Where a relevant company has contributed to the development of a relevant IP under a cost sharing arrangement and is entitled to a share of the income from that contribution as a result, such income is eligible for purposes of the IP box[1404].

E) Double taxation relief

The lump-sum tax credit for foreign license income is calculated in accordance with article 5 of the Ordinance on the Lump-Sum Tax Credit and paragraph 6 of the Guidelines on the Lump-Sum Tax Credit. The precondition is its inclusion in the applicable double taxation agreements. If applicable, the maximum amount for federal taxes on the one hand and for cantonal taxes on the other hand are calculated separately. In any case, the credit is limited to the respective maximum amount levied by the federal Government and the canton[1405].

III. Critical acclaim

1. IP to which the IP box applies

Article 85 paragraph (3) of the Tax Act delegates specification of the relevant IP rights to the canton's governing council. It must be agreed that the associated delegation of power is in tension with the principle of legality in relation to taxation[1406].

Similarly, the Liechtenstein Constitutional Court in its judgment of 1 July 2011 found a directly analogous circumstance relating to the Liechtenstein IP box to be unconstitutional and unlawful[1407]. As a result, the entire content of the rule set out in the Tax Ordinance was incorporated into article 55 of the Liechtenstein Tax Act[1408].

Moreover, the view is sometimes taken that the alignment of the Nidwalden catalogue of relevant IP to the IP enumerated in article 12 of the OECD MC does not create new conflict potential in the tax dispute with the EU[1409]. This view is not at all convincing. It is true that an excessively narrow scope of defi-

---

1404 See Schäuble/Giger, p. 712; See also section 2 (II) (6) (D) (Application of the IP box to cost sharing arrangements) of Part 3.

1405 Cantonal Tax Office of Nidwalden, p. 2 recital 3.4; See also Hausmann/Roth/Krummenacher, p. 89; SwissHoldings; Schäuble/Giger, p. 712, 716, 718.

1406 See Schäuble/Giger, p. 711.

1407 Liechtenstein Constitutional Court, StGH 2011/13.

1408 See section 3 (II) (1) (Rights to which the IP box applies) of Part 3.

1409 Schäuble/Giger, p. 717.

nition of relevant IP would unnecessarily restrict the applicability of the IP box. The IP would therefore lose attractiveness as a sensible alternative to the mixed company[1410].

The findings of this treatise show that none of the examined states include copyrights to literary, artistic or scientific works, including cinematic films, in the scope of application of their IP box. Copyrights other than software and certain databases generally have a weak or no relation to technological and scientific activity[1411]. The view must thus be taken that the comprehensive inclusion of copyrights in the Nidwalden catalogue of relevant IP has a potentially distortive effect on trade and competition and therefore in fact may not necessarily contribute to a solution of the tax dispute with the European Union[1412].

2. Relevant IP income

Paragraph 57a subparagraph (1) of the Tax Ordinance stipulates that for IP box purposes the own use of IP is not admissible. The canton of Nidwalden thus expressly excludes the own use of IP[1413]. This restriction prevents the application of the IP box to sales income of products. Compared with the IP box regimes examined in this treatise, this circumstance must be deemed a serious disadvantage.

It should be stressed that like many other economic operators, principal and trading companies often do not derive license income in a formal way. The Nidwalden IP box is thus supposed to acknowledge this fact and apply to income from the exploitation of relevant IP that is embedded in the sales income of products[1414]. Only by including embedded income in the scope of application of the IP box can the tax measure constitute a sensible alternative to the mixed taxation of principal and trading companies[1415].

The inclusion of sales income to an IP box increases the difficulty of identifying in a tax year what level of RP should be attributed to relevant IP. Not least of all

---

1410 See Hausmann/Roth/Krummenacher, p. 88.

1411 See section 2 (II) (Analysis) of Part 3; Section 2 (II) (2) (B) (Rights to which the IP box applies) of Part 3; Section 3 (II) (1) (F) (Extension to relevant IP rights created or acquired before 1 January 2011) of Part 3; For a critical opinion, see: Nicholls/Smith; Roth, p. 62.

1412 See section 2 (III) (Critical acclaim) of Part 2; Section 3 (III) (Critical acclaim) of Part 2; Section 4 (Conclusion) of Part 2; Section 3 (II) (1) (F) (Extension to relevant IP rights created or acquired before 1 January 2011) of Part 3.

1413 See section 2 (II) (3) (C) (Notional royalty) of this Part; See also section 2 (II) (3) (B) (a) (Sales income) of this Part; See also section 2 (II) (3) (B) (a) (Sales income) of Part 3.

1414 See Hausmann/Roth/Krummenacher, p. 88, 89.

1415 Idem, p. 89, 92.

for this reason, calculations for IP box purposes generally require transfer pricing analyses[1416].

3. Notional royalty

As already illustrated, paragraph 57a subparagraph (1) of the Tax Ordinance sets out that for IP box purposes the own use of IP is not admissible[1417]. Such a restriction leads to unequal treatment of own use and third-party use of relevant IP and makes little sense[1418].

Other than Cyprus, France, Hungary, Malta or Spain, none of the IP box regimes examined here contains a similar provision. Moreover, the restriction in question is easy to circumvent in the practical application of the IP box. Despite this fact, small and medium companies are more heavily affected by the restriction overall, since they are often unable to avail themselves directly of associated companies without further arrangements[1419].

3. Federal model of an IP box regime

I. Overview

The introduction of an IP box regime on a federal level would increase the incentive for companies to keep IP profits in Switzerland. It would thus support Switzerland remaining an attractive destination to locate intangibles[1420]. Nevertheless, the Federal Council initially deemed introduction of an IP box inefficient and insufficiently purposeful. It also believed an IP box would lead to a complication of the tax system[1421].

Parliamentary efforts to introduce R&D tax incentives likewise did not meet with a very positive response. For instance, a parliamentary motion submitted in 2010 called for introduction of an R&D super deduction. According to the motion, R&D expenses should not be deductible as an expense at a rate of only 100%, as is possible under current law, but rather at a rate of 130% to 140%

1416 Idem, p. 89.

1417 See section 2 (II) (3) (C) (Notional royalty) of this Part; See also section 2 (II) (3) (C) (Notional royalty) of Part 3.

1418 See also Hausmann/Roth/Krummenacher, p. 89.

1419 See also Evers/Miller/Spengel, p. 18; Matteotti/Roth, p. 62, 63.

1420 See also HM Treasury/HM Revenue & Customs, Consultation, p. 29 recital 7.5.

1421 Schweizer Parlament, Motion Noser, Stellungnahme des Bundesrates, 18 February 2009.

from the assessment basis of the corporate income tax at the federal and cantonal levels. The proposal was decisively rejected by the Council of States on 21 September 2011[1422]. The concern of the motion is, however, covered by the slightly broader motion which has been converted into a request for examination entitled "Introduction of tax promotion measures to strengthen the Swiss research location". In addition to input R&D tax incentives, the request for examination also includes output R&D tax incentives. The scope of examination of the postulate includes the question to what extent tax promotion measures in the field of R&D might lead to distortion of competition between sectors or companies of different sizes and how the promotion of Swiss companies and jobs for Swiss workers can be ensured[1423].

Given the close interconnection between the Corporate Tax Reform III and the postulate, the Federal Department of Finance has decided to coordinate the work on these projects. Initial results can therefore be expected in the coming months[1424].

II. Proposed Swiss IP box regime

Using the same improved Liechtenstein IP box regime as a reference point for the introduction of a Swiss IP box regime, the following proposal could serve as a basis for discussion in Switzerland[1425]:

1) 80% of the profit from intellectual property rights shall also be considered a commercially justified expense provided that such profit is based on achievements of technological or scientific research and development and innovation.

