考虑透明度与实质性因素
更有效地打击有害税收实践

Counting Harmful Tax Practices More Effectively
Taking into Account Transparency and Substance

G20税基侵蚀和利润转移（BEPS）项目
2015年成果之五

第5项行动计划
action 5: 2015 Final Reports
考虑透明度与实质性因素，
更有效地打击有害税收实践
第5项行动计划

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# TABLE OF CONTENTS

ABBREVIATIONS AND ACRONYMS ..............................................................................................................1

EXECUTIVE SUMMARY ..........................................................................................................................2
  Requiring substantial activity for preferential regimes .................................................................2
  Improving transparency .......................................................................................................................2
  Review of preferential regimes ..........................................................................................................4
  Next steps ............................................................................................................................................4

CHAPTER 1 INTRODUCTION AND BACKGROUND ...............................................................................6

CHAPTER 2 OVERVIEW OF THE OECD’S WORK ON HARMFUL TAX PRACTICES .............................10

CHAPTER 3 FRAMEWORK UNDER THE 1998 REPORT FOR DETERMINING WHETHER A REGIME IS A HARMFUL PREFERENTIAL REGIME ........................................................................16
  I. Consideration of whether a regime is within the scope of work of the FHTP and whether it is preferential ..........................................................................................................................16
     A. Scope of work of the FHTP .......................................................................................................16
     B. Preferential tax treatment .......................................................................................................16
  II. Consideration of the four key factors and eight other factors set out in the 1998 Report to determine whether a preferential regime is potentially harmful ................................18
  III. Consideration of the economic effects of a regime to determine whether a potentially harmful regime is actually harmful ...............................................................20

CHAPTER 4 REVAMP OF THE WORK ON HARMFUL TAX PRACTICES: SUBSTANTIAL ACTIVITY REQUIREMENT .................................................................................................24
  I. Introduction ..................................................................................................................................24
  II. Substantial activity requirement in the context of IP regimes ..................................................26
     A. Qualifying taxpayers ..................................................................................................................28
     B. IP assets ....................................................................................................................................30
     C. Qualifying expenditures ............................................................................................................32
     D. Overall expenditures ..................................................................................................................34
     E. Overall income ............................................................................................................................36
     F. Outsourcing .................................................................................................................................38
     G. Treatment of acquired IP ............................................................................................................40
     H. Tracking of income and expenditures ....................................................................................40
  I. Grandfathering and safeguards ....................................................................................................46
  J. Rebuttable presumption ................................................................................................................50
  III. Substantial activity in the context of regimes other than IP regimes .......................................52

CHAPTER 5 REVAMP OF THE WORK ON HARMFUL TAX PRACTICES: FRAMEWORK FOR IMPROVING TRANSPARENCY IN RELATION TO RULINGS .............................................62
  I. Introduction ..................................................................................................................................62
  II. Rulings covered by the spontaneous exchange framework .......................................................66
目录

缩写和简称 .................................................................................................................. 1

内容摘要 ...................................................................................................................... 3

享受优惠政策所必须满足的实质性活动要求 ................................................................ 3

提升透明度 .................................................................................................................. 3

优惠制度的审慎 .......................................................................................................... 5

下一步工作 .................................................................................................................... 5

第一章 简介与背景 .................................................................................................... 7

第二章 OECD有害税收实践工作概述 ...................................................................... 11

第三章 1998年报告中关于如何判定有害优惠制度的框架 ...................................... 17

  I. 考虑某项制度是否属于FHTP的工作范围以及是否属于优惠制度.................. 17
      A. FHTP的评审范围 ......................................................................................... 17
      B. 税收优惠待遇 ............................................................................................. 17
  II. 根据1998年报告中的9项关键因素以及8项其他因素来判定一项优惠制度是否潜在有害 .............................................................................................. 19
  III. 结合一项制度的经济影响，判定一项潜在有害制度是否实际有害 .............. 21

第四章 有害税收实践内容的重新修订：实质性活动要求 ..................................... 25

  I. 简介 .................................................................................................................... 25
  II. IP制度下的实质性活动要求 ....................................................................... 27
      A. 符合条件的纳税人 ..................................................................................... 29
      B. IP资产 ......................................................................................................... 31
      C. 符合条件的支出 ......................................................................................... 33
      D. 支出总额 ..................................................................................................... 35
      E. 净收入总额 .................................................................................................. 37
      F. 外包 .............................................................................................................. 39
      G. 对于外购IP的处理 ..................................................................................... 39
      H. 收入和支出的跟踪记录管理 ..................................................................... 41
      I. 过渡条款和保障措施 .................................................................................. 47
      J. 可推翻假设 .................................................................................................. 49
  III. IP制度以外的具体制度下的实质性活动要求 ......................................... 53

第五章 更新有害税收实践工作：提高有关裁定透明度的框架 ............................. 63

  I. 简介 .................................................................................................................... 63
  II. 自发达国家交换框架所涵盖的裁定类型 ..................................................... 67
A. Definition of a ruling
B. Taxpayer-specific rulings related to preferential regimes
C. Cross-border unilateral APAs and any other cross-border unilateral tax rulings (such as ATRs) covering transfer pricing or the application of transfer pricing principles
D. Cross-border rulings providing for a unilateral downward adjustment to the taxpayer's taxable profits that is not directly reflected in the taxpayer's financial/commercial accounts
E. Permanent Establishment (PE) rulings, i.e. rulings concerning the existence or absence of, and/or the attribution of profits to, a permanent establishment in the country giving the ruling
F. Related party conduit rulings
G. Any other type of ruling that in the absence of spontaneous information exchange gives rise to BEPS concerns
III. Jurisdictions receiving the information
IV. Application of the framework to rulings
A. Past rulings
B. Future rulings
V. Information subject to the exchange
VI. Practical implementation questions
A. Method of exchange
B. Reciprocity
VIII. Confidentiality of the information exchanged
IX. Best practices
A. Process of granting a ruling
B. Term of the ruling and subsequent audit/checking procedure
C. Publication and exchange of information
CHAPTER 6 REVIEW OF MEMBER AND ASSOCIATE COUNTRY REGIMES
I. Introduction
II. Conclusions on sub-national regimes and when they are in scope
III. Conclusions reached on regimes reviewed
IV. Regimes relating to disadvantaged areas
V. Downward adjustments
CHAPTER 7 FURTHER WORK OF THE FHTP
I. Ongoing work including monitoring
II. Development of a strategy to expand participation to third countries
III. Consideration of revisions or additions to the existing FHTP criteria
ANNEX A: EXAMPLE OF A TRANSITIONAL MEASURE FOR TRACKING AND TRACING
ANNEX B: SPONTANEOUS EXCHANGE ON TAXPAYER-SPECIFIC RULINGS UNDER THE FRAMEWORK
ANNEX C: TEMPLATE AND INSTRUCTION SHEET FOR INFORMATION EXCHANGE
# ABBREVIATIONS & ACRONYMS

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<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AOA</td>
<td>Authorised OECD Approach</td>
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<tr>
<td>APA</td>
<td>Advance Pricing Arrangement</td>
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<tr>
<td>ATR</td>
<td>Advance Tax Ruling</td>
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<td>BEPS</td>
<td>Base Erosion and Profit Shifting</td>
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<td>CAN</td>
<td>Consolidated Application Note</td>
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<tr>
<td>CFA</td>
<td>Committee on Fiscal Affairs</td>
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<tr>
<td>CFC</td>
<td>Controlled Foreign Company</td>
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<td>EOI</td>
<td>Exchange of Information</td>
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<td>FATF</td>
<td>Financial Action Task Force</td>
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<td>FHTP</td>
<td>Forum on Harmful Tax Practices</td>
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<td>IP</td>
<td>Intellectual Property</td>
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<tr>
<td>MAC</td>
<td>Convention on Mutual Administrative Assistance in Tax Matters</td>
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<td>MNE</td>
<td>Multinational Enterprise</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<td>PE</td>
<td>Permanent Establishment</td>
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<td>R&amp;D</td>
<td>Research and Development</td>
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<td>TP</td>
<td>Transfer Pricing</td>
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EXECUTIVE SUMMARY

1. More than 15 years have passed since the publication of the Organisation for Economic Co-operation and Development's (OECD) 1998 Report Harmful Tax Competition: An Emerging Global Issue and the underlying policy concerns expressed then are as relevant today as they were then. Current concerns are primarily about preferential regimes that risk being used for artificial profit shifting and about a lack of transparency in connection with certain rulings. The continued importance of the work on harmful tax practices was highlighted by the inclusion of this work in the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project, whose Action 5 committed the Forum on Harmful Tax Practices (FHTP) to:

Revamp 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. It will take a holistic approach to evaluate preferential tax regimes in the BEPS context. It will engage with non-OECD members on the basis of the existing framework and consider revisions or additions to the existing framework.

2. In 2014, the FHTP delivered an initial progress report, which is incorporated into and superseded by this final report. The main focus of the FHTP’s work has been on agreeing and applying a methodology to define the substantial activity requirement to assess preferential regimes, looking first at intellectual property (IP) regimes and then other preferential regimes. The work has also focused on improving transparency through the compulsory spontaneous exchange of certain rulings that could give rise to BEPS concerns in the absence of such exchanges.

Requiring substantial activity for preferential regimes

3. Countries agreed that the substantial activity requirement used to assess preferential regimes should be strengthened in order to realign taxation of profits with the substantial activities that generate them. Several approaches were considered and consensus was reached on the “nexus approach”. This approach was developed in the context of IP regimes, and it allows a taxpayer to benefit from an IP regime only to the extent that the taxpayer itself incurred qualifying Research and Development (R&D) expenditures that gave rise to the IP income. The nexus approach uses expenditure as a proxy for activity and builds on the principle that, because IP regimes are designed to encourage R&D activities and to foster growth and employment, a substantial activity requirement should ensure that taxpayers benefitting from these regimes did in fact engage in such activities and did incur actual expenditures on such activities. This same principle can also be applied to other preferential regimes so that such regimes would be found to require substantial activities where they grant benefits to a taxpayer to the extent that the taxpayer undertook the core income-generating activities required to produce the type of income covered by the preferential regime.

Improving transparency

4. In the area of transparency, a framework covering all rulings that could give rise to base erosion and profit shifting concerns in the absence of compulsory spontaneous exchange has been agreed. The framework covers six categories of rulings: (i) rulings related to preferential regimes; (ii) cross border unilateral Advance Pricing Arrangements (APAs) or other unilateral transfer pricing rulings; (iii) rulings giving a downward adjustment to profits; (iv) Permanent Establishment (PE) rulings; (v) conduit rulings;
内容摘要

1. 自1998年OECD发布《有法税收竞争：一个新兴的国际性问题》报告（简称“1998年报告”），迄今已逾15年，当时报告中所表达的潜在深层次问题，直到今天仍然那么相关。当下的根本问题是滥用税收优惠而导致产生人为利润转移的风险，以及对于相关（国内法）法规对某些税收裁定缺乏透明度。BEPS项目中的第8项行动强调了关于有害税收实践相关工作中的一贯重要性，并委托了有害税收实践论坛（FHTP）以下的相关的相关工作。

改进针对有害税收实践的有关工作，优先考虑增加透明度，包括对有关优惠制度的相关裁定进行强制的自动情报交换。同时要求任何优惠制度必须基于实质性的活动。结合BEPS的大背景，对税收优惠制度进行全方位评估；在现有框架下让非OECD成员参与，并同时考虑对现有框架进行修订和补充。

2. 2014年，FHTP提交了初步报告。该初步报告的内容已纳入本最终报告。FHTP工作所关注的焦点是寻求共识，选择并应用一个定义为获取优惠下需要具备实质性的活动的要求，其中首先着眼于知识产权（IP）的优惠制度。随后考虑其他优惠制度。由于缺乏有关税收优惠的税情报交换将可能导致BEPS问题，FHTP的工作同时也关注如何通过这类税收裁定进行强制性自发票交换提高信息的透明度。

享受优惠政策所必须满足的实质性的活动要求

3. 2001年，OECD发布了《有法税收竞争：一个新兴的国际性问题》报告，以解决如何“利益的征收应与实质性活动产生利润的地方相一致”的原则。经考虑多项方案后，各方就选用“关联法”达成共识。此方案是在IP制度背景下发展而来，在关联法下，受益人应基于其自身发生的合法支出并获取相关的IP收入的情况下才能享受有关的IP税收优惠。关联法用“支出”作为衡量实质性的活动的指标，并基于这样一个原则建立：IP制度的设计应旨在鼓励研发活动。促进经济增长和就业，因此对实质性活动的要求应有资本利益相关优惠制度的受益人必须真实从事了相关活动。并且因从事该相关活动发生了真实的支出。相同的原理也可适用于其他优惠制度，其均基于受益人的实质性活动给予。即，仅在纳税人从事了相关优惠制度所要求的实质业务而与优惠制度相关的收入时，才能给予优惠。

提升透明度

4. 在透明度方面，各方已就相关的框架体系达成一致意见。该框架体系涵盖在缺乏强制性自发票交换可产生BEPS问题的所有六大类税收裁定（规定文件），包括：（i）关于优惠制度的裁定；（ii）跨境单边预约定价协议或其他单边转让定价裁定；（iii）高减利润的裁定；（iv）有关常设机构的裁定；（v）导管公司的裁定；以及（vi）FHTP将
and (vi) any other type of ruling where the FHTP agrees in the future that the absence of exchange would give rise to base erosion and profit shifting concerns. This does not mean that such rulings are per se preferential or that they will in themselves give rise to BEPS, but it does acknowledge that a lack of transparency in the operation of a regime or administrative process can give rise to mismatches in tax treatment and instances of double non-taxation. For countries which have the necessary legal basis, exchange of information under this framework will take place from 1 April 2016 for future rulings and the exchange of certain past rulings will need to be completed by 31 December 2016. The Report also sets out best practices for cross-border rulings.

Review of preferential regimes

5. A total of 43 preferential regimes have been reviewed, out of which 16 are IP regimes. The Report contains the results of the application of the existing factors in the 1998 Report, as well as the elaborated substantial activity and transparency factors, to the preferential regimes of members and associates. However, the elaborated substantial activity factor has so far only been applied to IP regimes. In respect of substantial activity the IP regimes reviewed were all considered inconsistent, either in whole or in part, with the nexus approach as described in this report. This reflects the fact that, unlike other aspects of the work on harmful tax practices, the details of this approach were only finalised during the BEPS project while the regimes had been designed at an earlier point in time. Countries with such regimes will now proceed with a review of possible amendments of the relevant features of their regimes. The FHTP’s work on reviewing preferential regimes will continue, recognising also that regimes that were assessed before the substantial activity requirement was elaborated may need to be reassessed.

Next steps

6. The elements of a strategy to engage with countries other than members and associates in order to achieve a level playing field and avoid the risk that the work on harmful tax practices could displace regimes to third countries is outlined in the Report, together with the status of discussions on the revisions or additions to the existing framework. These aspects of the work will be taken forward in the context of the wider objective of designing a more inclusive framework to support and monitor the implementation of the BEPS measures.