2) "Intellectual property rights" means the following intellectual property rights:

a) Patents, utility models, trademarks, designs, and topography rights provided that they are protected by entry in a domestic, foreign or international register;

b) Supplementary protection certificates;

c) Software, know-how, trade secrets and technical and scientific databases;

1422 Cavelti, Bemerkungen, p. 6; Hurter, p. 638; Schweizer Parlament, Motion Hurter.

1423 Obrist, p. 649, 650; Economiesuisse, Steuerstandort Schweiz, p. 27; Cavelti, Bemerkungen, p. 6; Schweizer Parlament, Postulat WAK-N; Schweizer Parlament, Motion Hurter; Schweizer Parlament, Motion Noser.

1424 EFD, Zwischenbericht USTR III, p. 27.

1425 Thanks to Mr. Baumer of the Swiss Federal Tax Administration, Berne, for his valuable support in the analysis of the proposed Swiss IP box regime.

d) Medicinal and veterinary products with marketing authorisations and marketing or data protection;

e) Plant protection products with data protection benefits; and

f) Any other right which is inherently linked with at least one of the intellectual property rights referred to above and inseparable from it.

3) The profit from intellectual property rights constitutes the basis of assessment for the deduction of 80% and shall be determined as follows:

a) Any income from the exploitation of intellectual property rights, including embedded income, license fees, proceeds of sale, damages for infringement and other compensation; minus

b) Any associated tax-relevant expenses which may be attributed to the income from the exploitation of intellectual property rights, even if the expenses arose over several assessment periods; minus

c) Routine return of 10% on associated tax-relevant routine expenses; minus

d) Marketing return which in respect of intellectual property rights shall differentiate between the return from technology and science and the return from marketing.

4) If the intellectual property rights or a license in respect of any such rights are used by a legal person or permanent establishment itself in the course of its production or by a third party acting as its contractor, or in the course of services, but the resulting income is not included in the basis of assessment for the deduction of 80%, then a notional royalty shall be applied.

5) The notional royalty in respect of the profit from intellectual property rights for a tax year shall be the appropriate percentage of the income from the exploitation of intellectual property rights as well as of the IP-derived income for that tax year.

6) Any payment for the intellectual property rights shall correspond to the arm's length principle. If amounts exceed the usual market compensation, then the 80% deduction shall be calculated on the basis of the usual market price. The arm's length principle shall also apply to the determination of the appropriate percentage.

7) If the intellectual property rights are subject to grant, then the sum of positive income shall extend to the period from the tax year when the intellectual property rights were applied for until the year preceding the tax year in which the intellectual property rights are granted.

8) The Federal Council shall provide further details by ordinance.

Given that the proposed model for introduction at the federal level is largely based on the Liechtenstein regime, references can be made to the commentary on the Liechtenstein IP box. With the exception of the notes set out below, this fact obviates the need for a more detailed commentary on the proposed model itself.

1. Purpose of the proposed IP box

The proposed Swiss IP box regime provides for a partial exemption of 80% of the relevant IP profit ("RP"), which results in a reduced effective tax rate on such RP[1426].

It applies to relevant taxpayers that use, realise or sell relevant IP rights, such as patents, utility models, trademarks, designs and topography rights provided that they are protected by entry in a domestic, foreign or international register[1427]. The proposed regime further applies to supplementary protection certificates, software, know-how, trade secrets, technical and scientific databases as well as regulatory protection data and plant variety rights. It further applies to any other right which is inherently linked with at least one of the intellectual property rights referred to above and inseparable from it[1428].

Profits attributed to routine manufacturing or development functions, and profits attributable to exploitation of marketing assets, are excluded[1429].

The IP box is an optional regime. Taxpayers elect into it. The reduced taxation of RP is delivered through an additional tax deduction in the corporate income tax return.

2. Ownership requirement

A taxpayer can benefit from the IP box where it holds relevant IP rights or a license in respect of such relevant IP rights. Certain relevant IP rights are further required to be protected by entry in a domestic, foreign or international register.

There is no development condition under the proposed regime. A taxpayer should however meet the ownership condition[1430]. A substance over form and thus an effective economic approach prevails in the practical application of the IP box.

1426 See also PwC, TAXeNEWS Lizenzboxlösung; Müller/Gramigna/Linder, p. 809.

1427 Idem, p. 808.

1428 Idem.

1429 See Section 3 (II) (1) (F) (Extension to relevant IP rights created or acquired before 1 January 2011) of Part 3.

1430 See also Rouenhoff, p. 656; OECD Discussion Draft, p. 17 recital 54.

3. Profits benefiting from the IP box

In order to determine the profits benefiting from the IP box, a three stage calculation model applies.

A) Relevant IP income

The first stage of the calculation model deals with the determination of the sum of positive income from relevant IP rights. The profits benefiting from the IP box are calculated by income from the use, realisation or sale of relevant IP rights, reduced by associated tax-relevant expenses.

The calculation starts by identifying how much of the income of a taxpayer includes RIPI, which is income derived from its relevant IP rights. Generally speaking, five specific categories of income can qualify as RIPI. But additionally, taxpayers who generate income outside these categories can treat a part of their income as RIPI, if they use legally protected innovations in providing services, or in their business processes. Such notional royalty is an arm's length royalty rate for the relevant IP rights.

RIPI includes:

– Income from sales (embedded income);

– License fees and royalties;

– Income from the sale or disposal relevant IP rights;

– Amounts received from others accused of infringing relevant IP rights; and

– Other compensation.

To identify an appropriate amount of RP, based on a cost accounting approach the associated tax-relevant expenses need to be allocated to the corresponding RIPI.

B) Removing a routine return

The second stage of the calculation model is to remove a routine return on certain specified expenses from the sum of positive income from relevant IP rights. This leaves an amount referred to as relevant residual profit ("RRP"). These expenses include tax deductions made in respect of personnel, material and supplies, premises, plant and machinery, professional services, administration or write-downs.

The routine return is to be predefined by the Swiss legislator or the competent tax authorities and may be set at 10% of the relevant expenses.

C) Removing a marketing assets return

The third stage of the calculation model consist of the removal of a return on marketing assets by deducting the marketing assets return ("MAR") for use of the assets. The result is referred to as relevant IP profits ("RP") which can then benefit from the tax deduction of 80% by virtue of article 55 paragraph (1) of the Tax Act.

It should be noted that the calculation model follows the residual profit split method based on the OECD Transfer Pricing Guidelines.

4. Applying the IP box to relevant IP profits

Applying the IP box results in taxation of RP at a lower effective tax rate. This is done by considering a special tax deduction of 80%.

If calculating the RP produces a negative figure, then there is no change to the normal tax calculations of a taxpayer. Such RL must, however, be recaptured with RP of subsequent tax years.

A taxpayer can further not benefit immediately from the IP box on profits from relevant IP rights pending for approval. Yet, the taxpayer can calculate what the RP would have been had the relevant IP right been granted at that time. These amounts are summed up and then can be added to the RP of the year in which the relevant IP right is granted.

5. Other aspects of the IP box

Apart from targeted transfer pricing rules, the IP box legislation does not include targeted anti-avoidance rules to prevent unreasonable tax benefits arising from tax motivated schemes. A general anti-avoidance rule may however apply.

The IP box can apply to joint ventures and cost sharing arrangements, it should ideally also cover partnerships.

III. Critical acclaim

1. Constitutionality

In tax policy debates, reference is frequently made to the principles of taxation with regard to constitutional law, whether it concerns endearing the proposed solutions or denouncing uncomfortable regulations as inappropriate[1431].

What follows is an assessment of the extent to which the introduction of an IP box regime at federal level is consistent with constitutional principles. For this purpose, the focus is firstly put on the research article of the Swiss Federal Con-

[1431] See Reich, Allgemeinheit der Steuer, p. 171.

stitution. It will thereupon be considered whether a non-fiscal purpose provides sufficient justification if violations of the principles of taxation, which have been standardised in article 127 paragraph (2) of the Federal Constitution, are identified, or at least cannot be ruled out[1432].

A) Research and innovation

Article 64 of the Federal Constitution (Research) corresponds to article 27^{sexies} of the old Federal Constitution[1433]. Within the framework of the 2006 education reforms in the constitution, its paragraph (1) was slightly amended. Apart from scientific research, innovation as the subject of state support by the Federal Government was standardised in paragraph (1) of the Federal Constitution. Innovation means the conversion of scientific knowledge into new technologies, products and services[1434].