7. An ongoing monitoring and review mechanism covering preferential regimes, including IP regimes, and the transparency framework has been agreed and will now be put in place.
来认定的因缺乏相关方面的信息交换会导致BEP5问题的其他裁定。这并不意味着上述这些裁定实际上即为优惠制度本身或其直接会导致BEP5。然而可以确认的是，在这些相关制度的运作或管理过程中如果缺乏透明度将会导致税务处理的错误或产生双重不征税的情况。对于已具有信息交换框架的国家，在此框架下的信息交换将从2016年4月1日的裁定适用，对于在此日期之前的相关裁定的信息交换则需于2016年12月31日完成。本报告亦提供了对跨境裁定信息交换的最佳实践方案。

优惠制度的审阅

5. 总计共有63项优惠制度被审阅，其中包括16项IP制度。本报告内容包含了依据1998年报告中涵盖的有关因素，以及后期进一步细化的实质性活动及透明度等要素等要素，对成员国及合作伙伴国的相关优惠制度的审议结果。然而，细化扩展的实质性活动的要求目前仅为适用于IP制度。关于实质性活动，无论是从总体还是部分而言，已审阅评估的IP制度均被认为与本报告中提及的关联法的要求不一致。这反映了一个事实，与有害税收实践的其他工作不同，关联法的具体内容是在BEPS行动过程中制定并完成的，而相关优惠制度的设立则早于关联法相关工作完成的时间。已建立相关优惠制度的国家应从现在开始着手审阅工作，对于其制度特征作一可能的修正。PHTP将继续进行相关优惠制度的审阅工作，对于实质性活动要求出台前已予以审阅的优惠制度，可能需要重新评估。

下一步工作

6. 一个战略要素，是要OECD成员国及合作伙伴国以外的其他国家参与有害税收实践的相关工作，以营造公平竞争的环境，避免有害税收实践转移至第三国的风险，并就现行框架的修订和增补进行讨论。这些方面的工作正在进行中，目的是建立一个更为全面的框架，以支持并监督BEPS措施的落实。

7. 对优惠制度（包括IP制度）进行持续监督和审议的机制以及透明度框架，已获一致通过，并即将实施。
CHAPTER 1

INTRODUCTION AND BACKGROUND

8. At its June 2013 meeting, the Committee on Fiscal Affairs (CFA) of the Organisation for Economic Co-operation and Development (OECD) approved the BEPS Action Plan (OECD, 2013a) which was subsequently endorsed by the G20 Finance Ministers at their July 2013 meeting and by the G20 Leaders at their September 2013 meeting. In response to the call in the BEPS Report (OECD, 2013b) to develop “solutions to counter harmful regimes more effectively, taking into account factors such as transparency and substance”,1 Action 5 of the OECD/G20 Base Erosion and Profit Shifting (BEPS) Project commits the Forum on Harmful Tax Practices (FHTP) to the following:2

Reform 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. It will take a holistic approach to evaluate preferential tax regimes in the BEPS context. It will engage with non-OECD members on the basis of the existing framework and consider revisions or additions to the existing framework.

9. As is clear from Action 5, work in this area is not new. In 1998, the OECD published the report Harmful Tax Competition: An Emerging Global Issue (1998 Report, OECD, 1998). This report laid the foundations for the OECD’s work in the area of harmful tax practices and created the FHTP to take forward this work. It was published in response to a request by Ministers to develop measures to counter harmful tax practices with respect to geographically mobile activities, such as financial and other service activities, including the provision of intangibles. The nature of these types of activities makes it very easy to shift them from one country to another. Globalisation and technological innovation have further enhanced that mobility. The goal of the OECD’s work in the area of harmful tax practices is to secure the integrity of tax systems by addressing the issues raised by regimes that apply to mobile activities and that unfairly erode the tax bases of other countries, potentially distorting the location of capital and services. Such practices can also cause undesired shifts of part of the tax burden to less mobile tax bases, such as labour, property, and consumption, and increase administrative costs and compliance burdens on tax authorities and taxpayers.

10. The work on harmful tax practices is not intended to promote the harmonisation of income taxes or tax structures generally within or outside the OECD, nor is it about dictating to any country what should be the appropriate level of tax rates. Rather, the work is about reducing the distortionary influence of taxation on the location of mobile financial and service activities, thereby encouraging an environment in which free and fair tax competition can take place. This is essential in moving towards a “level playing field” and a continued expansion of global economic growth. Countries have long recognised that a “race to the bottom” would ultimately drive applicable tax rates on certain sources of income to zero for all countries, whether or not this is the tax policy a country wishes to pursue, and combating harmful tax practices is an interest common to OECD and non-OECD member countries alike. There are obvious limitations to the effectiveness of unilateral actions against such practices. By agreeing a set of common

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2. See Action 5 of the BEPS Action Plan – Counter harmful tax practices more effectively, taking into account transparency and substance, p. 18.
第一章

简介与背景


“优先考虑提升透明度，以改进针对有害税收实践的相关工作，包括对优惠制度相关的具体措施进行强制性的自发情报交换，同时要求任何优惠必须基于实质性活动。结合BEPS大背景，相关工作会对优惠税收制度进行全面评估，并且在现有框架下让非OECD成员参与，同时考虑对现有框架进行修改和补充。”


10. 有害税收实践的相关工作并非为了促进OECD内部或外部的所得税或税制结构的协调，也不是为了让任何国家的税率水平进行干预。相反，相关工作是为了防止税收对那些可移动的金融及服务活动的地区所带来的扭曲性影响，从而有助于形成自由和公平的税收竞争环境。这对促进公平竞争环境和全球经济的持续增长至关重要。各国很快认识到，不论一个国家是否希望实现零税率的税收政策，“竞相还低”最终将导致所有国家对某种来源的收入的适用税率降为零。而打击有害税收实践才是OECD成员国和非成员国的共同利益。单边行动对打击这些有害实践的效果显然有限，而通过达成共同认可的标准并建

[1] 参见BEPS报告第五章：应对税收侵蚀与利润转移的考虑，第33页。
[2] 参见BEPS行动计划5：考虑透明度与实质性因素，更有效地打击有害税收实践，第18页。
criteria and promoting a co-operative framework, the work not only supports the effective fiscal sovereignty of countries over the design of their tax systems but it also enhances the ability of countries to react against the harmful tax practices of others.

11. More than 15 years have passed since the publication of the 1998 Report but the underlying policy concerns expressed in the 1998 Report have not lost their relevance. In certain areas, current concerns may be less about traditional ring-fencing but instead relate to across the board corporate tax rate reductions on particular types of income (such as income from financial activities or from the provision of intangibles). The fact that preferential regimes continue to be a pressure area is highlighted by their inclusion in the BEPS Report\textsuperscript{3} and Action 5 of the BEPS Action Plan.\textsuperscript{4}

12. Under Action 5, the FHTP is to deliver the following three outputs:
    - First, finalisation of the review of member and associate country preferential regimes
    - Second, a strategy to expand participation to third countries
    - Third, consideration of revisions or additions to the existing framework.


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\textsuperscript{3} See Chapter 5 of the BEPS Report – Addressing concerns related to base erosion and profit shifting, p. 48.

\textsuperscript{4} See Action 5 of the BEPS Action Plan – Counter harmful tax practices more effectively, taking into account transparency and substance, p. 17.
立合作式框架，相关工作不仅能够支持各国在税制设计上的有效财政主权，而且还能够提高各国应对国税有害税收实践的能力。

11. 自 1998 年报告发表迄今已过去了超过 15 年，但是 1998 年报告曾强调的对于一些基本政策的关注在今天仍未失去其现实意义。在某些方面，当前的问题可能较少关注传统的“博弈策略”问题，而是更多关注对特定类型所得（如金融活动及无形资产所生产的所得）的跨境企业所得税税率减低的问题。BEPs 报告及 BEPS 行动 5 将优惠制度纳入讨论，更显示出优惠制度仍然是一个核心压力区。

12. 根据行动 5，FHTP 需要完成并发布以下成果：

- 第一，完成对成员国及合作伙伴国优惠制度的审议；
- 第二，制定扩大其他第三国家参与的战略；
- 第三，考虑对现有框架进行修订或补充。


参考文献


3 参见 BEPS 报告第五章·应对税收侵蚀与利润转移有关问题，第 48 页。
4 参见 BEPS 行动计划中的行动 5·考虑透明度与实质因素，更有效地打击有害税收实践，第 17 页。
CHAPTER 2

OVERVIEW OF THE OECD'S WORK ON HARMFUL TAX PRACTICES

14. The 1998 Report (OECD, 1998) divided the work on harmful tax practices into three areas: (i) preferential regimes in OECD member countries, (ii) tax havens and (iii) non-OECD economies. The 1998 Report set out four key factors and eight other factors to determine whether a preferential regime is potentially harmful and four key factors used to define “tax havens”. The 1998 Report was followed by four progress reports:

1. The first report, issued in June (2000 Report, OECD, 2001a), outlined the progress made and, among other things, identified 47 potentially harmful regimes within OECD member countries as well as 35 jurisdictions found to have met the tax haven criteria (in addition to the six jurisdictions meeting the criteria that had made advance commitments to eliminate harmful tax practices).

2. A second progress report was released in 2001 (OECD, 2001b). It made several important modifications to the tax haven aspect of the work. Most importantly, it provided that in determining which jurisdictions would be considered as uncooperative tax havens, commitments would be sought only with respect to the principles of effective exchange of information and transparency.

3. Between 2000 and 2004, generic guidance, or “application”, notes were developed to assist member countries in reviewing existing or future preferential regimes and in assessing whether any of the factors in the 1998 Report are present. Application notes were developed on transparency and exchange of information, ring-fencing, transfer pricing, rulings, holding companies, fund management, and shipping. The separate application notes were combined into a single Consolidated Application Note (CAN, OECD, 2004a).

4. In early 2004, the OECD issued another report (2004 Report, OECD, 2004b) which focused mainly on the progress made with respect to eliminating harmful aspects of preferential regimes in OECD member countries. In addition to the 47 regimes identified in 2000, the report included determinations on holding companies and similar preferential regimes. A number of regimes that had been introduced since the initial identification of potentially harmful regimes in 2000 were also considered but none of these regimes were found to be harmful within the meaning of the 1998 Report.

5. Finally, a report on member country preferential regimes was issued in September 2006 (OECD, 2006). Of the 47 regimes initially identified as potentially harmful in the 2000 Report, 46 were abolished, amended or found not to be harmful following further analysis. Only one

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1 Those factors and the process for determining whether a regime is a harmful preferential regime under the framework of the 1998 Report are described below under Chapter 3, Section II.

2 The four key factors to define a “tax haven” were: (i) no or nominal tax on the relevant income; (ii) lack of effective exchange of information; (iii) lack of transparency; (iv) no substantial activities. No or nominal tax is not sufficient in itself to classify a jurisdiction as a tax haven.
第二章
"OECD有害税收实践工作概述"


1. 2000年6月发表的第一份报告（以下简称“2000年报告”，OECD, 2001a）简要介绍了工作进展情况。在OECD成员国的47项潜在有害的税收制度，同时确认35个符合避税地标准的国家或地区（另有6个请求标准但已预先承诺消除有害税收实践的国家或地区）。

2. 2001年发表的第二份报告（OECD, 2001b）对有关避税地方面的做法作了一些重要修订。最重要的是，该报告规定，在判定国家或地区为不合作的避税地时，只能采用在有效信息交换和透明度所要求的方面的承诺来做出判决。


5. 最后，OECD于2006年9月发表了一份关于成员国优惠制度的报告（OECD, 2006）。在2000年报告中初步判定为潜在有害的47项制度中，6项制度被废除或经进一步分析后认为不再有害。仅有一项优惠制度被认定为实际有害。

1. 关于这些因素及判定有害优惠制度的流程，参见1998年报告第三章第2节。
2. 定义避税地的4项关键因素为：(i) 与相关收入不挂钩或只名义上挂钩；(ii) 缺乏有效信息交换；(iii) 缺乏透明度；(iv) 不存在实质性活动。不挂钩或只名义上挂钩本身不足以使某一管辖国被归类为避税地。
preferential regime was found to be actually harmful and legislation was subsequently enacted by the relevant country to abolish this regime.

15. Over time, the work relating to the tax haven aspects was increasingly carried out through the Global Forum on Taxation (Global Forum), which was created in the early 2000s to engage in a dialogue with non-OECD member countries on tax issues. The jurisdictions that had committed to the principles of effective exchange of information on request and transparency were invited to participate in the Global Forum, along with OECD member countries, to further articulate the principles of effective exchange of information on request and transparency and to ensure their implementation. In 2002, the Global Forum developed the Agreement on Exchange of Information in Tax Matters (OECD, 2002), and in 2005 it agreed standards on transparency relating to availability and reliability of information. Since 2006, the Global Forum has published annual assessments of progress in implementing the standards.

16. In September 2009, the Global Forum was renamed the Global Forum on Transparency and Exchange of Information for Tax Purposes, and was restructured to expand its membership and its mandate and to improve its governance. Subsequently, the CFA decided to restructure the bodies responsible for Exchange of Information (EOI) by creating Working Party No. 10 on Exchange of Information and Tax Compliance to take over the responsibilities of Working Party No. 8 on Tax Avoidance and Evasion, as well as the EOI matters previously addressed by the FHTP. Going forward, the work of the FHTP has therefore focused on preferential tax regimes and on defensive measures in respect of such regimes (other than any such measures related to a lack of EOI or transparency).

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3 The relevant reports can be accessed on the following webpage: www.oecd.org/tax/transparency/keypublications.htm.


5 Defensive measures related to a lack of exchange of information on request or transparency fall within the mandate of Working Party No. 10 on Exchange of Information and Tax Compliance. Action 5, however, requests the FHTP to "[r]evamp the work on harmful tax practices with a priority on improving transparency", and under this mandate, the FHTP has considered the ruling regimes in member and associate countries and developed a general best practices framework for the design and operation of ruling regimes, as described below under Chapter 5.
害，随后该相关国家即通过立法废除了该制度。

15. 随着时间的推移，越来越多有关避税地方面的目标通过全球税收论坛（全球论坛）进行。该论坛创建于21世纪初，目的是为了与OECD非成员国之间开展关于税务问题的对话。那些已承诺有效交换所需情报以及透明度原则的国家和地区自愿与OECD成员国一起参加该论坛，以进一步清晰地陈述有效情报交换和透明度原则并保障其实施开展。2002年，全球税收论坛制定了《税收情报交换确定范本》，并于2005年就与信息获取和可靠性有关的透明度标准达成一致意见。自2006年以来，该论坛每年均发布关于标准执行情况的评估报告。③

16. 2009年9月，全球税收论坛更名为税收透明度和情报交换全球论坛。为了扩大成员国范围和影响力，改善治理方式，该论坛进行了重组。④随后，CFA决定重组负责信息交换（EOI）的机构，设立了“税收情报与纳税遵从”第10工作组，取代负责“逃税与逃税”的第8工作组的职责及以前由FHTP处理的有关情报交换（EOI）方面的工作。⑤此后，FHTP的工作便集中于优惠税收制度和针对此类制度采取的防卫性措施（而不是针对缺乏EOI或透明度有关的措施）。

③相关报告详情如下网址：
www.oecd.org/tax/transparency/keypublications.htm
④关于税收透明度与情报交换全球论坛及其工作的相关信息见以下网址：
http://www.oecd.org/tax/transparency
⑤与缺乏情报交换及透明度有关的防卫性措施则属于第10工作组的职责范围。然而，行动5要求FHTP“把提高透明度列为重中之重，并修改有关税收制度的相关工作内容。”因此，FHTP已反对成员国和合作伙伴国的税收确定制度进行了审议，并制定了一套关于设计和实施确定制度的通用最佳实践模板。具体请参见第五章。
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CHAPTER 3

FRAMEWORK UNDER THE 1998 REPORT FOR DETERMINING WHETHER A REGIME IS A HARMFUL PREFERENTIAL REGIME

17. This Chapter describes the framework under the 1998 Report (OECD, 1998) for determining whether a regime is a harmful preferential regime. This involves three stages:

a) Consideration of whether a regime is within the scope of work of the FHTP and whether it is preferential;
b) Consideration of the four key factors and eight other factors set out in the 1998 Report to determine whether a preferential regime is potentially harmful;
c) Consideration of the economic effects of a regime to determine whether a potentially harmful regime is actually harmful.

I. Consideration of whether a regime is within the scope of work of the FHTP and whether it is preferential

A. Scope of work of the FHTP

18. To be within the scope of the 1998 Report, the regime must, firstly, apply to income from geographically mobile activities, such as financial and other service activities, including the provision of intangibles. Preferential regimes designed to attract investment in plant, building and equipment are outside the scope of the 1998 Report.¹

19. Secondly, the regime must relate to the taxation of the relevant income from geographically mobile activities. Hence, the work is mainly concerned with business taxation. Consumption taxes are explicitly excluded.² Business taxes may be levied at national, federal or central government level ("national taxes") and/or at sub-national, sub-federal or decentralised level ("sub-national taxes"). Sub-national taxes include taxes levied at state, regional, provincial or local level. In the course of the current review, the question arose as to whether regimes offering tax benefits at sub-national level alone ("sub-national regimes") are within the scope of the FHTP’s work. This is discussed in Chapter 6.

B. Preferential tax treatment

20. In order for a regime to be considered preferential, it must offer some form of tax preference in comparison with the general principles of taxation in the relevant country. A preference offered by a regime may take a wide range of forms, including a reduction in the tax rate or tax base or preferential terms for the payment or repayment of taxes. Even a small amount of preference is sufficient for the regime to be considered preferential. The key point is that the regime must be preferential in comparison with the general principles of taxation in the relevant country, and not in comparison with principles applied in other countries. For example, where the rate of corporate tax applied to all income in a particular

第三章

1998年报告中关于如何判定有害优惠制度的框架

17. 本章介绍1998年报告（OECD, 1998）中关于如何判定一个制度是否属于有害优惠制度的内容框架，涉及以下3个步骤:

a) 考虑某项制度是否属于FHTP的审议范围以及是否属于优惠制度;

b) 根据1998年报告中列出的4项关键因素以及8项其他因素，判定某项优惠制度是否潜在有害;

c) 结合一项制度的经济影响，判定某项潜在有害制度是否实际有害。

I. 考虑某项制度是否属于FHTP的工作范围以及是否属于优惠制度

A. FHTP的审议范围

18. 一项制度只有满足以下特征时才属于1998年报告的审议范围：首先，必须适用于具有地域流动性特征的活动（如金融和其他服务活动，包括提供无形资产）所产生的所得。为了吸引厂房、建筑和设备投资而设计的优惠制度不属于1998年报告涉及的范围。

19. 其次，该优惠制度必须与对具有地域流动性所产生所得征收的税收。因此，该工作主要涉及对企业，消费环节税收明确地被排除在工作范围之外。针对企业的税收可能在国家、联邦或中央政府层面（“国家税”）征收和/或在国家、联邦层级以下地区或地方层级征收（“地方税”）。地方税包括州、地区、省或地方层面征收的税收。在当前的审议中，出现了新的问题，即仅在地方层面提供税收优惠制度（地方优惠制度）是否属于FHTP的工作审理范围。该问题将在第六章另行讨论。

B. 税收优惠待遇

20. 要使一项制度被认定为优惠制度，该制度必须是提供了与该国普遍税收原则相比之下更优的某一种形式的税收优惠。一项制度所提供的税收优惠可能有很多种形式，包括降低税率或税基，或者在征收或退税方面提供优惠政策。即使所提供的优惠数值很小也是足够使该制度被认定为优惠制度。重点在于该制度与本国普通税收制度相比，是否更为优惠，而不是与其他国家的相关适用原则相比。

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1 参见1998年报告第8页，第6段。
2 参见1998年报告第8页，第7段。
country is 10%, the taxation of income from mobile activities at 10% is not preferential, even though it may be lower than the rate applied in other countries.

II. Consideration of the four key factors and eight other factors set out in the 1998 Report to determine whether a preferential regime is potentially harmful

21. Four key factors and eight other factors are used to determine whether a preferential regime within the scope of the FHTP's work is potentially harmful. A reference to substantial activity is already included in the eight other factors so this is not a new concept. The eight other factors generally help to spell out, in more detail, some of the key principles and assumptions that should be considered in applying the key factors themselves.

22. The four key factors are:

1. The regime imposes no or low effective tax rates on income from geographically mobile financial and other service activities.
2. The regime is ring-fenced from the domestic economy.
3. The regime lacks transparency (for example, the details of the regime or its application are not apparent, or there is inadequate regulatory supervision or financial disclosure).
4. There is no effective exchange of information with respect to the regime.

23. The eight other factors are:

a) An artificial definition of the tax base.
b) Failure to adhere to international transfer pricing principles.
c) Foreign source income exempt from residence country taxation.
d) Negotiable tax rate or tax base.
e) Existence of secrecy provisions.
f) Access to a wide network of tax treaties.
g) The regime is promoted as a tax minimisation vehicle.
h) The regime encourages operations or arrangements that are purely tax-driven and involve no substantial activities.

24. In order for a regime to be considered potentially harmful, the first key factor, "no or low effective tax rate", must apply. This is a gateway criterion. Where a regime offers tax benefits at both national and sub-national level, the question of whether the regime meets the low or no effective tax rate factor is, generally, determined based on the combined effective tax rate for both the national and sub-national levels. The reduction in national taxes alone may, in some cases, be considered sufficient to

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4 Note that in assessing transparency and effective exchange of information factors, the FHTP looks specifically at how a particular regime measures up against those factors. It does not attempt to revisit the work of the Global Forum, which has a broader and more general focus on transparency and effective exchange of information more generally. However, to the extent that the work of the Global Forum highlights certain issues with respect to a particular regime, these are taken into account in the FHTP's evaluations.
例如，某一国家适用于全部所得的企业税率为10%，对具有地域间流动性的活动所得同样征收10%的税则不属于优惠制度，即使这可能比其他国家实行的相应税率要低。

II. 根据1998年报告中的4项关键因素以及8项其他因素来判定一项优惠制度是否潜在有害

21. 四项关键因素和八项其他因素可以用于判定属于FHTP工作范围的优惠制度是否存在潜在危害。FHTP定义的判定标准早已包含在八项其他因素中，因此这并不是一个新概念。八项其他因素的引入有助于更加详细地阐述在应用关键因素考量时应考虑一些其他重要原则和假设加以综合考虑。

22. 四项关键因素包括:

1. 该制度使得对具有地域间流动性的金融及服务活动所得不征税或虽征税但实际税率极低。
2. 该制度与其所在国的国内经济之间存在“环形箱笼”。
3. 该制度缺乏透明度（例如，制度的细节或实施不明，缺乏足够的监管或财务披露）。
4. 没有针对该制度的有效情报交换。\(^3\)

23. 八项其他因素包括:

a) 人为随意确定（扩大或缩小）税基。
b) 违背国际转让定价原则。
c) 对来源于境外所得在居民国免税。
d) 税率或税基具有可协商性。
e) 存在保密条款。
f) 具有广泛的税收协定网络。
g) 被用作税收最小化有效工具。
h) 鼓励在并无实质活动的情况下那仅仅是为了税收利益而进行的运营或安排。

24. 判定一项制度是否潜在有害，首先应考虑的关键因素是“不征税或虽征税但实际税率极低”，如果某项制度在国家和地区层面均提供税收优惠，那么判定该制度是否满足“不征税或虽征税但实际税率极低”这一因素，则取决于综合国家和地方税率共同考量后的

\(^3\) 参见1998年报告第25-34页，第59-79页。
\(^4\) 请注意在评估透明度及有效情报交换时，FHTP尤其是对某一制度是否符合这些因素的描述。它并不试图重复全球论坛的工作，后者在透明度和有效情报交换方面的讨论更加广泛。但是，当全球论坛的工作成果强调与某一制度有关的一些问题时，FHTP应在评估中考虑这些问题。
determine that entities benefiting from the regime are subject to a low or no effective tax rate. The application of the no or low effective tax rate factor to regimes offering tax benefits at sub-national level alone is discussed in Chapter 6.

25. Where a regime meets the no or low effective tax rate factor, an evaluation of whether that regime is potentially harmful should be based on an overall assessment of each of the other three “key factors” and, where relevant, the eight “other factors”. Where low or zero effective taxation and one or more of the remaining factors apply, a regime will be characterised as potentially harmful.

III. Consideration of the economic effects of a regime to determine whether a potentially harmful regime is actually harmful

26. A regime that has been identified as being potentially harmful based on the above factor analysis may be considered not to be actually harmful if it does not appear to have created harmful economic effects.

27. The following three questions can be helpful in making this assessment:

- Does the tax regime shift activity from one country to the country providing the preferential tax regime, rather than generate significant new activity?
- Is the presence and level of activities in the host country commensurate with the amount of investment or income?
- Is the preferential regime the primary motivation for the location of an activity?5

28. Following consideration of its economic effects, a regime that has created harmful effects will be categorised as a harmful preferential regime.

29. Where a preferential regime has been found to be actually harmful, the relevant country is given the opportunity to abolish the regime or remove the features that create the harmful effect. Other countries may take defensive measures to counter the effects of the harmful regime, while at the same time continuing to encourage the country applying the regime to modify or remove it. It is recognised that countries’ defensive measures may also apply in situations which do not involve harmful preferential regimes as defined in the 1998 Report. The 1998 Report does not affect countries’ right to use such measures in such situations.6

5 See paragraphs 80-84 of 1998 Report for more details on each of those questions, pp. 34-35.
7 See paragraph 98 of 1998 Report which states this principle with respect to controlled foreign company (CFC) rules specifically, p. 41.
有效税率。但在有些案例中，单是国家层面的税收优惠不足以确实避免企业根据相关优惠制列未征税或虽征税但实际税率极低。"不征税或虽征税但实际税率极低"适用国家层面税收优惠制度的情况将在第六章讨论。

25. 当一项制度满足"不征税或虽征税但实际税率极低"这一因素后，评估该制度是否潜在有害则取决于其他3项关键因素以及8项其他因素（如适用）的整体综合评估。当"不征税或虽征税但实际税率极低"这一关键因素以及其他一个或多个因素满足时，该制度将被判定为潜在有害。

III. 综合一项制度的经济影响，判定一项潜在有害制度是否实际有害

26. 如果某一制度基于以上因素分析被判定为潜在有害，但并未对经济造成实际有害影响，该制度可以不被视为实际有害。

27. 以下3个问题能有助于此评估：

- 该税收制度是否导致经济活动从一个国家转移至另一个提供相关优惠的国家，而不是鼓励新建立的此类经济活动？
- 经济活动在该投资所在地的总量和水平是否与其投资额或所得额相匹配？
- 获得该优惠制度是导致选择在相关地点开展某种经济活动的主要动机吗？

28. 在考虑其经济影响之后，如果一项制度已实际产生有害影响，将被归类为有害优惠制度。

29. 当某项优惠制度被判定为实际有害，相关国家有机会废除此制度或者去除此制度产生该有害影响的特征。其他国家可以采取防止型措施抵御该有害制度的影响，同时也可采用这种制度的国家修正或废除该制度。各国的防御措施也可以用于不属于1998年报告定义的有害税收制度的情况。1998年报告不影响各国在此类情形中采取防御措施的相关权利。①

① 如果想了解关于这些问题的细节，请参见1998年报告第44-45页，第80-84页。② 参见1998年报告第40页，第96页。③ 参见1998年报告，第41页，第98页，该节特别说明此原则与受控外国企业（CFC）规则相关的部分。
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CHAPTER 4

REVAMP OF THE WORK ON HARMFUL TAX PRACTICES:
SUBSTANTIAL ACTIVITY REQUIREMENT

30. To counter harmful regimes more effectively, Action 5 of the BEPS Action Plan (OECD, 2013) requires the FHTP to revamp the work on harmful tax practices, with a priority and renewed focus on requiring substantial activity for any preferential regime and on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes. This Chapter describes the work carried out by the FHTP in the first of these two priority areas. The discussion on substantial activity in this Chapter builds on and incorporates the discussion in the 2014 Progress Report (OECD, 2014) to ensure that all discussions of the nexus approach are combined in one report. This Chapter is therefore fully self-standing and contains all the guidance on the nexus approach and its application in the context of regimes which provide a preferential tax treatment for certain income arising from qualifying Intellectual Property (“IP regimes”).

1. Introduction

31. Action 5 specifically requires substantial activity for any preferential regime. Seen in the wider context of the work on BEPS, this requirement contributes to the second pillar of the BEPS project, which is to align taxation with substance by ensuring that taxable profits can no longer be artificially shifted away from the countries where value is created. The framework set out in the 1998 Report (OECD, 1998) already contains a substantial activity requirement. This requirement is grounded in particular in the twelfth factor (i.e. the eighth other factor) set out in the 1998 Report. This factor looks at whether a regime "encourages purely tax-driven operations or arrangements" and states that "many harmful preferential tax regimes are designed in a way that allows taxpayers to derive benefits from the regime while engaging in operations that are purely tax-driven and involve no substantial activities". The 1998 Report contains limited guidance on how to apply this factor.

32. The substantial activity factor has been elevated in importance under Action 5, which mandates that this factor be elaborated in the context of BEPS. This factor will then be considered along with the four key factors when determining whether a preferential regime within the scope of the FHTP’s work is potentially harmful. The FHTP considered various approaches to applying the substantial activity factor in the context of IP regimes. There is a clear link between this work and statements in the BEPS Action Plan that current concerns in the area of harmful tax practices may be less about traditional ring-fencing and instead relate to corporate tax rate reductions on particular types of income, such as income from the provision of intangibles. All IP regimes in member countries and associate countries have been reviewed at the same time as part of the current review and none of these regimes had been reviewed as part of the earlier work. The elaborated substantial activity requirement can therefore be applied without needing to re-assess IP regimes previously reviewed. Under Action 5, the substantial activity requirement applies to all preferential regimes within scope, including preferential regimes other than IP regimes, and the FHTP has also considered this aspect.

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1 See p. 17 of the BEPS Action Plan. See also Chapter 1 above.
第四章
有害税收实践内容的重新修订：实质性活动要求

30. 为了更有效地打击有害税收制度，BEPS 行动 5 (OECD, 2013) 要求 FIHTP 重新修订有害税收实践的内容，并优先关注两大更新的焦点，即对优惠制度提出实质性活动要求以及提高透明度，其中包括对优惠制度相关裁决实施强制性自发情报交换等。本章叙述了 FIHTP 为上述这两方面内容之一——实质性活动要求所作的工作。本章第一节关于实质性活动的讨论基于 2014 年进展报告 (OECD, 2014)，以确保有关联法的所有讨论内容均合并于同一份报告当中。因此，本章是完全独立的，涵盖了所有有关联法的指引，以及如何将其应用于那些对符合条件知识产权所产生的收入提供税收优惠处理的制度（IP 优惠制度）之中。

I. 简介


32. 实质性因素在行动 5 中的重要性已被提升，授权在 BEPS 的大环境下对实质性因素加以详细阐述。当判定一项属于 FIHTP 工作范围的优惠制度是否潜在有害时，该因素将与其他四个关键因素一同考虑。FIHTP 考虑了各种方案，将实质性活动因素应用在 IP 制度之中。本工作与 BEPS 行动计划中的声明有关，该声明指出：目前有害税收的实质性活动指标较少在传统的环形箱问题上，而是在于降低某类所得（如无形资产的有关所得）的企业所得税税率。作为现行审议工作的一部分，所有成员国和合作伙伴国的 IP 制度已经接受审议，这些制度在之前的工作中都未经审议过。也因此，细化后的实质性活动要求可以予以直接应用。而无需对之前已经审议过的 IP 制度重新进行评估。根据行动 5，实质性活动的要求将适用于所有优惠制度，包括 IP 制度以外的优惠制度，对于后者，FHTP 已作出了相关考虑。

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1. 参见 BEPS 行动计划第 17 部，同时参见第一章。
II. Substantial activity requirement in the context of IP regimes

33. Regimes that provide for a tax preference on income relating to IP raise the base-eroding concerns that are the focus of the FHTP’s work. At the same time, it is recognised that IP-intensive industries are a key driver of growth and employment and that countries are free to provide tax incentives for research and development (R&D) activities, provided that they are granted according to the principles agreed by the FHTP. The approach adopted by the FHTP to requiring substantial activity is therefore not intended to recommend any particular IP regime, but it is instead designed to describe the outer limits of an IP regime that grants benefits to R&D but does not have harmful effects on other countries. The FHTP makes no recommendation on the introduction of IP regimes and jurisdictions remain free to decide whether or not to implement an IP regime. IP regimes that provide benefits to a narrower set of income, IP assets, expenditures, or taxpayers than that outlined below would also be consistent with the FHTP’s approach.

34. The FHTP considered three different approaches to requiring substantial activities in an IP regime. The first approach was a value creation approach that required taxpayers to undertake a set number of significant development activities. This approach did not have any support over the other two. The second approach was a transfer pricing approach that would allow a regime to provide benefits to all the income generated by the IP if the taxpayer had located a set level of important functions in the jurisdiction providing the regime, if the taxpayer is the legal owner of the assets giving rise to the tax benefits and uses the assets giving rise to the tax benefits, and if the taxpayer bears the economic risks of the assets giving rise to the tax benefits. A few countries supported the transfer pricing approach, but many countries raised a number of concerns with the transfer pricing approach, which is why the work of the FHTP did not focus further on this approach. The third approach was the nexus approach, which has been agreed by the FHTP and endorsed by the G20.²

35. This approach looks to whether an IP regime makes its benefits conditional on the extent of R&D activities of taxpayers receiving benefits. The approach seeks to build on the basic principle underlying R&D credits and similar “front-end” tax regimes that apply to expenditures incurred in the creation of IP. Under these front-end regimes, the expenditures and benefits are directly linked because the expenditures are used to calculate the tax benefit. The nexus approach extends this principle to apply to “back-end” tax regimes that apply to the income earned after the creation and exploitation of the IP. Thus, rather than limiting jurisdictions to IP regimes that only provide benefits directly to the expenditures incurred to create the IP, the nexus approach also permits jurisdictions to provide benefits to the income arising out of that IP, so long as there is a direct nexus between the income receiving benefits and the expenditures contributing to that income. This focus on expenditures aligns with the underlying purpose of IP regimes by ensuring that the regimes that are intended to encourage R&D activity only provide benefits to taxpayers that in fact engage in such activity.