Scientific research is to be understood as systematic and methodical intellectual activity for increasing, deepening and confirming human knowledge. It can be divided into the two categories of basic and applied research. Applied research strives to widen knowledge on humans and their environment, irrespective of any existing or foreseeable practical applications. Applied research, on the other hand, is concerned with the conversion of research results into practical applications. Close links and reciprocal interaction exist between the two areas of research, and a clear separation is often not possible[1435].

In Switzerland, research is driven both by private sector undertakings and also by colleges and universities. Private research undertakings and researchers can invoke scientific freedom and economic freedom according to article 20 and 27 of the Federal Constitution to protect their research activity[1436].

As already explained, apart from the scientific research in paragraph (1) of the Federal Constitution, the revised research article also mentions innovation as a further new subject of promotion. This means the use of technological and scientific knowledge in the area of application, such as in the development of innovative products and services for society and the economy. This relates in particular to the transfer of knowledge from research into industry and the utilisation of knowledge[1437].

1432 See also Hinny, Lizenzbox des Kantons Nidwalden, p. 151; See also Reich, Allgemeinheit der Steuer, p. 171.

1433 Schmid/Schott, p. 1197 recital 1; Borghi, p. 3.

1434 Schmid/Schott, p. 1197 recital 2; Schweizerische Eidgenossenschaft, Neuordnung Verfassungsbestimmungen, p. 6; See also Hinny, Lizenzbox des Kantons Nidwalden, p. 157.

1435 Schmid/Schott, p. 1198 recital 3.

1436 Idem, recital 4.

1437 Idem, recital 5.

Among other things, innovation in a broader sense includes application-oriented private research and the development and marketing of new products. Apart from the education policy and public support for research, the innovation policy thus also extends to the creation of favourable economic conditions, such as in the area of taxation and in the protection of IP. It follows that the promotion of innovation is a typical cross-sectional task of the Confederation, the economy and society[1438].

The Federal Government has thus the task of extensively promoting scientific research in Switzerland, creating favourable conditions and contributing financial and other means. But at the same time, the Federal Government bears the obligation of setting limits for potential sensitive ethical problems caused by research and of prescribing or prohibiting specific procedures[1439].

The research article according to article 64 paragraph (1) of the Federal Constitution obliges the Federal Government to promote and fund scientific research. Covered by this are all areas of research, the unsystematic and one-sided support for solely individual projects and sectors does not fulfil the constitutional mandate[1440]. Although the private sector is the most important sector, which finances and drives research, it is primarily public research institutes that enjoy support from the Federal Government. Direct and indirect support for private research is equally possible, based on article 64 paragraph (1) of the Federal Constitution. The Federal Government can indirectly fund research in the private sector, for example by the creation of favourable framework conditions. At the same time, however, it should be noted that neutrality in competition based on article 94 of the Federal Constitution has to be maintained. Notably, the express mention of state support for innovation must not be interpreted as authorising or even committing the Federal Government to an extensive industrial policy[1441]. Attention in particular should also be paid to barriers under international law with regard to state support for research, such as state aid principles under the EU-Switzerland Free Trade Agreement of 1972[1442].

B) Principles of taxation

Article 127 of the Federal Constitution stipulates the principles of taxation, according to which the form of any tax, namely the group of persons subject to tax, the object of the tax and its assessment, must be regulated in the main features of the law itself. Provided the nature of the tax permits it, the principles of universality and uniformity of taxation as well as the principle of ability to pay

---

1438 Idem, recital 6.

1439 Schmid/Schott, p. 1199 recitals 9, 10; Borghi, p. 4 recital 11.

1440 Schmid/Schott, p. 1200 recital 12; Borghi, p. 4 recital 10.

1441 Schmid/Schott, p. 1199 recital 13; Borghi, p. 10 recital 30; See also Botschaft Art. 27 Bundesverfassung, p. 408, 409.

1442 Schmid/Schott, p. 1199 recitals 15, See also Bartholet, p. 387 et seq.

must be applied. The principles of taxation standardised in article 127 of the Federal Constitution specify the legal equality anchored in article 8 of the Federal Constitution, according to which all people are equal before the law[1443].

Basically, any economic or socio-political state support measure more or less implies a breach of the ability to pay principle. A person subject to tax is not charged according to its economic ability to pay, but exempted in order to stimulate a specific pattern of behaviour[1444]. Nonetheless, it is permissible to deviate from the principles mentioned if there is an adequate legal basis and common interest in this, and the principle of proportionality is maintained. Tax law regularly concerns non-fiscal purposes, which are pursued with tax measures. In legislative practice, numerous tax law standards are used for non-fiscal purposes of this kind[1445].

a) Legal equality and prohibition of arbitrary action

Since the enactment of the new Federal Constitution of 1999, the general principle of equality in taxation, which is laid down in article 8 paragraph (1) of the Federal Constitution, no longer has any independent significance. Although the general principle of equality penetrates the entire legal system, based on article 4 paragraph (1) of the old Federal Constitution, the Federal Supreme Court and doctrine have nevertheless developed different fundamental principles of the rule of law in the creative administration of justice, which have now been explicitly standardised in the constitution. This also includes the principles of the universality and uniformity of taxation, which are laid down in article 127 paragraph (2) of the Federal Constitution and the principle of ability to pay[1446].

What is meant exactly by the principles of taxation cannot be derived directly from the constitution. The decisive moral perceptions are not formulated in the constitution, and must accordingly be extraneously interpreted[1447]. A tax mesaure violates the legal requirement on equality, if it encounters legal distinctions for which reasonable grounds are not apparent in the circumstances being regulated, or if they omit distinctions, which intrude due to the circumstances. Legal

---

1443 Hinny, Lizenzbox des Kantons Nidwalden, p. 151; Cavelti, Besteuerung nach dem Aufwand, p. 149; BGE 133 I 206 E. 6.1 p. 215; Vallender, Leitlinien, p. 688; See also BGE 133 I 206 E. 6.1 p. 215.

1444 Reich, Leistungsfähigkeitsprinzip, p. 21; See also Yersin, Les buts extra-fiscaux, p. 65.

1445 Hinny, Lizenzbox des Kantons Nidwalden, p. 151; Cavelti, Besteuerung nach dem Aufwand, p. 153; Reich, Leistungsfähigkeitsprinzip, p. 20; See also Yersin, Les buts extra-fiscaux, p. 63.

1446 Cagianut/Cavelti, p. 152; Reich, Verfassungsrechtliche Beurteilung, p. 695; Vallender, Leitlinien, p. 689; Reich, Allgemeinheit der Steuer, p. 171; See also BGE 133 I 206 E. 6.1 p. 215.

1447 Reich, Allgemeinheit der Steuer, p. 171; See also Yersin, Les buts extra-fiscaux, p. 58, 59.

equality is especially violated if equal entities are not treated equally according to their equality or unequal entities are not treated unequally according to their inequality, provided that the unfounded difference or unfounded equality relates to a basic fact. Accordingly, what is required is not absolute, but only relative equality of treatment. In tax law, relative equality of treatment is especially achieved through the principles of universality of taxation and ability to pay[1448].

Prohibition of arbitrary action is expressly re-enacted in article 9 of the Federal Constitution. This elementary fundamental right and justice imperative has been derived by the Federal Supreme Court from article 4 paragraph (1) of the old Federal Constitution. It is valid both in the legislation and in the application of law[1449].

A tax measure violates prohibition of arbitrary action if it cannot be based on serious factual grounds, is senseless and pointless, manifestly breaches a clear right or is contrary to perceptions of justice in an objectionable way. Arbitrariness is the qualified or crass interpretation of standards; an arbitrary tax measure conflicts with the general justice system and cannot be reconciled with prevailing legal opinion[1450].

Apart from article 127 paragraph (2) of the Federal Constitution, great importance continues to be attached to the legal requirement on equality and prohibition of arbitrary action for the shaping of the tax law. These fundamental rights primarily protect against taxes, which as such are legally unequal or arbitrary by nature[1451].

Furthermore, arbitrariness has nothing to do with the subjective sense of justice of a judge, which is why he is not entitled to put forward the solution he considers fair in place of the regulations laid down by the legislator. Those who assert arbitrariness in connection with the introduction of a Swiss IP box regime must show evidence of the existence of a general conflicting view of justice to the contested tax measure. Since this is tantamount to a very difficult exercise, it can be assumed that the introduction of a Swiss IP box cannot be interpreted as arbitrary[1452].

1448 Reich, Verfassungsrechtliche Beurteilung, p. 695; See also Hangartner, p. 93.

1449 Reich, Verfassungsrechtliche Beurteilung, p. 695.

1450 Hinny, Lizenzbox des Kantons Nidwalden, p. 151; Reich, Verfassungsrechtliche Beurteilung, p. 695; Höhn/Waldburger, p. 117 recital 86.

1451 Höhn/Waldburger, p. 107 recital 68.

1452 See also Hinny, Lizenzbox des Kantons Nidwalden, p. 152; Reich, Verfassungsrechtliche Beurteilung, p. 696.

b) Universality of taxation

According to the principle of universality of taxation, public expenditure for the accomplishment of public functions should basically be borne by all citizens[1453].

The main focus of the principle of universality is the prevention of privileged treatment and discrimination. Everyone has to pay tax regardless of individual characteristics, such as status, religion, origin or race, even though only a symbolic contribution is possibly made to the financing of the public expenditure. The legislator must not favour inferior or superior taxpayers without sufficient justification. The principle of universality of taxation pursuant to article 127 paragraph (2) of the Federal Constitution thus refers to the subjective side of the tax law relationship or to persons subject to tax respectively.

The principle does, however, not rule out factually justified exemptions from tax. Tax exemptions are admissible for macroeconomic and social reasons, or on tax systematic grounds[1454]. The justification of exemptions of this kind may possibly consist of the fact that the affected persons have already been appropriately burdened by other taxes, such as the value-added tax[1455].

The principle of universality of taxation has two characteristics; it can prohibit privileged treatment or discrimination. Privileged treatment prohibition forbids the factually unjustified exemption of persons or group of persons from taxation[1456]. The Federal Supreme Court summarised its more recent stance on prohibition of discrimination in the Obwalden decision in 2007. Thereafter, the principle of universality of taxation requires that all persons or groups of persons are affected by the same legal regulations; exemptions for which there are no factual grounds are inadmissible[1457]. On the other hand, the prohibition of discrimination forbids the imposing of substantially larger burdens on a small group of taxpayers – in relation to their economic ability to pay – than to the bulk of remaining taxpayers. With the protection against excessive taxation, the

---

1453 Hinny, Lizenzbox des Kantons Nidwalden, p. 152; Reich, Verfassungsrechtliche Beurteilung, p. 699; Hangartner, p. 92; Reich, Allgemeinheit der Steuer, p. 172.

1454 Hinny, Lizenzbox des Kantons Nidwalden, p. 152; Cagianut/Cavelti, p. 152; Reich, Verfassungsrechtliche Beurteilung, p. 699; Höhn/Waldburger, p. 108 recital 71; Vallender, Leitlinien, p. 689; Hangartner, p. 91; Reich, Allgemeinheit der Steuer, p. 172, 173.

1455 Höhn/Waldburger, p. 109 recital 72.

1456 Reich, Steuerrecht, p. 85 recital 128 et seq; Höhn/Waldburger, p. 108, recital 71; Reich, Verfassungsrechtliche Beurteilung, p. 699.

1457 Hinny, Lizenzbox des Kantons Nidwalden, p. 152; BGE 133 I 206 E. 6.1 p. 215; Höhn/Waldburger, p. 108 recital 71; BGE 114 Ia 221 E. 2c p. 224; BGE 114 Ia 321 E. 3b p. 323.

principle of universality of taxation also contains a constitutional protection of minorities[1458].

It follows that the preferred treatment of relevant IP income does not tarnish the subjective side of the tax law relationship. A Swiss IP box regime is supposed to be applicable equally by all economic operators. The sole requirement is that the relevant formal and material criteria are fulfilled. If so, then relevant IP income is subject to lower taxation. Taking especially also self-employed persons into consideration, an IP box regime treats all persons or groups of persons according to the same lawful order. Accordingly, no persons subject to tax are exempt from or favoured by taxation with the proposed tax measure. This is why the principle of universality of taxation is considered as being fulfilled[1459].

c) Uniformity of taxation

According to the principle of uniformity of taxation, people in the same circumstances must be taxed in the same way and substantial differences in the actual circumstances must lead to a correspondingly different tax burden[1460].

In this wording, the principle essentially specifies the principle of equal treatment of article 8 paragraph (1) of the Federal Constitution. According to other doctrine, the principle refers to the objective side of the tax law relationship by requiring that taxable objects are selected fully and uniformly[1461].

If one were to comply with this doctrine, the principle of uniformity of taxation could be shown as a specific principle for distributing the tax burden. The objective and quantitative elements of the tax law relationship would thus be tarnished, whereupon every person subject to tax should contribute to covering the public financial needs in proportion to the funds available to it and the individual circumstances influencing its ability to pay[1462].

Taking into account the constitutional barriers, the principle of uniformity grants the legislator extensive creative freedom in tax law. Legal equality is not violat-

---

1458 Reich, Steuerrecht p. 86 recital 133; Hinny, Lizenzbox des Kantons Nidwalden, p. 152; BGE 133 I 206 E. 6.1 p. 215; Cagianut/Cavelti, p. 153; Reich, Verfassungsrechtliche Beurteilung, p. 699; Reich, Allgemeinheit der Steuer, p. 173; Yersin, Les buts extra-fiscaux, p. 52; BGE 99 Ia 638 E. 9 p. 653.

1459 See also Hinny, Lizenzbox des Kantons Nidwalden, p. 152.

1460 Hinny, Lizenzbox des Kantons Nidwalden, p. 152; BGE 133 I 206 E. 6.1 p. 215; Reich, Verfassungsrechtliche Beurteilung, p. 700; Höhn/Waldburger, p. 109 recital 74; BGE 114 Ia 221 E. 2c p. 224 et seq.

1461 Hinny, Lizenzbox des Kantons Nidwalden, p. 152; BGE 133 I 206 E. 6.1 p. 216; Reich, Verfassungsrechtliche Beurteilung, p. 700; Höhn/Waldburger, p. 109 recital 74.

1462 Hinny, Lizenzbox des Kantons Nidwalden, p. 152; Höhn/Waldburger, p. 109, 110 recital 74; Vallender, Leitlinien, p. 689.

ed if the legislator reaches solutions, which do not comply in every respect with a specific economic, legal or public finance system[1463]. Moreover, the Federal Supreme Court qualifies the meaning of the principle of uniformity in the Obwalden decision in terms of the fact that the principle of the uniformity of taxation has increasingly suffered a loss in substance in the area of direct tax with the emergence and consolidation of the principle of ability to pay[1464].

Since the principle of uniformity of taxation was originally on an equal footing with the principle of universality of taxation in public finance tax doctrine, the first of these has obviously suffered a loss in substance in the meantime. The principle of ability to pay has taken over the function of the principle of uniformity of taxation[1465].

As outlined, the principle of equality does not require absolute equality of treatment, but only relative equality of treatment: equal entities should be treated equally according to their equality or unequal entities should be treated unequally according to their inequality. Passive IP income is qualitatively a different class of income to active income from production, trading or provision of services. It does not seem unreasonable to provide different fiscal treatment for recipients of IP income. A glance at legal systems with their own IP box solutions shows that this distinction is also taken into consideration[1466]. Moreover, with respect to the Swiss tax system it should be pointed out that for various reasons different kinds of income are already being decoupled from the general basis of assessment and listed at a separate tax rate[1467].

d) Ability to pay

In the second half of the 19th century, the prevailing view was that uniform taxation was not guaranteed with absolute but solely with relative equality of treatment of persons subject to tax. According to this, it was not the tax rate that was to be the same, but the economic burden on persons caused by taxation[1468].