36. Expenditures therefore act as a proxy for substantial activities. It is not the amount of expenditures that acts as a direct proxy for the amount of activities. It is instead the proportion of expenditures directly related to development activities that demonstrates real value added by the taxpayer and acts as a proxy for how much substantial activity the taxpayer undertook. The nexus approach applies a proportionate analysis to income, under which the proportion of income that may benefit from an IP regime is the same proportion as that between qualifying expenditures and overall expenditures. In other words, the nexus approach allows a regime to provide for a preferential rate on IP-related income to the extent it was generated by qualifying expenditures. The purpose of the nexus approach is to grant benefits only to income that arises from IP where the actual R&D activity was undertaken by the taxpayer itself.

² Details on the agreement are available at www.oecd.orgctp/beps-action-5-agreement-on-modified-nexus-approach-for-ip-regimes.pdf.
II. IP制度下的实质化活动要求

33. 与IP相关的所得税优惠制度导致了税基侵蚀问题，正是FHTP的工作重点。同时，FHTP也承认IP密集型产业是经济增长与就业的关键性驱动因素。各国可自主地对研发行为提供税收优惠，但必须按照FHTP认可的原则进行。因此，FHTP采取的有关实质化活动的要求的方案并不是在推荐一种特定的IP税收优惠制度，而是要设计一个外延框架，即IP制度既能对研发活动提供税收优惠，但亦没有对其他国家产生有害影响。FHTP并未就引入IP制度给予任何建议，各国仍可自由决定是否实施一项IP制度。对比以下主张，如果IP制度对更狭隘的所得，IP资产、支出或者纳税人提供税收优惠，那么这些IP制度将被视为与FHTP方案一致。

34. FHTP就IP制度的实质性活动要求考虑过三种不同方案。第一种方案为价值创造方案，即要求纳税人拥有—系列显著的开发活动。然而相比其他两个方案，此方案并未获得更多的支持。第二个方案为转让定价方案，即根据纳税人拥有IP或地区派生了重要功能。管理办法相关税收利益的资产的决定所有人，且通过使用该资产获取了税收利益，同时该资产承担经济风险，则允许转该纳税人应获取的全部所得给予税收优惠。某些国家支持对转让定价方案，但是更多国家对转让定价方案提出了种种疑问，这也是为什么FHTP没有对该方案作进一步研究。第三种方案是关联法。此方案已经得到FHTP认可并由G20背书。

35. 关联法关注的一项制度是否以纳税人从事研发活动的程度为条件而给予税收优惠。该方案旨在建立基于研发费用税收抵扣以及基于适用于创新性成果的支出的类似“前管”税收优惠制度的基本原则。在此种制度下，由于税收优惠是按支出计算的，因此支出和税收优惠直接挂钩。关联法同时将此原则延伸到“后管”税收优惠制度，适用于创新和开发利用IP之后获得的收入。因此，关联法没有限制各国和地区只能对创造IP的支出规则给予税收优惠，而只要享受优惠的收入与产生该收入的支出有直接联系，关联法也允许各国（及地区）对来自该IP的收入给予税收优惠。这个关注支出的方案与IP制度的基本理念是一致的，即确保那些旨在鼓励研发活动的税收制度只能向真正实际从事了研发活动的纳税人提供税收优惠。

36. 因此，支出即代表了实质性活动。这并非指支出的量直接代表实质性活动的量，相反，只有直接与开发活动相关的支出的比例才能反映出纳税人真正贡献的价值，并作为纳税人从事了多少实质性活动的指标。关联法适用于相对收人的比例分析，即获得IP税收优惠的收入比例与符合条件的支出占支出总额的比例相同。换句话说，关联法允许向与IP相关的收入提供优惠，以由符合条件的支出产生的收入比例为限。关联法的目的是反对来源于由纳税人自身进行的实质研发活动所取得的IP收入给予税收优惠。

This goal is achieved by defining “qualifying expenditures” in such a way that they effectively prevent mere capital contribution or expenditures for substantial R&D activity by parties other than the taxpayer from qualifying the subsequent income for benefits under an IP regime.

37. If a company only had one IP asset and had itself incurred all of the expenditures to develop that asset, the nexus approach would simply allow all of the income from that IP asset to qualify for benefits. Once a company’s business model becomes more complicated, however, the nexus approach also becomes more complicated, because the approach must determine a nexus between multiple strands of income and expenditure, only some of which may be qualifying expenditures. In order to address this complexity, the nexus approach apportions income according to a ratio of expenditures. The nexus approach determines what income may receive tax benefits by applying the following calculation:

\[
\text{Qualifying expenditures incurred} \quad \frac{\text{Qualifying expenditures incurred}}{\text{Overall expenditures incurred}} \times \frac{\text{Income receiving tax benefits}}{\text{Income receiving from IP asset}}
\]

38. The ratio in this calculation (“the nexus ratio”) only includes qualifying and overall expenditures incurred by the entity. It therefore does not consider all expenditures ever incurred in the development of the IP asset. As will be explained in the following discussions of qualifying expenditures and overall expenditures, a qualifying taxpayer that did not acquire the IP asset or outsource the development of that IP asset to a related party would therefore have a ratio of 100%, which would apply to the entity’s overall income from the IP asset. This in turn means that the nexus approach was not designed to disadvantage arrangements where different entities are engaged in activities contributing to the development of IP assets.

39. Where the amount of income receiving benefits under an IP regime does not exceed the amount determined by the nexus approach, the regime has met the substantial activity requirement. The remainder of this section provides further guidance on the application of the nexus approach and the above calculation.

A. Qualifying taxpayers

40. Qualifying taxpayers would include resident companies, domestic Permanent Establishments (PES) of foreign companies, and foreign PEs of resident companies that are subject to tax in the jurisdiction providing benefits. The expenditures incurred by a PE cannot qualify income earned by the head office as qualifying income if the PE is not operating at the time that income is earned.

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3 For example, Company A, Company B, and Company C together develop IP Asset D in Year 1. Company A is in a jurisdiction with an IP regime. Company A contributes 30% of the R&D and 3 000 of the R&D funding, Company B contributes 30% of the R&D and 3 000 of the R&D funding, and Company C contributes 40% of the R&D and 4 000 of the R&D funding. IP Asset D produces 100 000 of IP income in Year 2, and 30 000 of this IP income is allocated to Company A. If Company A did not pay to outsource to a related company or to acquire any IP assets, then the nexus ratio that would apply to that 30 000 before the up-lift is 3 000/3 000 (or 100%). The entire 30 000 would therefore qualify for the IP regime in Company A’s jurisdiction.

4 Jurisdictions with IP regimes should ensure that the same IP asset is not allocated to both the head office and the foreign PE (e.g. because they apply the Authorised OECD Approach (AOA)).
要达到这个目的，就要对所谓“符合条件的支出”做出定义。达到有效防止纳税人仅通过出
资，或支付给其他人承担实质性活动而其之后产生的收入取得IP税收优惠。

37. 如果某公司只有一项IP资产，该开发该资产的所有费用皆由公司自身发生，那么关联
法将简单地允许由该IP产生的所有收入享受税收优惠。当公司的业务模式复杂时，关联
以免用也必须考虑复杂，因为关联法必须决定多种收入和支出之间的关系，可能只有
某部分是符合条件的支出。为了解决此复杂性，关联法按照支出的比例对收入进行划分。
关联法通过以下计算公式确定可以获取税收优惠的收入。

\[
\text{开发IP所发生的} \times \frac{\text{IP资产产生的}}{\text{净收入总额}} - \text{符合条件的支出总额} = \text{可享受税收优惠的收入}
\]

38. 上述公式中的比例（“关联度比例”）仅包括企业发生的符合条件的支出和企业支出总
额，因此并未考虑企业开发该IP资产时所有曾经发生的支出。如下文将对关于符合条
件的支出及支出总额的扩大解释所指出的，对于并未经外购IP也没有外购委托其关联方
研发IP的符合条件的纳税人，则上述公式中的比例为100%，即与IP资产所产生的全部
净收入总额（原文为Over all income，根据正文第54段，这里的overall income指广义收
入减去相应支出后的净额，为和后文的收入总额以示区别，译为净收入总额）即可享受优惠。这
也表明关联法在不会排斥不同企业共同参与研发IP资产的情形。

39. 如果取得税收优惠的收入不超过关联法确定的数额，则该IP制度已经满足了实质性
活动要求。本章余下部分将就如何运用关联法及以上计算方法提供进一步指引。

A. 符合条件的纳税人

40. 符合条件的纳税人包括居民企业、外国公司在本国的常设机构，以及在给予税收优
惠国家负有税收义务的居民企业在中国的常设机构。如果一个常设机构在其总公司取得符
合条件的收入时发生的运营活动，则该常设机构所发生的支出不得按计算其总公司符合
条件的收入（按OECD转让定价指引第9条，A0A方法主要把每个常设机构视同独立运
作，按独立交易原则分配集团利润）。

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3 假设A公司、B公司和C公司在第一年共同研发IP资产D，A公司应按自己提供IP优惠制
度的国家。A公司投资30%在研发活动中，且投资总计2,000研发资金，B公司投资30%在
研发活动中，且投资总计3,000的研发资金，C公司投资40%在研发活动中，且投资总计
4,000的研发资金。第二年，IP资产D产生了100,000的IP收入，其中分配给A公司的收入
为30,000。假定A公司没有支付任何与研发以外的费用研发费用，也没有缴付外购的IP资
产。对于30,000这部分收入而言，在上述基础上其关联度比例为3,000/3,000*100%=100%，即
全部30,000所得都在A公司所在地构成符合IP制度要求的收入。

4 实行IP制度的国家应确保没有同时将IP资产分配到总公司和其外国常设机构（例如：由于
它的应用了Authorised OECD Approach “A0A”方法）。
B. **IP assets**

41. Under the nexus approach as contemplated, the only IP assets that could qualify for tax benefits under an IP regime are patents and other IP assets that are functionally equivalent to patents if those IP assets are both legally protected and subject to similar approval and registration processes, where such processes are relevant. IP assets that are functionally equivalent to patents are (i) patents defined broadly, (ii) copyrighted software, and (iii) in certain circumstances set out below, other IP assets that are non-obvious, useful, and novel.

42. For purposes of the first category of functionally equivalent assets, patents that qualify under the nexus approach are not just patents in a narrow sense of the word but also utility models, IP assets that grant protection to plants and genetic material, orphan drug designations, and extensions of patent protection. Utility models, irrespective of their designation under domestic law (e.g., also referred to as "petty patents", "innovation patents", and "short term patents"), and including similar IP protections under domestic law are generally provided to incremental inventions, have a less rigorous patent process, and provide patent protection for a shorter time period. IP assets that grant protection to plants and genetic material would include plant breeders' rights, which grant exclusive control over new varieties of plants. Orphan drug designations are provided by government agencies for certain pharmaceuticals that are developed to treat rare diseases or diseases that are not likely to lead to significant profits and these designations grant exclusive rights to the innovations. Extensions of patent protection such as supplementary protection certificates extend the exclusive right of certain patents for pharmaceuticals and plant protection products, and they recognize that the time needed to research and develop these IP assets is generally longer than the time needed to research and develop other IP assets and therefore justifies that the protected life of the asset should extend past the duration of the patent. Therefore, IP assets in the first category cover patents in the broad sense, including the extension of patent protection.

43. Copyrighted software\(^5\) shares the fundamental characteristics of patents, since it is novel, non-obvious, and useful. It arises from the type of innovation and R&D that IP regimes are typically designed to encourage, and taxpayers in the software industry are unlikely to outsource the development of their core software to unrelated parties. Copyrighted software therefore is the second category of functionally equivalent assets, but other copyrighted assets are not included in the definition of functionally equivalent IP assets because they do not arise out of the same type of R&D activities as software.

44. Qualifying IP assets can also include IP assets that do not fall into either of the first two categories but that share features of patents (i.e., are non-obvious, useful, and novel), are substantially similar to the IP assets in the first two categories, and are certified as such in a transparent certification process by a competent government agency that is independent from the tax administration. Such a certification process must also provide for full transparency on the types of assets covered. The only taxpayers that may qualify for such benefits are those that have no more than EUR 50 million (or a near equivalent amount in domestic currency) in global group-wide turnover and that do not themselves earn more than EUR 7.5 million per year (or a near equivalent amount in domestic currency) in gross

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\(^5\) For this purpose, legal protection includes exclusive rights to use the IP asset, legal remedies against infringement, trade secret law, and contractual and criminal protections against use of the IP asset or unauthorized disclosure of information related to the IP asset.

\(^6\) Although some jurisdictions provide patent protection for software, not all jurisdictions do so. Many taxpayers that produce software must therefore copyright it instead of relying on patent protection. Including copyrighted software in the definition of functionally equivalent IP assets also ensures that the different treatment of software under the patent laws of different jurisdictions does not affect whether or not income from software could benefit from IP regimes.
B.  

IP资产

41. 根据上述关联法，符合税收优惠资格的IP资产只包含专利以及与专利功能等同、受法律保护且经过相同的审批和注册流程（如适用）的其他IP资产。与专利功能等同的IP资产包括：（i）广义上的专利，（ii）受版权保护的软件，（iii）在下述特定情况下也包括那些明显、实用、新颖的IP资产。

42. 就关联法下的与专利功能等同的财产的第一类而言，专利不仅包括狭义上的专利，也包括“实用新型”、“以保护植物和遗传物质的IP资产”、“专利法中的药物专利”以及“专利保护的领域”。不论其国国内法中对应的名称（如“小专利”、“专利保护”、“短专利”），通常用于改良型发明专利，其申请程序相对宽松，专利保护期也较短。“用于保护植物和遗传物质的IP资产”包括植物品种改良型植物的授予权专利。“专利法中的药物专利”是政府机关在专利的用于治疗罕见疾病或治疗其他严重疾病药物的开发，政府对这类专利的授予权赋予特殊专利。专利保护的领域”包括例如延长某些药物的专利和植物保护产品的专利保护期的补充保护证书，因为研发此类IP资产通常涉及其他IP资产需要耗费更长的时间，此类资产受保护的时间理应与专利保护期相差。因此，第一类IP资产涵盖广义上的专利，包括专利保护的领域。

43. 受版权保护的软件与专利的基本特征相同——新颖、明显、实用。它们出乎意料地散布的软件的创新和研发，而从事软件行业的纳税人很少将核心软件的研发外包给非关联方。因此，受版权保护的软件属于第二类功能等同资产，但其他受版权保护的非软件资产则不属于所谓的“和专利功能等同的IP资产”，因为研发这些非软件资产的活动与研发软件大不相同。

44. 符合条件的IP资产还可以包括不属于第一类和第二类但具有专利特征（即：明显、实用、新颖）的资产。这些资产与第一类和第二类资产非常相似，且由具有税收优惠资格的关联方进行研发，只要研发的IP资产是符合规定的。该认证程序必须完全透明地表明所涵盖的资产类型。唯一能享受这些税收优惠待遇的纳税人，必须符合两个条件：一是纳税人所属全球集团五年内平均每年营业额不超过5,000万欧元（或其国内等值货币）。

5. 就这一目的而言，受保护专利包括：IP资产的独家权利、对抗侵权行为的法律救济手段、商业秘密法、对使用IP资产未授权披露IP资产相同信息的合同和司法保护措施。

6. 如下表所列，这些保护为软件提供专利保护。但是各国国家和地区标准不同。因此许多生产软件的纳税人必须执行申请注册，而不是仅仅依赖专利保护。受保护软件的软件涵盖在功能等同的IP资产中，因此可能不同国家和地区的专利对软件的不同处理不会影响来自软件的收入是否享受IP制度下的税收优惠。
revenues from all IP assets, using a five-year average for both calculations. Jurisdictions that provide benefits to income from the third category of IP assets should notify the FHTP that they provide such benefits and should provide information on the applicable legal and administrative framework. They should provide information to the FHTP on the number of each type of IP asset included in the third category, the number of taxpayers benefiting from the third category, and the aggregate amount of IP income arising from the third category of IP assets that qualifies for the IP regime. Jurisdictions would also need to spontaneously exchange information on taxpayers benefiting from the third category of IP assets, using the framework set out in Chapter 5. The FHTP will proceed to a review of the third category of IP assets no later than 2020.

45. The nexus approach focuses on establishing a nexus between expenditures, these IP assets, and income. Under the nexus approach, marketing-related IP assets such as trademarks can never qualify for tax benefits under an IP regime.

C. Qualifying expenditures

46. Qualifying expenditures must have been incurred by a qualifying taxpayer, and they must be directly connected to the IP asset. Jurisdictions will provide their own definitions of qualifying expenditures, and such definitions must ensure that qualifying expenditures only include expenditures that are incurred for the purpose of actual R&D activities. They would include the types of expenditures that currently qualify for R&D credits under the tax laws of multiple jurisdictions. They would not include interest payments, building costs, acquisition costs, or any costs that could not be directly linked to a specific IP asset. However, where expenditures for general and speculative R&D cannot be included in the qualifying expenditures of a specific IP asset to which they have a direct link, they could be divided pro rata across IP assets or products. Qualifying expenditures will be included in the nexus calculation at the time they are incurred, regardless of their treatment for accounting or other tax purposes. In other words, expenditures that are not fully deductible in the year in which they were incurred because they are capitalised will still be included in full in the nexus ratio starting in the year in which they were incurred. This timing rule only applies for purposes of the nexus ratio, and it is not intended to change any timing rules in jurisdictions’ domestic tax rules.

7 The determination of whether a taxpayer meets these two requirements should be made on an annual basis, using a five-year average that changes every year. The reference to EUR 50 million in global group-wide turnover does not mean that these requirements only apply to groups. Stand-alone entities that want to qualify for benefits using the third category of IP assets must also meet these two requirements.

8 The information on the use of the third category of IP assets would then be included in the summary box 7 of the template set out in Annex C.

9 IP regimes that must be assessed under the nexus approach include regimes that grant benefits to any IP assets. Regimes that grant benefits to IP assets that are not qualifying IP assets for purposes of the nexus approach would be found not to meet the substantial activity requirement.

10 Qualifying expenditures could therefore include salary and wages, direct costs, overhead costs directly associated with R&D facilities, and cost of supplies so long as all of these costs arise out of activities undertaken to advance the understanding of scientific relations or technologies, address known scientific or technological obstacles, or otherwise increase knowledge or develop new applications.

11 Building costs or other non-separable capital costs would not be included because it would be impossible to establish a direct link between the cost of an entire building and different IP assets created in that building.
二是纳税人本身五年内平均每年度所有IP收入不得超过750万欧元（或其等值货币）。对第三类IP资产收入提供税收优惠的国家和地区须通知FHTP其提供的税收优惠以及适用的法律及行政管理框架下的相关信息。这些国家和地区须向FHTP提供的信息包括：第三类IP资产中每一类资产的数量，享受第三类IP资产税收优惠的纳税人数量，以及享受第三类IP资产产生的税收优惠的净收入总额。各国及地区还须按照第四章所列的框架，就纳税人享受第三类IP资产税收优惠作自备信息交换。FHTP将在2020年之前对第三类IP资产进行审核。

45. 关联法着眼于在支出、IP资产和收入之间建立关联度。在关联法下，与市场营销相关的IP资产，如商标等不可能符合IP制度税收优惠的条件。

### C. 符合条件的支出

46. 符合条件的支出必须由符合条件的纳税人自身发生，且必须直接与IP资产相关。各国将各自对符合条件的支出做出定义，而该定义必须确保符合条件的支出具有实际研发活动所发生的支出。符合条件的支出应包括目前在多个国家的税法下满足研发费用扣除条件的支出。但不包括利息支出、建筑成本、购置成本或其他任何不能直接与特定IP资产相联系的支出。然而，当上述支出或其中的某一项支出不能计入与某个特定IP资产有直接联系的条件下时，这些支出可以按比例分配到各个IP或产品中。不论其在会计或税务上如何处理，符合条件的支出应在发生时计入关联度比例计算中。

47. 在计算“符合条件的支出”时，各国可以允许纳税人对符合条件的支出使用30%的上浮调整。上浮调整可能增加符合条件的支出，但仅以纳税人不符合条件支出额为限。

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7 纳税人是否满足这两项条件，需计算五年平均数进行判断。集团全年营业额3,000万欧元的规定并不包含这两项条件。各国使用第三类IP资产的最低标准是否完全符合这两项条件。

8 使用符合第三类IP资产的税收优惠需详细列举在附录C第7条文件中。

9 在关联法下，需要进行评估的IP制度包括任何给予IP资产税收优惠的制度。对不符合条件的IP资产给予税收优惠的制度将被认定为不符合实质性要求。

10 符合条件的支出应直接与IP资产及相关活动的直接成本相关，包括研发活动直接相关的间接成本以及消耗费用。这些费用是为了加深对科学知识的理解，发展技术所需的费用，或者提升服务水平和开发新技术和应用技术而产生的。

11 建筑成本和其他不可单独分摊的资本成本不属符合条件的符合条件支出，这是因为建筑成本与在这一建筑中创造的各IP资产不可能有直接关联。
47. When calculating qualifying expenditures, jurisdictions may permit taxpayers to apply a 30% "up-lift" to expenditures that are included in qualifying expenditures. This up-lift may increase qualifying expenditures but only to the extent that the taxpayer has non-qualifying expenditures. In other words, the increased amount of qualifying expenditures may not exceed the taxpayer's overall expenditures. This is illustrated in the examples below:

- Example 1: The taxpayer itself incurred qualifying expenditures of 100, it incurred acquisition costs of 10, and it paid 40 for the R&D expenditures of a related party. The initial amount of qualifying expenditures is therefore 100, and the maximum up-lift will be 30 (i.e. 100 x 30%). The taxpayer can only increase its qualifying expenditures to 130 if its overall expenditures are equal to or greater than 130. Overall expenditures in this example are equal to 150, so the up-lift can increase qualifying expenditures to 130. IP income will therefore be multiplied by 130/150 (or 86.7%).

- Example 2: The taxpayer itself incurred qualifying expenditures of 100, it incurred acquisition costs of 5, and it paid 20 for the R&D expenditures of a related party. The maximum up-lift would again increase qualifying expenditures to 130, but the taxpayer in this example only has 125 of overall expenditures. The up-lift can therefore only increase qualifying expenditures to 125, and IP income will therefore be multiplied by 125/125 (or 100%).

48. The purpose of the up-lift is to ensure that the nexus approach does not penalise taxpayers excessively for acquiring IP or outsourcing R&D activities to related parties. The up-lift still ensures that taxpayers only receive benefits if they themselves undertook R&D activities, but it acknowledges that taxpayers that acquired IP or outsourced a portion of the R&D to a related party may themselves be responsible for much of the value creation that contributed to IP income.

D. Overall expenditures

49. Overall expenditures should be defined in such a way that, if the qualifying taxpayer incurred all relevant expenditures itself, the ratio would allow 100% of the income from the IP asset to benefit from the preferential regime. This means that overall expenditures must be the sum of all expenditures that would count as qualifying expenditures if they were undertaken by the taxpayer itself. This in turn means that any expenditures that would not be included in qualifying expenditures even if incurred by the taxpayer itself (e.g. interest payments, building costs, and other costs that do not represent actual R&D activities) cannot be included in overall expenditures and hence do not affect the amount of income that may benefit from an IP regime. IP acquisition costs are an exception, since they are included in overall expenditures and not in qualifying expenditures. Their exclusion is consistent with the principle of what is included in overall expenditures, however, because they are a proxy for expenditures incurred by a non-qualifying taxpayer. Overall expenditures therefore include all qualifying expenditures, acquisition costs, and expenditures for outsourcing that do not count as qualifying expenditures.

50. The nexus approach therefore does not include all expenditures ever incurred in the development of an IP asset in overall expenditures. Instead, it only adds two things to qualifying expenditures: expenditures for related-party outsourcing and acquisition costs. The nexus ratio can therefore be written as:

\[
\frac{a + b}{a + b + c + d}
\]

See Sections II.F and II.G of this Chapter for an explanation of why expenditures for related-party outsourcing and acquisition costs are included in overall expenditures and not in qualifying expenditures.
换言之，符合条件的支出加计后不可以超过纳税人的支出总额。详见以下示例：

- 例 1：纳税人自己发生了 100 元的符合条件的支出，同时又发生了 10 元的购置成本，并且向一家关联企业支付了 40 元的研发支出。因此，符合条件的支出最初应当为 100 元，最多可加计 30 元（即 100 x 30%）。然而，纳税人只有在支出总额大于或等于 130 元时，方可将其符合条件的支出加计至 130 元。在这个示例中，总支出为 150 元，所以符合条件的支出可以加计至 130 元。因此，IP 收入将乘以 130/150（或 86.7%）。

- 例 2：纳税人自己发生了 100 元的符合条件支出，同时又发生了 5 元的购置成本，并且向一家关联企业支付了 20 元的研发支出。同样地，符合条件的支出可以上浮至 130 元。不同的是，这个示例中纳税人只有 125 元的支出总额，因此符合条件支出只能加计至 125 元。IP 收入将乘以 125/125（或 100%）。

48. 上浮调整的目的是要确保关联方不会过度惩罚纳税人外购 IP 或者向关联方外包研发活动的行为。上浮调整仍然能确保只有当纳税人自身承担研发活动时才能享受税收优惠，但同时也承认外购 IP 或向关联方外包部分研发活动的纳税人也可能创造了很多最后能取得 IP 收入的价值贡献。

D. 支出总额

49. 支出总额的定义应该沿用这个方法：如果所有的相关支出都是由符合条件的纳税人自身发生，则上浮关联度比例允许与 IP 相关的 100% 收入都会享受税收优惠。也就是说如果这些支出是纳税人自身发生的，则支出总额仍然是符合条件的支出总和。也就是说，由纳税人自己发生和不符合条件的支出（例如利息支出、建筑成本以及其他不属于实际研发活动的成本），不会被包含在支出总额中，因此不会影响 IP 制度下可享受税收优惠的收入额。而 IP 购置成本是个例外，它们被包含在支出总额中，但在符合条件的支出之中。这个例外与支出金额包含的内容的原则是一致的，因为它们代表着不符合条件的纳税人发生的支出。因此，支出总额包括所有符合条件支出、购置成本和不属于符合条件支出的外包支出。

50. 因此，关联法并不包括所有在研发 IP 资产过程中曾经发生的支出总额。相反，它仅在符合条件的支出上加上外包给关联方的支出和购置成本。

$$\frac{a+b}{a+b+c+d}$$

51. 在上述关联度比例中，a 代表纳税人自身发生的研发支出，b 代表外包给非关联第三方的支出，c 代表外购成本，d 代表外包给关联方的支出。这也意味着，只有纳税人将研发活动外包给关联方或有外购 IP 的行为时才会令此比例低于 100%。不成功的研发支出通常不包括在关联度比例的计算中。这与就收人给予税收优惠的 IP 制度的目的是一致的，因为从
51. In this version of the nexus ratio, a represents R&D expenditures incurred by the taxpayer itself, b represents expenditures for unrelated-party outsourcing, c represents acquisition costs, and d represents expenditures for related-party outsourcing. This means that the only way that the ratio can be decreased from 100% is if the taxpayer outsourced the R&D to unrelated parties or acquired the R&D. Expenditures for unsuccessful R&D will typically not be included in the nexus ratio, which is consistent with the purposes of IP regimes that grant benefits to income, since unsuccessful R&D by definition does not generate any income. If, however, R&D expenditures were incurred by the taxpayer or outsourced to unrelated parties in connection with a larger R&D project that produced an income-generating IP asset, then an IP regime may also include all such R&D expenditures in qualifying expenditures and not just those R&D expenditures that, with the benefit of hindsight, directly contributed to IP income. These expenditures could be treated the same as general or speculative R&D and either divided pro rata across IP assets or included in qualifying expenditures if a direct link between the IP asset and the expenditures could be established. As in the context of qualifying expenditures, overall expenditures will be included in the nexus calculation at the time they are incurred, regardless of their treatment for accounting or other tax purposes. This timing rule only applies for purposes of the nexus ratio, and it is not intended to change any timing rules in jurisdictions' tax rules insofar as they apply for other purposes, including the computation of overall income derived from the IP asset.\textsuperscript{13}

52. Often, overall expenditures will be incurred prior to the production of income that could qualify for benefits under the IP regime. The nexus approach is an additive approach, and the calculation requires both that "qualifying expenditures" include all qualifying expenditures incurred by the taxpayer over the life of the IP asset and that "overall expenditures" include all overall expenditures incurred over the life of the IP asset. These numbers will therefore increase every time a taxpayer incurs expenditure that would qualify for either category. The proportion of the cumulative numbers will then determine the percentage to be applied to overall income earned each year.

\textbf{E. Overall income}

53. Jurisdictions will define "overall income" consistent with their domestic laws on income definition after the application of transfer pricing rules. The definition that they choose should comply with the following principles:

\textit{Income benefiting from the regime should be proportionate}:

54. Overall income should be defined in such a way that the income that benefits from the regime is not disproportionately high given the percentage of qualifying expenditures undertaken by qualifying taxpayers. This means that overall income should not be defined as the gross income from the IP asset, since such a definition could allow 100% of the net income of qualifying taxpayers to benefit even when those taxpayers had not incurred 100% of qualifying expenditures. Overall income should instead be calculated by subtracting IP expenditures allocable to IP income and incurred in the year from gross IP income earned in the year.\textsuperscript{14}

\textsuperscript{13} See Section II.E below.

\textsuperscript{14} IP expenditures will be calculated by applying the ordinary domestic tax law provisions (i.e. not using specific provisions in IP regimes). Jurisdictions may limit expenditures allocable to IP income to ensure that the use of such expenditures is consistent with domestic legislation. Jurisdictions should also use any tax losses associated with the IP income in a manner that is consistent with domestic legislation and that does not allow the diversion of those losses against income that is taxed at the ordinary rate.
字面定义看，不成功的研发也不会带来任何收入。然而，如果纳税人或纳税人在外国非关联方面的较大的研发项目上发生研发支出，而该项目创造了可以带来收入的IP资产，除了那些直接产生IP收入的研发支出外，IP制度还可将这些研发支出也包括在符合条件的支出内。这些支出可以和一般或根据理念或准则的研发同样处理，即：可以按IP资产比例分摊。或者，如果这些支出可以和某一项IP资产建立直接关联或也可以直接计入（某项IP资产的）符合条件的支出。就符合条件的支出而言，支出总额会在发生时纳入关联度比例计算，不论其在会计或税务上如何处理。这样的时间核算原则仅适用于关联度比例的计算，而不影响各国国内法就其他问题规定的时间核算原则，包括对IP资产产生的净收入总额的计算。[11]

52. 通常来说，支出总额会在取得可以享受IP税收优惠的收入之前发生。关联法是一种附加方法，而其计算需要“符合条件支出”（包括纳税人同IP资产的存续周期内发生的所有符合条件支出）和“支出总额”（包括纳税人同IP资产的存续周期内发生的所有支出总额）。因此，当纳税人发生符合条件支出或支出总额的其中一项时，数字会相应增加。而这两个累加数字的将决定每年净收入总额中（可以享受IP税收优惠）的比例。

E. 净收入总额（Overall income）

53. 各国将按照国内法和转让定价规则对“净收入总额”进行定义，但应遵循以下原则：

享受税收优惠的收入应以适当比例为准。

54. 净收入总额的定义应确保享受税收优惠的收入。相对于符合条件的纳税人产生的符合条件支出的百分比。不超过不小于比例地高。这也意味着，净收入总额并不是应支出产生的所有收入总额，否则，这样会使符合也条件的纳税人即使没有发生100%的符合条件的支出，其100%的净收入仍能享受税收优惠。净收入总额指从IP相关的收入总额中减去当年发生的与IP收入相关的支出。[14]

净收入总额应限于与IP相关的收入：

55. 净收入总额应只包含IP资产产生的收入，可以包括特许权使用费、财产收益、转让IP资产的其他收入、销售收入的IP产品的收入，以及取得使用IP资产直接相关的程序的收入。


[14] IP支出将通过税法规定（即不使用IP优惠制度的具体规定）来计算。各国在IP管理上应考虑同对IP资产的存续周期内应支出的限制，以确保与国内法规定保持一致。各国在IP管理上应考虑同对IP资产的存续周期内应支出的限制，以确保与国内法规定保持一致。
Overall income should be limited to IP income:

55. Overall income should only include income that is derived from the IP asset. This may include royalties, capital gains and other income from the sale of an IP asset, and embedded IP income from the sale of products and the use of processes directly related to the IP asset. Jurisdictions that choose to grant benefits to embedded IP income must implement a consistent and coherent method for separating income unrelated to IP (e.g., marketing and manufacturing returns) from the income arising from IP. One method that would achieve this outcome could, for example, be based on transfer pricing principles.\(^\text{15}\)

F. Outsourcing

56. The nexus approach is intended to ensure that, in order for a significant proportion of IP income to qualify for benefits, a significant proportion of the actual R&D activities must have been undertaken by the qualifying taxpayer itself. The nexus approach would allow all qualifying expenditures for activities undertaken by unrelated parties (whether or not they were within the jurisdiction) to qualify, while all expenditures for activities undertaken by related parties—again, whether or not they were within the jurisdiction—would not count as qualifying expenditures.\(^\text{16}\)

57. As a matter of business practice, unlimited outsourcing to unrelated parties should not provide many opportunities for taxpayers to receive benefits without themselves engaging in substantial activities because, while a company may outsource the full spectrum of R&D activities to a related party, the same is typically not true of an unrelated party. Since the vast majority of the value of an IP asset rests in both the R&D undertaken to create it and the information necessary to undertake such R&D, it is unlikely that a company will outsource the fundamental value-creating activities to an unrelated party, regardless of where that unrelated party is located.\(^\text{17}\) Allowing only expenditures incurred by unrelated parties to be treated as qualifying expenditures thus achieves the goal of the nexus approach to only grant tax benefits to income arising from the substantive R&D activities in which the taxpayer itself engaged that contributed to the income. Jurisdictions could narrow the definition of unrelated parties to include only universities, hospitals, R&D centres and non-profit entities that were unrelated to the qualifying taxpayer. Where a payment is made through a related party to an unrelated party without any margin, the payment will be included in qualifying expenditures.