The principle of ability to pay is derived from the principles of uniformity and universality of taxation, which is based on article 8 of the Federal Constitution.

1463 Hinny, Lizenzbox des Kantons Nidwalden, p. 153.

1464 BGE 133 I 206 E. 6.1 p. 216.

1465 Hinny, Lizenzbox des Kantons Nidwalden, p. 153; Reich, Verfassungsrechtliche Beurteilung, p. 700; See also Reich, Allgemeinheit der Steuer, p. 173.

1466 See also EFD, Zwischenbericht USTR III, p. 25; Hinny, Lizenzbox des Kantons Nidwalden, p. 153; Reich, Verfassungsrechtliche Beurteilung, p. 695; Hangartner, p. 93.

1467 Hinny, Lizenzbox des Kantons Nidwalden, p. 153; See also Reich, Verfassungsrechtliche Beurteilung, p. 700.

1468 Reich, Steuerrecht, p. 88 recital 139; Reich, Allgemeinheit der Steuer, p. 173; See also BGE 133 I 206 E. 7.1 p. 217; BGE 99 Ia 638 E. 9 p. 652 et seq.

It requires that every citizen should contribute to covering the public financial needs in proportion to the funds available to him and the individual circumstances influencing his ability to pay[1469].

The principle of ability to pay based on article 127 paragraph (2) of the Federal Constitution runs through the entire tax system and generally applies both to direct as well as indirect tax. Although the principle of ability to pay, like the other principles of taxation, is notably tailored to direct tax, it is generally also relevant for indirect tax. It thus relates to the entire tax burden. In this respect, one should look at the overall picture by also taking into account the burden of other taxes for the purpose of the assessment[1470].

The main area of application of the ability to pay principle is clearly income and net wealth tax law, which has been increasingly defined in concrete terms over the course of the last few decades. Against this backdrop, it is questionable whether this constitutional principle applies to the taxation of legal entities at all. Under the integration theory, the constitutional principle of ability to pay is not used in isolation for legal entities. According to this theory, profit still only manifests the ability to pay of the individuals involved. It follows that legal entities do not imply any additional and independently absorbable ability to pay[1471].

Nonetheless and despite this substantial objection, were it the considered approach that the principle of ability to pay is relevant to the taxation of undertakings, reference can be made to the rulings of the Federal Supreme Court. According to these rulings, the principle of ability to pay requires that every individual should contribute to covering the public financial needs in proportion to the funds available to him[1472]. Public expenditure should be distributed amongst taxpayers uniformly and according to individual economic ability to pay. A general rule with regard to distribution of the burden, such as an absolutely equal distribution of the tax burden or the principle of equivalence, that is distri-

---

1469 Hinny, Lizenzbox des Kantons Nidwalden, p. 154, 155; Cavelti, Besteuerung nach dem Aufwand, p. 149; BGE 133 I 206 E. 7.1 p. 217; Cagianut/Cavelti, p. 154; Reich, Verfassungsrechtliche Beurteilung, p. 700, 701; Höhn/Waldburger, p. 112 recital 76; Vallender, Leitlinien, p. 689; BGE 122 I 101 E. 2b (aa) p. 103; BGE 114 Ia 221 E. 2c p. 225; BGE 99 Ia 638 E. 9 p. 652 et seq.

1470 Reich, Steuerrecht, p. 89 recital 141; Cavelti, Besteuerung nach dem Aufwand, p. 149; Reich, Verfassungsrechtliche Beurteilung, p. 701; See also Höhn/Waldburger, p. 107, 108 recital 69.

1471 Reich, Steuerrecht, p. 89 recital 142; Hinny, Lizenzbox des Kantons Nidwalden, p. 154, 155; Reich, Verfassungsrechtliche Beurteilung, p. 701.

1472 Hinny, Lizenzbox des Kantons Nidwalden, p. 155; Cavelti, Besteuerung nach dem Aufwand, p. 149; BGE 133 I 206 E. 7.1 p. 217; BGE 122 I 101 E. 2b (aa) p. 103; 114 Ia 221 E. 2c p. 225; 99 Ia 638 E. 9 p. 652 et seq.

bution of the burden depending on the utilisation of public institutions, would be inconceivable according to current legal conviction[1473].

With respect to taxes from income, the principle of ability to pay directly indicates that persons and groups of persons in the same income bracket have to pay the same amount of tax. This is referred to as horizontal equity. Persons with different levels of income have to be taxed differently. It is thus not permitted for someone on a low income to have to pay the same amount of tax as someone on a high income. By the same token, it cannot be requested that a person pays tax, although it is not in a position to do this. With these three basic rules, the principle is already suitable for making a contribution to fair taxation, and what is more, both in a horizontal as well as vertical direction[1474].

In terms of a concluding assessment of the present matter, it can be held that persons and groups of persons in the same income bracket basically have to pay the same amount of tax. Accordingly, a Swiss IP box solution would at first glance not necessarily do justice to the principle of ability to pay. If an undertaking achieves a corresponding IP income, the amount of tax to be paid on the entire profit is lower than for an undertaking, which nominally achieves the same amount of profit, but does not achieve any corresponding IP income[1475].

Any violation of the principle of ability to pay can in no way be justified by other violations. However, insofar as there is a violation, it should be noted that violations of this kind are frequently encountered in the Swiss tax system. For example, individuals who earn dividends or other qualified income, property income, provisional revenue, small amounts of remuneration from paid employment or liquidation gains from activity as a self-employed person, are taxed differently and as a rule lower than persons that do not earn income of this kind. Not to mention the many different kinds of tax reliefs, which ultimately achieve the same tax effect. Notwithstanding, it should be pointed out that the principle of ability to pay is often deliberately violated in legislative practice and may thereby de facto have lost part of its substance[1476].

As will be explained subsequently, a tax measure can deviate from the principle of legal equality and at the same time be in conformity with the constitution. Tax measures of this kind, such as lump-sum taxation, include deviation from the tax system and thus need to be justified[1477].

1473 Reich, Steuerrecht, p. 88 recital 139; Hinny, Lizenzbox des Kantons Nidwalden, p. 155; BGE 133 I 206 E. 7.1 p. 217, 218; Reich, Leistungsfähigkeitsprinzip, p. 10.

1474 Hinny, Lizenzbox des Kantons Nidwalden, p. 155; BGE 133 I 206 E. 7.2 p. 718.

1475 Hinny, Lizenzbox des Kantons Nidwalden, p. 155.

1476 Hinny, Lizenzbox des Kantons Nidwalden, p. 155; See also Benz, p. 14; BGE 133 I 206 E. 11.1 p. 229; Yersin, Les buts extra-fiscaux, p. 47, 48.

1477 EFD, Zwischenbericht USTR III, p. 25; Cavelti, Besteuerung nach dem Aufwand,

e) Non-fiscal purposes

The burden on persons subject to tax according to the ability to pay corresponds to the fiscal purpose of taxation. The public financial needs should be distributed equally amongst the persons subject to tax. There can be no talk of non-fiscal purpose until the legislator distances itself from the actual aim of a tax system, which is the procurement of revenue, to pursue other aims. The question thus rises to what extent the legislator is permitted to specifically deviate from taxation compatible with ability to pay, in order to strive for non-fiscal purposes with unequal legal relief[1478].

First of all, it should be stated that the general principles of taxation and in particular the principle of ability to pay cannot be banished at the outset from a tax system in order to pursue non-fiscal purposes. The legislator is basically at liberty to use a tax system to implement economic and socio-political aims. For example, apart from the stimulation of the economy the Tax Harmonisation Act encourages the preservation of monuments, energy efficient construction, pension plans, charity and private home ownership by granting specific tax relief[1479].

With the existence of legal authority for regulation in a specific area of state support, prior to the laying down of a tax measure, it should be examined whether objectively plausible and reasonable grounds can be put forward for the abandonment of the ability to pay principle. It then should be evaluated whether common interest in the implementation of the intended tax measure is capable of justifying an incursion into the concept of ability to pay, which is sustaining a tax system[1480].