58. Jurisdictions could also only permit unrelated outsourcing up to a certain percentage or proportion (while still excluding outsourcing to related parties from the definition of qualifying expenditures). As explained above, business realities typically mean that a company will not outsource more than an insubstantial amount of R&D activities to an unrelated party, so both a prohibition on outsourcing to any related parties and that same prohibition combined with a cap that prohibits outsourcing to unrelated parties beyond an insubstantial amount should have the equivalent effect of limiting qualifying expenditures to those expenditures incurred to support fundamental R&D activities by the taxpayer.

\(^{15}\) Such a method would need to be based on transfer pricing principles as updated through the report on Actions 8-10 of the BEPS Action Plan.

\(^{16}\) Jurisdictions that are not member states of the European Union could modify this limitation to include all qualifying expenditures for activities undertaken by both unrelated parties and resident related parties in the definition of qualifying expenditures.

\(^{17}\) Outsourcing is different from the buying in of components from a party that owns the IP to those components, and this reference to the likelihood of outsourcing to unrelated parties does not refer to the likelihood of buying components from unrelated parties.
如果一国要对基于IP收入给予税收优惠，则其必须以一致和连贯的方法将那些与IP无关的收入（例如市场营销和生产回报）剥离开来。比如转让定价就是其中一种可以达到这种结果的方法。

F. 外包

56. 关联法的目的旨在确保符合条件的纳税人自身必须进行一些显著比例的的研发活动，方可在显著比例的IP收入享受税收优惠。关联法允许由非关联方进行的活动所产生的所有符合条件支出为符合条件支出（不论非关联方是否在该税收管辖区）。但由关联方进行的活动所产生的支出——再次重申，不论关联方是否在该税收管辖区——不能作为符合条件的支出。

57. 从一般商业角度来看，如果纳税人无限地将研发活动外包给非关联方自身不从事实质性活动，这将可能为纳税人带来很多益处。因为公司不可能将所有研发活动外包给关联方，但不太可能将全部研发活动外包给非关联方。由于IP的绝大部分价值来自于创造该资产的研发活动本身以及进行这些研发活动所需要的信息，不论非关联方位于何处。

企业不可能将关键的价值创造活动外包给非关联方。仅仅非关联方发生的研发支出作为符合条件的支出也因此正符合关联法的定义。即纳税人必须通过进行实质性研发活动产生相关收入，才能就该收入享受税收优惠。各国同时可以缩小非关联方定义的范围，比如与符合条件的纳税人相关的大学、医院、研发中心以及非营利机构。若企业通过关联方向非关联方支付费用，而在此过程中没有任何加成，则该费用也可作为符合条件的支出。

58. 各国也可对企业外包给非关联方的活动设定一个比例上限（同时，外包给关联方的活动支出也将计入符合条件的支出）。如上所述，典型的商业现实是企业不会外包大量实质性开发活动给非关联方。因此，对这三种做法，在上述外包给关联方或者对外包给非关联方的活动设定一个上限，对于将符合条件的支出限于纳税人自己的重要研发活动发生的相关支出有着相同的效果。

G. 对于外购IP的处理

59. 关联法有关外购IP的税务处理的基本原则是，只有外购IP后发生的改进IP的支出才可作为符合条件支出。为达到这一原则，如上所述，关联法将外购成本排除在符合条件支出之外，只允许外购IP后发生的支出作为符合条件的支出。然而，外购成本将会被纳入收入总额。

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15. 该方法需根据转让定价原则，而相关原则已在引用中以第8-10的报告修正。

16. 联合国成员国（或地区）可以修正该限制，可将非关联方和居民关联方开展的活动的所有符合条件的支出，包含在符合条件支出的定义中。

17. 外购不用于自用IP的所有一方购买税。这里提及的自非关联方购买税的可性并不指从非关联方购买税的可性。
G. Treatment of acquired IP

59. The basic principle underlying the treatment of acquired IP by the nexus approach is that only the expenditures incurred for improving the IP asset after it was acquired should be treated as qualifying expenditures. In order to achieve this, the nexus approach would exclude acquisition costs from the definition of qualifying expenditures, as mentioned above, and only allow expenditures incurred after acquisition to be treated as qualifying expenditures. Acquisition costs could, however, be included in overall expenditures. Acquisition costs would include, among other expenditures, those that were incurred to obtain rights to research. Acquisition costs (or, in the case of licensing, royalties or license fees) are a proxy for overall expenditures incurred prior to acquisition. Therefore, no expenditures incurred by any party prior to acquisition will be included in either qualifying expenditures or overall expenditures. In the context of related party acquisitions, the arm’s length price must be used to determine acquisition costs. Given that taxpayers may have an incentive to undervalue transfers between related parties into IP regimes, any related party acquisitions will require that taxpayers prepare documentation substantiating the arm’s length price, including documentation on the overall expenditures that the related party transferor incurred. Acquisitions include any transfer of rights regardless of whether a payment was actually made.

II. Tracking of income and expenditures

60. Since the nexus approach depends on there being a nexus between expenditures and income, it requires jurisdictions wishing to introduce an IP regime to mandate that taxpayers that want to benefit from an IP regime must track expenditures, IP assets, and income to ensure that the income receiving benefits did in fact arise from the expenditures that qualified for those benefits. If a taxpayer has only one IP asset that it has fully self-developed and that provides all of its income, this tracking should be fairly simple, since all qualifying expenditures incurred by that company will determine the benefits to be granted to all the IP income earned by that company. Once a company has more than one IP asset or engages in any degree of outsourcing or acquisition, however, tracking becomes essential. Tracking must also ensure that taxpayers have not manipulated the amount of overall expenditures to inflate the amount of income that may benefit from the regime. This means that taxpayers will have to be able to track the link between expenditures and income and provide evidence of this to their tax administrations. Not engaging in such tracking will not prevent taxpayers from earning IP income in a jurisdiction, but it will prevent them from benefiting from a preferential IP regime.

61. The main complexity associated with tracking arises from the fact that a preferential rate is applied to certain IP income, which is a function of the regime rather than the nexus approach, and existing IP regimes suggest that taxpayers are willing to comply with certain often complex requirements when an optional tax benefit is made conditional on such requirements. Because the nexus approach will standardise the requirements of IP regimes across jurisdictions, it may in the long term reduce the overall complexity that taxpayers that are benefiting from multiple IP regimes currently face.

62. The fundamental principle underlying the nexus approach is that income should only benefit from an IP regime to the extent that the taxpayer itself incurred the R&D expenditures that contributed to

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19 Jurisdictions with IP regimes need to ensure that taxpayers are not able to circumvent this treatment of acquisition costs by acquiring entities that own IP assets.

19 Jurisdictions that are not member states of the European Union could modify this limitation so that the acquisition of a taxpayer that incurred qualifying expenditures in the jurisdiction providing the IP regime allowed those expenditures to be included in the qualifying expenditures of the acquirer (while either including the acquisition costs in overall expenditures or including all the overall expenditures of the transferor in the overall expenditures of the acquirer if the transferor has engaged in complete tracking and tracing to ensure that all overall expenditures are included).
除其他成本外，外购成本还应包括为获得IP研究的权利所发生的支出。购成本（或在许可的情况下）指特许权使用费或许可费，代表从购置发生前产生的支出总额。因此，在购置IP前，不论由哪一方发生的支出都不能计入符合条件的支出或支出总额。

在关联方交易的情况下，购置成本必须根据独立交易原则确定。由于纳税人可能有动机以低价把IP转让给关联方，因此对于任何关联方交易，纳税人须按要求准备文档以证明价格符合独立交易原则，包括关联转让方产生的支出总额的文档。购置包括价格的转让，不论是否发生实际费用支付。

H. 收入和支出的跟踪记录管理

60. 由于关联法要求支出和收入之间有关联度，因此要求希望推行IP制度的各国必须要求纳税人跟踪记录其支出，IP资产和收入。确保享受优惠的收入确实来源于符合条件的支出。如果纳税人仅拥有或完全由其自行研发的IP，且该IP是其所有收入的来源，那么跟踪记录就相对简单，因为企业发生的所有符合条件支出将决定企业所有IP收入可以享受的优惠。可是，如果一家公司拥有超过一项IP，或从事某种程度的外包或外购业务，跟踪记录则变得尤为重要。跟踪记录也必须确保纳税人没有人为操纵支出总成本数额，以虚增可以享受优惠的收入数额。也就是说，纳税人须记录支出和收入之间的联系，并向其税务机关提供关于该联系的证明。不作跟踪管理不会令纳税人无法在一国取得IP收入，但会让其无法享受IP税收优惠。

61. 跟踪记录的复杂性主要是由于某些IP收入适用优惠税率，该制度明显不符合关联法的要求，但纳税人却通常愿意为获得额外税收优惠而遵循由此所设置的比较复杂的要求。由于关联法将使不同国家的IP制度标准化，长远而言，可能会减少那些目前享受多个IP优惠政策的纳税人所面临的复杂性。

62. 关联法的基本原则是，收入和支出的IP税收优惠须确保纳税人就该IP在发生研发费用的程度而定。如果纳税人外购IP或将研发外包给关联方，与购置的IP或外包相关的收入不得享受IP税收优惠。关联法要求支出和IP收入之间存在联系，而纳税人必须跟踪记录到每个IP资产。当跟踪变得不真实且需要主客观判断时，各国可以选择运用关联法，要求支出和IP生产的产品和收入之间存在关联度。此方法要求纳税人将与IP产品开发相关的所有符合条件的支出视为“符合条件的支出”，并将所有与IP产品开发相关的支出总
that IP. If the taxpayer instead acquired the IP or outsourced the R&D to a related party, the income that arose from acquired IP or outsourced R&D should not benefit from an IP regime. The nexus approach was designed to require a link between expenditures, IP assets, and IP income, and taxpayers must track to IP assets. However, where such tracking would be unrealistic and require arbitrary judgements, jurisdictions may also choose to allow the application of the nexus approach so that the nexus can be between expenditures, products arising from IP assets, and income. Such an approach would require taxpayers to include all qualifying expenditures linked to the development of all IP assets that contributed to the product in “qualifying expenditures” and to include all overall expenditures linked to the development of all IP assets that contributed to the product in “overall expenditures”. This aggregate ratio would then be applied to overall income from the product that was directly linked to all the underlying IP assets. This approach would be consistent with the nexus approach in cases where multiple IP assets are incorporated into one product, but jurisdictions must ensure that this product-based approach requires accurate tracking of all qualifying and overall expenditure at the level of the product and that benefits expire at a fair and reasonable time (e.g. the average life of all IP assets).

63. The product-based approach acknowledges that R&D activities often may not be structured on an IP-asset-by-IP-asset basis and it may then be consistent with the nexus approach to track and trace to products. This is because R&D programmes and projects are generally focused on answering research questions or solving technical problems and it is only in a subsequent stage that there is any discussion of how to provide legal protection to the results of these projects. Often, the results of these projects will contribute to multiple IP assets. Where this is the case, forcing an allocation of R&D expenditure between or among different IP assets would require taxpayers to arbitrarily divide research projects along lines that did not exist at the time the projects were undertaken.

64. In using the product-based approach, jurisdictions should apply a purposive definition of products, under which the meaning of the product to which taxpayers track and trace cannot be so large as to include all the IP income or expenditures of a taxpayer engaged in a complex, IP-based business with multiple products and R&D projects or so small as to require taxpayers to track and trace to a category that is entirely unrelated to innovation or business practices. For a company that produces multiple components for one type of product, which it then sells, for instance a truck, a product definition that permitted tracking and tracing to that truck, and allowing the taxpayer to allocate all its R&D expenditures and IP income to that one final product, would be too broad because the R&D and related IP assets underlying the different value driving components would not sufficiently overlap. For a company that for example produces hinges that are used in hundreds of industries, however, a product definition that required the taxpayer to track and trace to the specific type of hinge built for a specific type of truck would be too narrow as it would require the taxpayer to track and trace to a level of detail that did not relate to the actual innovation. In the first situation (whole truck), it would be more appropriate for the taxpayer to track and trace to the components. In the second situation (hinges), it would be more appropriate for the taxpayer to track to the groups of hinges that shared the same IP rather than to the products in which they are used. This also means that it would not be appropriate to require tracking by individual products if they had only minor variations but contained the same IP (e.g. medicines that are produced in different colours, dosages, or sizes). The definition of products can therefore include product families such as components for printer or computer producers, active compounds for the pharmaceutical industry, and therapeutic areas or narrower disease categories for the pharmaceutical industry. In applying the product-based approach, jurisdictions should

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39 Therapeutic or therapy areas include classes of diseases, such as cardiology, oncology, or respiratory diseases. Narrower disease categories would be subsets of therapeutic areas, such as breast cancer and lung cancer instead of the broader therapeutic area of oncology.

In certain industries that produce services or other outputs other than products, product families could include functional equivalents as long as these groupings include only those IP assets that arose from overlapping expenditures and contributed to overlapping streams of income.
63. 上述产品归属法也认同，研发活动通常不并不依据每一个IP而分别展开，因此，跟踪到每项产品的关联与关联法是相一致的。这是因为研发项目一般专注于某一研究问题或解决技术难题，往往到后期才会讨论如何将项目成果提供法律保护。这些项目的成功通常会创造出多个IP资产。在这种情况下，强制将研发支出分配到不同的IP项目只会令纳税人随意分割研究项目，而在项目程度上这种分割其实并不存在。

64. 在使用IP归属法时，各国对给产品作出具有针对性的定义。在此定义下，纳税人跟踪记录产品的内容不会过大，以一个以一个产品为基础的业务，并没有多种产品及研发项目的纳税人在所有收入或支出包含其中。同时也不过小，比如要求纳税人的记录必须完全与企业业务有关的产品和相关。假设企业为一种产品生产多种配件，随后销售该产品，以卡车为例，如果产品的定义允许纳税人跟踪的卡车上，并将所有研发支出和IP收入分配至一个产品（即卡车），则产品的定义就过于小了，因为那些产生价值的配件之间的研发和相关IP资产未必有很大程度的重复。假设企业生产可在数百种行业当中使用的钢筋，如果产品的定义要求纳税人跟踪至某特定型号卡车使用中的某种特定钢筋，则产品定义就过于大了，因为会要求纳税人跟踪至与实际创新无关的细节上。在第一种情况下（完全卡车），让纳税人跟踪至不同配件更为合适。在第二种情况下（钢筋），让纳税人跟踪至使用同一批的钢筋（而非使用钢筋的产品）更为合适。也就是说，如果一些产品包含的是相同的IP并相互之间的差别很小（比如不同颜色、剂量或大小的药品），要求纳税人针对各个产品进行跟踪并不可行。产品的定义如此可以包括产品群组，例如打印机或电脑配件、化工行业的活性成分、医药行业的治疗领域或更详细的疾病分类。

65. 纳税人如果采用产品归属法，必须提供证据以证明其从事相当复杂的IP相关行业，以至跟踪至每项IP资产不太现实且需要主观随意判断。为防止人为操纵数据，跟踪记录到
prevent taxpayers from tracking to a grouping that is so broad that it would include all the expenditures and income of an entity, but taxpayers may track to products (including product families) when these groupings include all the IP assets that arose from overlapping expenditures and contributed to overlapping streams of income.

65. A taxpayer that uses the product-based approach must provide documentation that the taxpayer was engaged in a sufficiently complex IP-related business that tracking to individual IP assets would be unrealistic and based on arbitrary judgements. To prevent manipulation, a taxpayer that tracks and traces to products (including product families) should be able to justify to a tax authority the appropriateness of this approach with reference to objective and verifiable information, for example the commonality of scientific, technological, or engineering challenges underlying the R&D expenditures and income, demonstrate its consistency with the organisation of R&D activities within the group and also apply the approach consistently over time.

66. Examples of tracking and tracing to IP assets or products arising from those IP assets are provided below. All examples assume that the taxpayers are resident in jurisdictions with IP regimes that are consistent with the nexus approach.

- **Example A** – Company A produces plastic lids for travel mugs. Company A has two patents, one of which applies to plastic lids for coffee mugs and one of which applies to plastic lids for tea mugs. The R&D responsible for the two patents was undertaken by different project teams of Company A employees. Company A is therefore an example of a taxpayer that would need to track and trace to IP assets. If it did not already do so, it would need to set up a tracking system that tracked income of coffee mugs and tea mugs separately.

- **Example B** – Company B produces hundreds of different types of printers, which are divided and managed along three different product families: large printer/copier combinations for office use, small personal printers for home use, and photo printers for professional-quality digital photos. Each product family contains several distinct product types. Company B engages in R&D to develop the printers, and this R&D contributes to 250 patents. 100 patents are relevant to all three product families, 50 are relevant only to the larger printer/copier combinations, 50 are relevant only to the small personal printers and 50 are relevant only to the photo printers. Company B’s employees track their research time according to which product family they are working on or whether they are engaged in general or speculative R&D. Company B is therefore an example of a taxpayer that would need to track and trace to product families. If it did not already do so, it would need to set up a tracking system that tracked income of the three product families separately. The expenditures incurred to develop the 100 general patents would be divided across the product families, and the expenditures that are only relevant to individual product families would be allocated only to those product families. It would not be appropriate to track and trace to either IP assets or product types because Company B’s R&D is shared across product families, so tracking and tracing to individual products could over-allocate expenditures to one individual printer or under-allocate expenditures to another individual printer.

- **Example C** – Company C is a pharmaceutical company which has thousands of patents and which produces hundreds of pharmaceutical products. Each patent contributes to multiple products, and each product uses multiple patents. Company C manages and tracks its R&D, including its employees’ time, along the four different diseases that its products treat. The R&D undertaken for one disease generally does not overlap with the R&D undertaken for another disease, and the diseases are dissimilar enough that products for one disease are not used to treat another disease. Company C’s expenditures cannot be tracked to individual products (since R&D expenditures would have to be divided across multiple products which could only be done on an
多项产品（包括产品系列）的研发人必须向税务机关提供客观和可验证的证据以证明其采用的方法的合理性，包括研发支出和收入在科学、技术或工程方面的共同性，展示其与集团内部研发活动组织的一致性，并持续一贯地采用此方法。

66. 以下例子叙述了如何跟踪到IP资产或源自IP资产的产品。所有例子均假设纳税人是一国的税收居民，而该国采取的IP制度与关联法原则一致。

**例子A** – A公司为旅行杯具生产塑料杯盖。A公司有两件专利，分别适用于咖啡杯塑料杯盖和茶杯塑料杯盖。两件专利的研发由A公司员工组成的不同项目小组负责。因此A公司是需要跟踪记录到每个IP资产的纳税人。如果A公司此前未建立跟踪制度，则需建立系统以分别跟踪记录咖啡杯和茶杯的收入。

**例子B** – C公司生产数百种不同型号的打印机，分别划分三个不同的产品系列管理：商用大型打印机/复印一体机，家庭用小型打印机以及专业级数码照片打印机。每个产品系列包括几种独特的产品型号。为开发打印机，C公司从事研发活动并就此产生了250项专利。其中100项专利与三种产品组相关，另外50项专利与一种产品组相关，50项专利与一种产品组相关。C公司员工根据其服务的产品系列或根据其从事的是一般或根据理念或假设的研发活动来记录其研究时间。因此C公司就需要跟踪至产品组的纳税人。如果C公司此前未建立跟踪制度，则需建立系统并基于三种产品的收入来分别跟踪记录。开发100项通用专利的支出应在各产品组间分配，50项专利分配到各产品组。跟踪至每个IP资产或产品组的做法并不合适。因为B公司的研发在产品组间共享，所以跟踪至个别产品可能导致向某一打印机过多分摊支出或向另一打印机过少分摊支出。

**例子C** – C公司是拥有数千项专利和生产数百种医药产品的医药公司。每项专利都适用于多种产品，同时每种产品亦使用了多项专利。C公司基于其生产药品所针对治疗的四种疾病分别管理记录研发活动，其中也包括员工的时间。针对某种疾病的研发活动通常和另一种疾病的研发活动并无重叠，疾病之间也不相同，因此治疗某种疾病的药物不能用来治疗另一种疾病。C公司的支出无法跟踪到个别产品（因为如果要分摊，也只能通过随意划分将研发支出分摊到多种产品）。C公司的收入无法跟踪至个别专利（由于将某个产品收入划分为多种专利也只能以随意分摊进行）。因此C公司需要跟踪记录到C公司所治疗的各种疾病。如果C公司此前未建立该跟踪记录系统，则需要设立系统分别跟踪记录治疗该四种疾病的产品所产生的IP收入。
The nexus approach was designed to apply a cumulative ratio of qualifying expenditures and overall expenditures, but, as a transitional measure, jurisdictions could allow taxpayers to apply a ratio where qualifying expenditures and overall expenditures were calculated based on a three- or five-year rolling average. Taxpayers would then need to transition from using the three- to five-year average to using a cumulative ratio. An example of how this transition could take place is included in Annex A. Jurisdictions that choose to implement a transitional measure must include anti-avoidance measures to prevent taxpayers from manipulating such a measure. These measures should ensure (i) that taxpayers that previously benefited from a grandfathered regime could not use a transitional measure in a new regime and (ii) that acquisition costs and outsourcing expenditures paid to related parties were included in both the transitional ratio and the cumulative ratio.

The nexus approach mandates that jurisdictions include several documentation requirements. Jurisdictions may draft their own specific guidance on these documentation requirements, but they must require at least the following forms of documentation from any taxpayer benefiting from the IP regime:

- If the taxpayer is not tracking directly to the IP asset but is instead tracking to products, the taxpayer must provide documentation showing the complexity of its IP business model and providing justification for using the product-based approach.
- The taxpayer must show that it had a qualifying IP asset (either because the income and expenditures are being tracked to that IP asset or because the product was produced using that IP asset).
- In calculating net IP income, taxpayers must reduce the amount of IP income by any deductions or other tax reductions that arose from the same IP asset (or product). Taxpayers must therefore provide documentation of all relevant deductions and other tax reductions and show why such benefits, if any, were not used to reduce the amount of IP income benefiting from an IP regime.
- Taxpayers that incur expenditures for general or speculative R&D must either show a link between such expenditures and the IP asset or product or provide an explanation for how such expenditures were divided pro rata across IP assets or products.
- The taxpayer must show that both qualifying expenditures and overall expenditures were tracked according to the same IP asset or product as the income and it must provide documentation on this tracking to show that the expenditures and income were linked.
- If the taxpayer acquired an IP asset from a related party, the taxpayer must prepare documentation substantiating the arm's length price. This should include documentation on the overall expenditures that the related party transferred incurred.

I. Grandfathering and safeguards

Consistent with the work so far in the area of harmful tax practices, the FHTP agreed in the 2014 Progress Report to draft further guidance on grandfathering, building in particular on paragraph 12 of the 2004 Report (OECD, 2004a), where it says “the Committee decided that where a regime is in the process of being eliminated it shall be treated as abolished […] if (1) no new entrants are permitted into the regime, (2) a definite date for complete abolition of the regime has been announced, and (3) the regime is transparent and has effective exchange of information”. Jurisdictions have agreed to refrain from adopting
67. 关联法的设计初衷基于符合条件的支出和收入总额的累计比例。但是，作为过渡性措施，各国可允许纳税人以每3年或5年的平均数计算符合条件的支出和收入总额，从而得出相应的比例。纳税人之后应逐渐过渡至使用累计比例。附件A列出了一个例子说明这一项过渡措施该如何进行。选择采用过渡法的国家或地区必须引人反避税措施，防止纳税人人为操纵此方法。反避税措施可以确保：(i) 之前已经享受过过渡期税收优惠的纳税人不得在新优惠制度下采用过渡法；(ii) 外购成本和支付给关联方的外包费用均已包括在过渡比例以及累计比例中。

68. 关联法强制要求各国提供文档资料报送做出一定的规定。各国可起草本国对这些文档资料报送要求的具体指引，但必须规定享受IP税收优惠的纳税人应至少提供以下形式的文档资料：
   
   - 如果纳税人不是直接跟踪到IP资产而是到产品本身，则纳税人必须提供描述其IP业务模式复杂性文件，并解释使用产品法的理由。

   - 纳税人必须证明其拥有一项符合条件的IP资产（无论是因为其收入和支出都被跟踪到该IP资产，还是因为产品使用了该IP资产）。

   - 在计算与IP相关的净收入时，纳税人必须从IP净收入总额中减去与该IP资产（或产品）相关的任何扣除项目或税收减免。因此，纳税人必须提供所有相关的扣除以及其他税收减免的文件并说明为何上述优惠（如有）并没有用来减少受益于IP制度的IP收入。

   - 纳税人如果发生了一般或根据规定或指出的性质的研发支出，必须证明这些支出和IP资产或产品之间的联系，或者提供该支出如何按比例分摊至不同IP资产或产品的说明。

   - 纳税人必须证明其发生的符合条件的支出和支出总额按同一IP资产或产品相关的收入进行跟踪记录，并且必须提供文件说明该支出和收入之间的联系。

   - 如果纳税人从关联方外购IP资产，必须准备文件证明购买价格符合独立交易原则，文件内容应包括该关联方转让发生的支出总额。

I. 过渡条款和保障措施

69. 与目前防止有害税收安排工作一致，在2014年的进度报告中，FHTP同意对过渡条款采取进一步的相关指引，其中将特别根据2004年报告（OECD，2004a）第12段的相关内容，即：委员会决定，如果一个制度已经在逐步取消的过程中，则应视为已经废除。如果（1）没有新批准企业可以享受该优惠；（2）废止该项制度的实施日期已经公布；（3）该制度是透明的且具备有效的情况交换，各国已经同意禁止采用与关联法不一致的新措施或扩大和加强目前与关联法不一致的措施。

70. 2016年6月30日之后，不能新批准企业享受现行与关联法不一致的IP制度下给予的优惠。如果一项新的税收优惠制度于2016年6月30日之前生效，并与关联法相一致，则在该新优惠制度生效后即不允新批准企业享受现行IP制度下给予的优惠。
new measures that would be inconsistent with the nexus approach or extending the scope of or strengthening existing measures that are inconsistent with the nexus approach.

70. No new entrants will be permitted in any existing IP regime not consistent with the nexus approach after 30 June 2016. If a new regime consistent with the nexus approach takes effect before 30 June 2016, no new entrants will be permitted in the existing IP regime after the new IP regime has taken effect. The FATF recognised that countries will need time for any legislative process, but it agreed that any legislative process necessary to bring a regime into line with the nexus approach must commence in 2015.

71. For the purposes of grandfathering, “new entrants” include both new taxpayers not previously benefiting from the regime and new IP assets owned by taxpayers already benefiting from the regime. It is understood that taxpayers that may benefit from grandfathered regimes are only those that fully meet all substantive requirements of the regime and have been officially approved by the tax administration, if required at that point in time. They therefore do not include taxpayers that have only applied for the regime. Taxpayers that have been approved by the tax administration but the IP assets of which have not yet received official approval may, however, benefit from grandfathering if they have applied for IP protection in the jurisdiction of the IP regime but have not yet received official approval because of the length of time of the jurisdiction’s approval process.

72. Jurisdictions are also permitted to introduce grandfathering rules that will allow all taxpayers benefiting from an existing regime to keep such entitlement until a second specific date (“abolition date”). The period between the two dates should not exceed 5 years (so the latest possible abolition date would be 30 June 2021). After that date, no more benefits stemming from the respective old regimes may be given to taxpayers.

73. In order to mitigate the risk that new entrants will seek to avail themselves of existing regimes with a view to benefiting from grandfathering, jurisdictions should implement the following safeguards:

- Enhanced transparency for new entrants entering the regime after 6 February 2015 by requiring spontaneous exchange of information on the identity of new entrants benefiting from a grandfathered regime, regardless of whether a ruling is provided, no later than the earlier of (i) three months after the date on which the information becomes available to the competent authority of the jurisdiction providing benefits under the IP regime (and jurisdictions should put in place appropriate systems to ensure that this information is transmitted to the competent authority without undue delay), or (ii) one year after the tax return was filed with the jurisdiction providing benefits under the IP regime.

- Measures that would allow IP assets to benefit from grandfathered regimes not consistent with the nexus approach after 31 December 2016 unless they are acquired directly or indirectly from related parties after 1 January 2016 and they do not qualify for benefits at the time of such acquisition under an existing “back-end” IP regime. Such measures prevent taxpayers that would not otherwise benefit from a grandfathered regime from using related-party acquisitions to shift IP assets into existing regimes in order to take advantage of the grandfathering provision. At the same time, they also permit taxpayers that acquire IP assets from related parties to benefit from grandfathering if this acquisition takes place as part of a domestic or international business restructuring intended to transfer IP assets to regimes that are being modified to comply with the nexus approach.
FHTP认同各国需要时间完成必要的法律程序，但同时也同意实施与关联法一致的IP制度所需的法律程序必须在2015年开始。

71. 就过渡措施而言，“新批准企业”包括之前未享受优惠的新纳税人，以及正在享受优惠的纳税人。可以从过渡措施中获得税收优惠的纳税人仅指那些能够充分满足该优惠制度规定的所有实质性活动要求，并在当年经税务机关正式批准（如本国法有此要求）的纳税人。因此并不包括仅仅申请了优惠的纳税人。对于纳税人已经获得税务机关批准但其IP资产尚未获得官方批准的情形，如果纳税人已经在实行IP制度的国家申请了IP保护，但由于该国的审批程序较短或者导致申请未获得官方批准的，则该纳税人也可以享受过渡优惠政策。

72. 各国也可以引入过渡条款，允许所有正在享受优惠的纳税人保留其可以享受优惠的权利，直到某一特定日期（即“终止日期”）为止。两个日期之间不应相隔超过5年（因此最迟的终止时间应为2021年6月30日）。在此日期后，没有纳税人可以享受旧制度下的税收优惠。

73. 为了减轻新批准企业带来的风险，各国应实施以下保障措施：

- 对2015年2月6日之后的新批准企业加强透明度管理，无论是否存在特定裁定，都应在以下两个时期中较早的一个开始前要求新批准企业的财务信息进行自发表明交换：（1）实行IP制度并提供优惠政策的国家的主管税务机关获得相关信息之日起三个月内（该国应当设有相关制度确保信息及时准确传递给主管税务机关）；或（2）纳税人向提供IP优惠的国家进行纳税申报之日起一年内。

- 允许IP资产于2016年12月31日之后享受与关联法不一致的过渡政策优惠的措施，但须排除下列情形：如果IP资产是2016年1月1日之后直接或间接从关联方购进，且在购进时点不符合享受现行“后置”IP优惠制度的条件，这种情况下可以继续享受过渡政策的纳税人通过向关联方购进IP，并将IP资产转移至现行优惠制度下从而享受过渡期政策的行为。同时，如果购进是向国内或全球商业重组的一部分且其意在使IP资产转出正在享受的以遵循关联法的优惠制度中，相关措施也允许上述纳税人自关联方购进的IP资产可享受过渡优惠政策。

4. 可推翻假设

74. 各国可以将关联度比例作为可推翻假设。当纳税人没有提供其他信息时，各国可以根据关联度比例来确定纳税人可以享受税收优惠的收入。然而，纳税人在某些特殊情况下

注：纳税人如果是在享受关联度比例作为可推翻假设的国家，须在会计报告中反映该假设和可推翻假设的适用情况。通常情况下，纳税人可以享受的关联度比例的条件是在计算有效税率时考虑该假设。纳税人必须基于IP资产、产品或服务来确定采用加计扣除上缴调整或者推翻关联度比例，并且不得使用与其联结更直接的交易方式。
J. Rebuttable presumption

74. Jurisdictions could treat the nexus ratio as a rebuttable presumption. In the absence of other information from a taxpayer, a jurisdiction would determine the income receiving tax benefits based on the nexus ratio. Taxpayers would, however, have the ability to prove that more income should be permitted to benefit from the IP regime in exceptional circumstances where taxpayers that have undertaken substantial qualifying R&D activity in developing a qualifying IP asset or product can establish that the application of the nexus fraction leads to an outcome where the level of income eligible for a preferential IP regime is not commensurate with the level of their R&D activity. Exceptional circumstances could include, for instance, a complete or partial write down of acquired IP in the taxpayer's financial statements or other instances of an exceptional nature where a taxpayer can demonstrate that it engaged in greater value creating activity than is reflected in the nexus calculation. If a jurisdiction chooses to treat the nexus ratio as a rebuttable presumption, any adjustments to the nexus ratio must result in outcomes that are commensurate with the level of the taxpayer's R&D activity, consistent with the fundamental principle of the nexus approach. A determination of the application of the rebuttable presumption should be reviewed on an annual basis to determine the continued presence of the exceptional circumstances. Such a review can take the form of a ruling with annual reviews or it can be achieved by other means. In any event, a tax administration must hold contemporaneous documentation showing that the taxpayer has met the requirements set out below in paragraph 75 and any other requirements that may be required under domestic law.