Against this background, strategies by which certain groups of persons are granted advantages on special factual grounds at the expense of the fiscal principle of equal treatment are permissible within narrow limits provided there is a

---

p. 144 et seq.

1478 Reich, Steuerrecht, p. 94 recitals 156, 157; Reich, Verfassungsrechtliche Beurteilung, p. 703; See also Yersin, Les buts extra-fiscaux, p. 51.

1479 Reich, Steuerrecht, p. 95 recital 158; Hinny, Lizenzbox des Kantons Nidwalden, p. 157; BGE 133 I 206 E. 11.1 p. 229; Reich, Verfassungsrechtliche Beurteilung, p. 703; Reich, Leistungsfähigkeitsprinzip, p. 20; See also Yersin, Les buts extra-fiscaux, p. 47, 49, 51, 52.

1480 Reich, Steuerrecht, p. 95 recital 158; Hinny, Lizenzbox des Kantons Nidwalden, p. 156; Cavelti, Besteuerung nach dem Aufwand, p. 149, 153; Reich, Verfassungsrechtliche Beurteilung, p. 703; Reich, Leistungsfähigkeitsprinzip, p. 22, 23; Yersin, Les buts extra-fiscaux, p. 54, 55.

clear legal or even constitutional basis and the tax lax is suitable to achieve the targeted purpose with the tax measure[1481].

Common interest seems all the more legitimate the more determined the mandate to the legislator is[1482]. It also implicitly emerges that the more the principle of ability to pay is impaired by public support measures, the higher the requirements relative to common interest must be made[1483].

Admittedly, a tax system for funding non-fiscal aims is not suitable in all cases. Economic policy through tax policy may cost a state a lot of money and its effects cannot be measured directly. Tax measures often work only indirectly and thus somewhat unclear. Furthermore, a certain deadweight effect may occur, after which undertakings are funded that themselves would have conducted in the targeted way without the fiscal incentive. Finally, non-fiscal purposes in a tax system may considerably impede its application[1484].

The lack of determinacy of the principles of taxation corresponds to their essence as fundamental constitutional values. They merely define the framework within which legislators and legal practitioners have to move. But through their fundamental statements on the equitable distribution of the tax burden, these tax collection principles succeed in limiting the creative freedom of the legislator. This is why especially the principle of ability to pay must not be overstretched and inadmissibly centred or made absolute. There is basic tension between the principle of ability to pay and other objectives of the legislator, which have to be carefully balanced against each other. The principles of taxation partly even contradict each other and moreover never apply without exceptions. It follows that the assessment of constitutionality depends heavily on the emphasis of the economic advantage as common interest[1485].

The openness and indeterminacy of the principles of taxation in the doctrine even creates grounds for fundamentally questioning their scope and capability. Some authors argue that perceptions of justice, which are outlined as being the substance of the principle of ability to pay, are unable to contribute anything to the interpretation of tax provisions. The principle of ability to pay is valueless both in tax law dogma and also in taxation policy. Occasionally, the authors say,

---

1481 Hinny, Lizenzbox des Kantons Nidwalden, p. 157; BGE 133 I 206 E. 11.1 p. 230; Yersin, Les buts extra-fiscaux, p. 59.

1482 Idem.

1483 Hinny, Lizenzbox des Kantons Nidwalden, p. 157; BGE 133 I 206 E. 11. 2 p. 230.

1484 See Reich, Leistungsfähigkeitsprinzip, p. 25.

1485 See Cavelti, Besteuerung nach dem Aufwand, p. 153; Reich, Verfassungsrechtliche Beurteilung, p. 732; Vallender, Leitlinien, p. 689; Reich, Allgemeinheit der Steuer, p. 175; Reich, Leistungsfähigkeitsprinzip, p. 28.

reference to the principle of ability to pay also conceals a shortage of justification[1486].

In this light, the scope of the principles of taxation should not be overrated. Particularly, the political process of democracy must not be circumvented by the judge. Before tax measures, such as a super deduction for R&D activities and a Swiss IP box, which have been selected by the legislator and matured in the political process, can be declared unconstitutional with reference to the principles of taxation, the different alternative solutions must be carefully evaluated against each other. It is not judges but legislators who should act as a leverage for controversial moral perceptions[1487].

Socio-political opinions on tax matters are finally greatly divergent. Inevitably, political assessments are necessary and admissible for the shaping of a tax measure. This particularly applies in light of the fact that constitutional principles of taxation are not rigid but must be accessible to the change in the political, social and economic sense of justice[1488].

Justification of the reduced taxation of IP income by means of a non-fiscal purpose is obviously only required if there is an actual violation of the constitutional principles of taxation. If it were still to be examined whether the privileged taxation of IP income can be justified with a non-fiscal purpose, apart from the research article laid down in article 64 of the Federal Constitution there must be a legal basis. Furthermore, the tax measure must be suitable for the achievement of objectives[1489].

Creating a legal basis for introduction of a Swiss IP box is consistent with the meaning of non-fiscal purposes and proportionate. In a globalised economy that is knowledge-based and innovation-oriented, IP has become an increasingly important driver of economic growth. This is why international tax competition is highly intensive around mobile income. Modern fiscal policies take the different degree of mobility into account by providing lower tax burdens for mobile factors[1490].

Properly designed IP boxes enjoy international acceptance and thus provide for corporate legal and planning certainty[1491]. Moreover, the tax measures are fully

---

1486 See Reich, Verfassungsrechtliche Beurteilung, p. 711 Fn 97.

1487 See Reich, Allgemeinheit der Steuer, p. 175; See also BGE 133 I 206 E. 10.2 p. 229.

1488 See Reich, Verfassungsrechtliche Beurteilung, p. 713, 714; Vallender, Leitlinien, p. 689; See also BGE 133 I 206 E. 7.2 p. 218, 219; Hangartner, p. 107.

1489 See Maute/Senn/König, p. 420; Hinny, Lizenzbox des Kantons Nidwalden, p. 157.

1490 See EFD, Zwischenbericht USTR III, p. 9.

1491 See Matteotti/Roth, p. 63; Economiesuisse, Steuerstandort Schweiz, p. 27; PwC, TAXeNEWS Stärkung der steuerlichen Wettbewerbsfähigkeit; EFD, Zwischenbericht USTR III, 10, 11; See also EFD, Staatliche Beihilfen an Unternehmen, p. 17.

accessible to Swiss resident undertakings. This is why reverse discrimination that is caused by present cantonal tax privileges will be removed. This being said, introduction of a Swiss IP box regime can be reconciled with constitutional principles and is suitable for achievement of objectives. The new tax measure arguably forms reasoned answers to the increasing mobility of production factors and to the promotion of Switzerland as a location for R&D[1492].

2. Impact on Direct Tax Act and Tax Harmonisation Act

Introduction of a Swiss IP box regime in principle requires a corresponding material adjustment of the Direct Tax Act, for example by introducing a new article 59a. An adjustment of the Direct Tax Act should ideally be accompanied by an analogous material adjustment of the Tax Harmonisation Act[1493].

This approach would have the effect that the IP box rule applies equally to all cantons[1494]. The existing level of tax harmonisation could thus be maintained. In this regard, it must obviously be taken into account that the cantons be free, with a certain range, to determine the tax deduction rates for the cantonal income taxes themselves[1495]. As an alternative, the Tax Harmonisation Act could grant the cantons a generally formulated enabling provision allowing them to introduce an IP box regime themselves[1496].

Simultaneous adjustment of the Tax Harmonisation Act would have the advantage that critical questions concerning the conformity of autonomous IP box rules at the cantonal level with the Tax Harmonisation Act and with the constitutional principles of taxation would be mitigated[1497]. Such an approach is sometimes criticised on constitutional grounds. Some authors have argued that it has not yet been conclusively determined from a dogmatic legal perspective whether an IP box regime integrated within the Tax Harmonisation Act could in fact be made compatible with constitutional principles. At the same time, however, article 190 of the Federal Constitution would make the IP box regime integrated

---

1492 See Hinny, Lizenzbox des Kantons Nidwalden, p. 158; See also Cavelti, Besteuerung nach dem Aufwand, p. 153; Reich, Verfassungsrechtliche Beurteilung, p. 714.

1493 See section 3 (II) (Proposed Swiss IP box regime) of this Part; See also Hurter, p. 637; Hinny, Lizenzbox des Kantons Nidwalden, p. 140; Schweizer Parlament, Motion Hurter; Schweizer Parlament, Motion Noser.

1494 See also Hausmann/Roth/Krummenacher, p. 89; See also BGE 133 I 206 E. 10.2 p. 229.

1495 See Müller/Wenger/Linder, Tax Incentives, p. 14; Keuschnigg/Ribi, p. 58.

1496 See Economiesuisse, Steuerstandort Schweiz, p. 51; SwissHoldings.

1497 Hinny, Lizenzbox des Kantons Nidwalden, p. 140, 143 et seq.

within the Tax Harmonisation Act binding upon the Federal Supreme Court and other authorities charged with application of the law[1498].

The criticism is directed solely at the fact that the legislative introduction of an IP box regime at the federal level might circumvent the potentially associated constitutional concerns. The criticism does however not affect the fact that article 190 of the Federal Constitution grants Parliament and the people priority over the constitution and judicial authorities[1499].

3. Phase-in

In contrast to Liechtenstein, introduction of an IP box solution in Switzerland should give priority to a phase-in. On tax-technical and budgetary grounds, it would likely be instrumental in this regard to exclude the sometimes substantial returns from marketing assets from the determination of profit as proposed[1500].

A phase-in is introduced by adapting increasing percentages in the first years of application of the tax deduction under the IP box regime. At the same time, the appropriate percentages should recognise the fact that the benefits provided by the IP box in its early years are still sufficient to provide an effective incentive to the exploitation of relevant IP rights[1501].

For the purposes of the Swiss IP box, the appropriate percentages in respect of a phase-in for each tax year could take the following values:

AP (Year of implementation of the IP box)	**AP**	**AP+1**	**AP+2**	**AP+3**
Percentage of RP	50%	60%	70%	80%

1498 Cavelti, Bemerkungen, p. 1, 2.

1499 Cavelti, Bemerkungen, p. 1, 2; Irrespective of this, the author in his criticism confuses the Dutch IP box with the Dutch interest group box. Latter has been confirmed by the Commission not to constitute state aid in the meaning of article 107 paragraph (1) of the TFEU. Despite of this fact, the Dutch Government has formally decided not to introduce the tax measure. This is why the Code of Conduct Group agreed that there was no need to assess the measure against the Code of Conduct criteria and closed the file accordingly; See Wattel, section 4.2; Cavelti, Bemerkungen, p. 2; Council of the European Union, Code of Conduct Report May 2010, p. 5 recital 15; Szudoczky/Van de Streek, p. 260; Council of the European Union, Code of Conduct Report November 2009, p. 4 recital 13; Commission Decision, Groepsrentebox Scheme, p. 22 recital 128; European Commission, Dutch Interest Group Box, p. 6 recitals 36, 37.

1500 See section 3 (II) (1) (F) (Extension to relevant IP rights created or acquired before 1 January 2011) of Part 3

1501 Idem.

4. Double taxation relief

Adjustment of the Ordinance of 22 August 1967 on the Lump-Sum Tax Credit regarding taxes on source remaining abroad that are withheld on license income would further improve the proposed IP box regime[1502].

4. Conclusion

A comparison of certain tax factors in respect of the Liechtenstein IP box, the Nidwalden and proposed Swiss IP box is set out below:

Comparison of IP box regimes of Liechtenstein, Nidwalden and proposed federal model

Tax factors	**LI current**	**CH** **Nidwalden**	**CH proposed** **Federal model**
ETR	2.5%	8.8% including direct federal tax	To be determined
Election for IP box	Yes	Yes	Yes
Relevant IP or IP rights	IP rights: Patents, utility models, SPCs, Trademarks, Design, Software copyrights, technical and scientific databases	IP: Royalty definition according to article 12 of the OECD MC	IP rights: Patents, utility models, SPCs, regulatory data protection, plant variety rights, Trademarks, Design, Software copyrights, technical and scientific databases
Application to acquired IP or IP rights	Yes	Yes	Yes
Development condition	No	No	No
Ownership condition	Yes	Yes	Yes
Application to RIPI			

[1502] SwissHoldings.

from:			
– Sales income	Yes	No	Yes
– License fees	Yes	Yes	Yes
– Proceeds of sales	Yes, only to sale of relevant IP rights	Yes, only to sale of IP	Yes, only to sale of relevant IP rights
– Damages for infringement	Yes	Yes	Yes
– Other compensation	Yes	Yes	Yes
Notional royalty	Yes	No	Yes
Application to mixed sources of income	Yes, proportionate	Yes, porportionate	Yes, proportionate
Application to profits arising before grant of relevant IP right	Yes	Yes	Yes
Includes relevant IP losses ("RL") rules	Yes, recapture rule	Yes	Yes, recapture rule
Cap on benefit	No	No	No
Includes anti-avoidance rules	No targeted rule within IP box legislation	No targeted rule within IP box legislation	No targeted rule within IP box legislation
Application to partnerships	Yes	No	To be determined
Application to cost sharing arrangements	Yes	Yes	Yes
Includes transfer pricing rules	Yes	Yes	Yes
Double taxation relief	Yes, subject to limitations	Yes, subject to limitations	Yes, subject to limitations
Application to existing IP or IP rights	No, only IP rights created or acquired from 01.01.2011	Yes	Yes

Having regard to the conclusions of Part 1 and 3, beyond the current cantonal tax privileges Switzerland does not offer a comparable R&D tax incentive standard on a federal level and, with the exception of Nidwalden, on a cantonal level either[1503]. Given the fact that numerous R&D tax incentive regimes have been introduced across Europe since 2007, the proposed model of a Swiss IP box should thus be seen as a contribution to remedy this situation[1504].

The proposed Swiss IP box would reduce the effective tax rate on profits derived from relevant IP rights. A tax rate close to the IP box rates of other countries would evidently favour the decision to locate or keep intangibles in Switzerland[1505].

It is remarkable that most of the IP boxes examined foresee lower effective tax rates on RP than Nidwalden. A rate including federal taxes of 8.8% may not be sufficient to keep innovative undertakings in Switzerland from migrating to countries that offer lower rates[1506]. At 2.5 percent, the effective rate in Liechtenstein is the lowest. The Netherlands offers an effective tax rate on RP of 5%, Luxembourg of 5.84% and Begium of 6.8%. At 10%, the effective tax rate in UK is 1.2% higher than in Nidwalden[1507].

The proposed regime applies to relevant IP rights such as patents, utility models, trademarks, designs and topography rights provided that they are protected by entry in a domestic, foreign or international register. It further applies to supplementary protection certificates, software, know-how, trade secrets, technical and scientific databases as well as regulatory protection data and plant variety rights.

This broad catalogue of relevant IP rights from a commercial viewpoint contains the rights needed to attract a great number of undertakings[1508]. In the same way, the Dutch IP box is available to a large number of undertakings. It is also available to smaller R&D projects and activities. This is because the regime applies to IP protected by patents and in particular to IP protected by R&D declarations. R&D declarations demonstrate the technical and innovative character of a development or invention[1509]. Should some form of R&D declaration be introduced in Liechtenstein or Switzerland in due time, the respective catalogues of

---

1503 See section 6 (Conclusion) of Part 1; See Matteotti/Roth, p. 62; Jones/Hickman, p. 9.

1504 See Jones/Hickman, p. 7.

1505 See also Krever, p. 756.

1506 See also Economiesuisse, Steuerstandort Schweiz, p. 35; Maute/Senn/König, p. 420; Krever, p. 756; For a contrary opinion, see: HM Treasury/HM Revenue & Customs, Corporate Tax Reform, p. 18.

1507 See Evers/Miller/Spengel, p. 18; Jones/Hickman, p. 9.

1508 Idem, p. 8, 11.

1509 See also section 4 (II) (2) (B) (IP to which the IP box applies) of Part 1.

relevant IP rights could be expanded to include such R&D declarations as well[1510]. The Luxembourg IP box regime covers patents, supplementary protection certificates, trademarks, designs, domain names and software. The Nidwalden IP box is extensive in definition and applies to all income from IP that falls under article 12 of the OECD MC[1511]. The regimes in several other countries have a more rigorous definition of IP. The Belgium IP box is limited to patents and supplementary protection certificates. The UK IP box is limited to patents, supplementary protection rights, regulatory data protection and plant variety rights[1512].

The proposed Swiss IP box regime is further quite flexible in encompassing all categories of income which relate to relevant IP rights. Accordingly, worldwide sales income from products protected by at least one relevant IP right, income from license fees, proceeds of sale of relevant IP rights, damages for infringement, other compensation as well as IP-derived income in the form of notional royalties qualify for IP box purposes. This flexible approach implies that on the presence of at least one relevant IP right in a product the corresponding RIPI qualifies for the IP box. In addition, IP-derived income from processes or services can qualify as RIPI as well[1513].

In terms of qualifying income, the Dutch and UK regimes apply equally to the proposed Swiss model. The Luxembourg IP box is also broad in its application. The Belgian and Nidwalden IP boxes in some respects are slightly more restrictive. The Nidwalden regime extends to worldwide income in the form of net license income, capital gains, damages for infringement and other compensation, but excludes sales income and notional royalties. The Belgian regime in particular does not cover capital gains arising on the disposal of relevant IP rights[1514].

The proposed Swiss IP box regime recognises both beneficial ownership and legal ownership of the relevant IP or IP rights. Belgium is the only jurisdiction that requires ownership or co-ownership of the relevant IP rights[1515].

The IP boxes in this treatise, including the proposed Swiss regime, normally apply to cost sharing arrangements and joint ventures[1516]. A decision however would be called for if the Swiss IP box should also apply to partnership models. Similar to the Liechtenstein IP box, it seems sensible to broaden the scope of the

---

1510 See also Müller/Wenger/Linder, Tax Incentives, p. 15.

1511 See also Evers/Miller/Spengel, p. 18; Jones/Hickman, p. 10.

1512 See also Luja, Opinion, p. 283.

1513 Hinny, Lizenzbox des Kantons Nidwalden, p. 140; See also Linder/Müller, Lizenzboxen auch für KMU, p. 33.

1514 See also Linder/Müller, Lizenzboxen auch für KMU, p. 33; Jones/Hickman, p. 10.

1515 See also Jones/Hickman, p. 10.

1516 Idem.

proposed Swiss IP box regime on individual taxpayers and thus including partnerships as far as possible[1517].

Eventually, the introduction of a Swiss IP box regime can be reconciled with constitutional principles and is suitable for achievement of objectives. A Swiss IP box arguably forms reasoned answers to the increasing mobility of production factors and to the promotion of Switzerland as a location for R&D[1518].

[1517] Idem.

[1518] See Hinny, Lizenzbox des Kantons Nidwalden, p. 158; See also Cavelti, Besteuerung nach dem Aufwand, p. 153; Reich, Verfassungsrechtliche Beurteilung, p. 714.

Part 5: Summary

IP boxes acknowledge that the process of innovation can be subject to market failures and help mitigating these failures. They further acknowledge that the process of innovation has become much more global and footloose[1519]. As such, certain jurisdictions have been introducing IP boxes over the last few years. This is why Part 2 of this treatise is dealing with the important question whether IP boxes may constitute prohibited state aid within the meaning of article 107 of the TFEU or harmful tax measures within the framework of the Code of Conduct.

The results show that IP boxes are challenging to tackle under the current state aid framework although they may entail distortive elements on trade and competition, which may be in conflict with the principles of the internal market. This is why it remains to be seen in what way the recent Gibraltar decision of the ECJ and the modernised framework of state aid will unfold in the present environment.

Irrespective of the legal qualification of the EU-Switzerland Free Trade Agreement, a certain loss of sovereignty should further not be dismissed. The economic and political realities imply that it is not possible for Switzerland to unswervingly foster an autonomous existence in the midst of Europe. It must bear the influence of the European state aid law. Switzerland is thus well advised to further acknowledge prohibition of state aid within the meaning of article 107 of the TFEU, especially in such a way as to guarantee non-discriminatory and unrestricted access to the single market.

IP boxes can further be formally in line with state aid principles but still be considered harmful under the Code of Conduct. Yet again, the findings suggest that on the condition of proper economic activity IP boxes are not straightforward in tackling under the Code of Conduct. It should however be noted that the Commission in a statement to the Member States very recently criticised the UK patent box. According to the Commission, the UK patent box in a number of points may violate the Code of Conduct.

Particular attention in this regard must further be paid to the fact that the G-20 finance ministers recently called on the OECD to develop an action plan to address base erosion and profit shifting issues in a co-ordinated and comprehensive manner. In terms of possible consequences of the BEPS report, no fundamental change of the taxation principles should be expected. Pressure will in particular increase, however, on structures and transactions without relevant substance. Accordingly, functions should be performed by key personnel and

[1519] See Atkinson/Andes, p. 4, 14; Linder/Müller, Steuerliche Anreize, p. 146.

undertakings should necessarily bear associated costs and risks[1520].

Part 3 of this treatise contains the commentary on the Liechtenstein IP box regime. It is also demonstrated that the current IP box legislation requires further clarifications and improvements. Policy-makers in Liechtenstein should recognise that primary the existence of input and output tax incentives is a precondition to establish a sound international reputation as an attractive R&D location. Low taxation of income from relevant IP rights namely can be a cause of concern from OECD perspective, if taxable income is artificially segregated from the economic activities that generate it. In the long term, Liechtenstein should thus not afford to deprive itself of input R&D tax incentives to promote innovation.

The analysis in Part 4 of this treatise is related to the material foundations of the IP box of the Canton of Nidwalden. The view is taken that the comprehensive inclusion of copyrights in the Nidwalden catalogue of relevant IP has a potentially distortive effect on trade and competition and, in contrast to other opinions, does not contribute to a solution of the tax dispute with the European Union. The Nidwalden IP box further expressly excludes the own use of IP. This restriction prevents the application of the IP box to sales income of products and must therefore be considered a serious disadvantage. Only by including embedded income in the scope of application of the IP box can the tax measure constitute a sensible alternative to the mixed taxation of principal and trading companies. Such a restriction also leads to unequal treatment of own use and third-party use of relevant IP and should be corrected.

Moreover, the introduction of an IP box regime on a federal level as proposed in Part 4 of this treatise increases the incentive for companies to keep relevant IP profits in Switzerland. A properly designed Swiss IP box regime enjoys international acceptance and thus provides for corporate legal and planning certainty. Its introduction can be reconciled with constitutional principles and is suitable for achievement of objectives. The new tax measure arguably forms reasoned answers to the increasing mobility of production factors and to the promotion of Switzerland as an attractive destination to locate intangibles.

The implementation of a Swiss IP box regime requires a material adjustment of the Direct Tax Act. An adjustment of the Direct Tax Act should ideally be accompanied by an analogous material adjustment of the Tax Harmonisation Act. This approach has the effect that the IP box rule would apply equally to all cantons. In this regard, it could be taken into account that the cantons be able, with a certain range, to determine the tax deduction rates for the cantonal income taxes themselves. As an alternative, the Tax Harmonisation Act could grant the

[1520] PwC, The board: duty calls, p. 6.

cantons a generally formulated enabling provision allowing them to introduce an IP box regime themselves.

More than ever, for small countries like Liechtenstein and Switzerland that are poor in natural resources it is essential to safeguard the future for the long term through technological and scientific R&D by protecting and realising the innovative achievements thereof. As R&D is a lifeline for economic advantage and growth, both countries are supposed to further improve their tax legislations accordingly.

Index