75. A jurisdiction that chooses to treat the nexus ratio as a rebuttable presumption would need to limit the situations where the ratio could be rebutted to those that meet, at a minimum, the following requirements:
   - The taxpayer first uses the nexus ratio to establish the presumed amount of income that could qualify for tax benefits.
   - The nexus ratio set out above (excluding the up-lift) equals or exceeds 25%.
   - The taxpayer demonstrates that because of exceptional circumstances the application of the nexus ratio would result in an outcome that was inconsistent with the principle of the nexus approach.
   The taxpayer specifies and provides evidence as to the exceptional circumstances.

76. Within these limitations, the design of the rebuttable presumption would be determined by jurisdictions that choose to implement it, but this version of the nexus approach will require greater record-keeping on the part of taxpayers, and jurisdictions would need to establish monitoring procedures and notify the FHTP of the circumstances in which they would allow the nexus ratio to be treated as a rebuttable presumption. Jurisdictions would further need to report on the legal and administrative framework for permitting taxpayers to rebut the nexus ratio, and, on an annual basis, the overall number of companies benefiting from the IP regime, the number of cases in which the rebuttable presumption is used, the number of such cases in which the jurisdiction spontaneously exchanged information, the aggregated value of income receiving benefits under the IP regime (differentiated between income benefiting from the nexus ratio and income benefiting from the rebuttable presumption), and a list of the exceptional circumstances, described in generic terms and without disclosing the identity of the taxpayer, that permitted taxpayers to rebut the nexus ratio in each case. This would permit the FHTP to monitor whether jurisdictions were only permitting taxpayers to rebut the nexus ratio in exceptional circumstances. Regardless of whether taxpayers rebut the nexus ratio in the context of a ruling, jurisdictions would also...

21 Taxpayers in jurisdictions that treat the nexus ratio as a rebuttable presumption would have to choose between the up-lift and the rebuttable presumption. In other words, taxpayers could not both rebut the nexus ratio and benefit from the 30% up-lift. Taxpayers must choose between the up-lift and rebutting the nexus ratio on the basis of IP asset, product, or product family, and taxpayers may not choose based on a narrower grouping than that used for tracking and tracing.
下有权证明其更多的收入可以享受税收优惠，即纳税人如果在开发符合条件的IP资产或产品时开展了符合要求的实质性研发活动，可以证明采用关联交易比例方法可以享受IP税收优惠的收入与其实质性研发活动的程度相匹配。这些特殊情况包括，纳税人对其财务报表中完全或部分或计所购置的IP，或者纳税人可以证明其从事的活动所创造的价值超出关联交易计算所反映的价值。一般如果选择将关联交易比例作为可税前假设，则必须确保任何对关联交易比例的调整与纳税人开展研发活动的程度相匹配，即与关联法的基本原则相一致。采用可税前假设的国家需要每年开展复核工作，以确定特殊情形是否仍然存在。而复核可以通过裁定及年审或者其他方式进行。税务机关在任何情况下都必须保存同期资料，以显示纳税人已满足以下第75段中的要求和其他国内法的要求。

75. 各国如选择将关联交易比例作为可税前假设，需要限制可以税前该比例的情形，即至少应满足以下要求：

- 纳税人首先采用关联交易比例来证明其可以享受税收优惠的所得额。
- 所得出的关联交易比例（包括上浮调整）不低于25%。
- 纳税人应能够证明由于特殊情形的存在，采用关联交易比例的将导致产生与关联法原则不一致的结果。纳税人应详细描述并提供资料证明特殊情形的存在。

76. 在上述这些限制条件的前提下，各国可以自行制定各自的可税前假设。但是在此情况下纳税人必须保存更多更广的记录，而各国也需要建立监管程序并通知FHTP在何种情形下将适用关联交易比例作为其可税前假设。同时各国还需要进一步报告允许纳税人可以推翻关联交易比例的法律和管理框架，并且需要每年提供以下资料：享受IP税收优惠政策的企业数量、采用可税前假设的案例数量。在这些案例中进行了自发情报交换的数量，享受IP优惠制度的收入总额（区分享受关联交易比例优惠政策的收入以及享受可税前假设的收入），以及允许纳税人推翻关联交易比例的特殊情形的清单；清单应是通用性描述且不应披露纳税人身份。这有助于FHTP监督各国是否仅在特殊情形下才允许纳税人推翻关联交易比例。无论纳税人是否是通过一个特定裁定来推翻关联交易比例，各国都应当基于有关信息交换工具以及纳税人提交的同期资料进行自发情报交换，以确保满足上述关于推翻关联交易比例的要求。在通过特定裁定（来推翻关联交易比例）的情况下，各国应该采用本报告第五章所在的框架；在通过特定以外的情形（未推翻关联交易比例），各国应该采用本报告第五章的框架确定与其进行自发情报交换的国家。
need to spontaneously exchange, on the basis of information exchange instruments, the contemporaneous documentation it has received from the taxpayer in order to fulfill the requirements for rebutting the nexus ratio set out above. In the context of rulings, jurisdictions would use the framework set out in Chapter 5. Outside the context of rulings, the framework of Chapter 5 would be used to determine the jurisdictions with which to spontaneously exchange such information. A jurisdiction may either exchange the contemporaneous documentation received or may use the template in Annex C and include the information to be exchanged in summary box 7.\textsuperscript{23}

III. Substantial activity in the context of regimes other than IP regimes

77. Action 5 requires substantial activity not only for IP regimes but for all preferential regimes. The FHTP has therefore considered the application of the substantial activity requirement to other preferential regimes that have been identified and reviewed by the FHTP since the 1998 Report. A more detailed consideration of how this requirement would apply to specific regimes would need to take place in the context of the specific category of regime being considered. The discussion below sets out the principle that will apply in the context of non-IP regimes.\textsuperscript{23}

78. Because IP regimes are designed to encourage R&D activities and contribute to growth and employment, the principle underlying the substantial activity requirement in the context of IP regimes is only to permit taxpayers that did in fact engage in such activities and did incur actual expenditures on such activities to benefit from the regimes. In the context of other preferential regimes, the same principle can also be applied so that such regimes would only be found to meet the substantial activity requirement if they also granted benefits only to qualifying taxpayers\textsuperscript{24} to the extent those taxpayers undertook the core income generating activities required to produce the type of business income covered by the preferential regime.

79. When applied to IP regimes, the substantial activity requirement establishes a link between expenditures, IP assets, and IP income. Expenditures are a proxy for activities, and IP assets are used to ensure that the income that receives benefits does in fact arise from the expenditures incurred by the qualifying taxpayer. The effect of this approach is therefore to link income and activities. When applied to other regimes, the substantial activity requirement should also establish a link between the income qualifying for benefits and the core activities necessary to earn the income. As set forth in the 1998 Report, the core activities at issue in non-IP regimes are geographically mobile activities such as financial and other service activities.\textsuperscript{25} These activities may not require anything to link them to income because service activities could be seen as contributing directly to the income that receives benefits.

80. The determination of what constitutes the core activities necessary to earn the income depends on the type of regime. Even where regimes are aimed at a similar type of income there can be a wide variation in the application of different countries’ regimes, so a more detailed consideration of the relevant core activities would need to be undertaken at the time and in the context of a specific regime being considered.

\textsuperscript{22} Any further information could be requested on the basis of applicable information exchange instruments.

\textsuperscript{23} These regimes include (i) holding company regimes, (ii) headquarters regimes, (iii) distribution centre regimes, (iv) service centre regimes, (v) financing and leasing regimes, (vi) fund management regimes, (vii) banking regimes, (viii) insurance regimes and (ix) shipping company regimes.

\textsuperscript{24} “Qualifying taxpayers” would have the same definition as that set out in the context of IP regimes. See supra paragraph 40. This definition includes resident companies, domestic (PEs) of foreign companies, and foreign PEs of resident companies that are subject to tax in the jurisdiction providing benefits.

\textsuperscript{25} See paragraph 6 of 1998 Report.
III. IP制度以外的其他制度下的实质性活动要求

77. 行动5不仅对IP制度提出了实质性活动要求，也对其它所有提供优惠政策的制度提出了同样的要求。因此，FAFT正在考虑对那些经1998年报告确定和审议过的优惠制度也实行实质性活动的要求。至于如何将实质性活动要求适用于各项具体制度中，则需要针对个别制度详细考虑。下文对非IP制度 invented适用实质性活动要求的具体原则做出论述。

78. IP制度的推行是为了鼓励研发活动，推动经济增长和就业。因此，就IP制度而言，实质性活动要求的原则是，只能允许对实际开展了相关活动并因此实际发生了支出的纳税人给予税收优惠。此原则也能同样适用于其他优惠制度，即：只有针对符合条件的纳税人\(^{24}\) 承担了产生税收优惠制度涵盖的营业支出所要求的核心业务活动，才算是符合了实质性活动的要求。

79. 当适用于IP制度时，实质性活动的要求在支出、IP资产以及IP收入之间建立了关联性。支出是实质性活动的代表指标，IP资产则确保享受税收优惠的该部分收入来自符合条件的纳税人实际承担的支出。因此，这一方法实际上将收入和支出联系起来了。当实质性活动要求适用于其他优惠制度时，同样应该将可以享受税收优惠的收入和产生该收入必须开展的核心业务活动联系起来。正如1998年报告所规定的，在非IP制度下的核心业务活动是在地理上具有流动性的活动，比如金融服务活动以及其他服务活动等。\(^{25}\) 这些活动也可能不需要借助任何东西去跟收入建立联系，因为这些服务活动可被视为直接创造了可以享受税收优惠的收入。

80. 要确定何为创造收入的核心业务活动则取决于各个优惠制度的类型。即使有些优惠制度针对的是同类型收入，可在不同国家应用时可能会截然不同，因此也许需要针对不同的特定制度，对其各自所需的核心业务活动分别予以更仔细的考虑。但是，我们仍就不同类型优惠制度可能要求的实质性活动予以概述如下：

总部优惠制度

81. 总部优惠制度就向整个集团或其位于某一特定地域内的部分集团成员提供管理、协调或指挥业务活动等总部服务的纳税人给予税收优惠待遇。这些制度可能由于“环形装置”而带来问题，或者因为这些制度对于税务机关的定义可以予以人为确定而带来问题——即在以

\(^{22}\) 可以根据所适用的信息交换工具要求提供更多进一步的信息。

\(^{23}\) 这些优惠制度包括：（i）控股公司优惠制度；（ii）税收优惠制度；（iii）分中心优惠制度；（iv）服务中心优惠制度；（v）融资或租赁优惠制度；（vi）基金管理优惠制度；（vii）银行优惠制度；（viii）保险优惠制度以及（ix）航运公司优惠制度。

\(^{24}\) “符合条件的纳税人”的定义与IP制度背景下的定义相同，具体内容请参见上文第46段。符合条件的纳税人包括：居民企业，外国企业的常设机构，在提供优惠的国家或地区负担纳税义务的居民企业的常设机构。

\(^{25}\) 参见1998年报告第6段。
However, a brief description of the type of activities that might be required for the different types of preferential regime is set out below.

**Headquarters regimes**

81. Headquarters regimes grant preferential tax treatment to taxpayers that provide certain services such as managing, co-ordinating or controlling business activities for a group as a whole or for group members in a specific geographical area. These regimes may raise concerns about ring-fencing or because they provide for an artificial definition of the tax base where the profits of an entity are determined based on a “cost-plus” basis but certain costs are excluded from the basis or particular circumstances are not taken into account. These features could be addressed by the existing factors, but these regimes could also raise concerns in respect of substance.

82. The core income-generating activities in a headquarters company could include the key activities giving rise to the particular type of services income received by the company. For example, they could include taking relevant management decisions, incurring expenditures on behalf of group entities, and co-ordinating group activities.

**Distribution and service centre regimes**

83. Distribution centre regimes provide preferential tax treatment to entities whose main or only activity is to purchase raw materials and finished products from other group members and re-sell them for a small percentage of profits. Services centre regimes provide preferential tax treatment to entities whose main or only activity is to provide services to other entities of the same group. A concern with such regimes is that they may have ring-fencing features. In addition, they may raise concerns that they permit an artificial definition of the tax base. Although these concerns may be addressed through the existing factors, concerns with respect to substance could remain.

84. The core income-generating activities in a distribution or service centre could include activities such as transporting and storing goods; managing the stocks and taking orders; and providing consulting or other administrative services.

**Financing or leasing regimes**

85. Financing and leasing regimes are regimes which provide a preferential tax treatment to financing and leasing activities. The main concerns underlying these regimes include, among others, ring-fencing considerations and an artificial definition of the tax base. Again, those concerns could be addressed through the existing factors.

86. The core income-generating activities in a financing or leasing company could include agreeing funding terms; identifying and acquiring assets to be leased (in the case of leasing); setting the terms and duration of any financing or leasing; monitoring and revising any agreements; and managing any risks.

**Fund management regimes**

87. Fund management regimes grant preferential tax treatment to income earned by fund managers for the management of funds. In exchange for its services, the fund manager receives compensation that is computed on the basis of a pre-agreed formula. The focus is not the taxation of the income or gains of the fund itself or of the investors in a fund but the income earned by fund managers from the management of

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26 A fund manager is a legal or natural person that provides management services, including making decisions on investments, to an investment fund or its investors.
“成本加成”为基准确定企业的利润时，将某些成本从“成本加成”的计算基础上剔除或没有考虑其他特殊情况等。这些问题可以通过现行判定因素予以解决，但也可能引起实质性方面的问题。

82. 总公司的核心收入创造活动可以包括一些让企业取得特定类型的服务收入的关键活动，比如可能包括：相关的管理决策，为企业发生的代付支出，以及协调集团活动等。

分销和服务中心优惠制度

83. 分销中心优惠制度所主要或全部从业向集团企业购买原材料或成品然后再以微利销售的纳税人给予税收优惠待遇。服务中心优惠制度纳税人主要或全部为同一集团内企业提供的服务给予税收优惠待遇。这一类制度的问题在于其可能带有形资产特征。此外，也可能存在人为随意确定税率的问题。这些问题虽然可以通过现行判定因素予以解决，但其引起的实质性问题仍然存在。

84. 分销和服务中心的核心收入创造活动可以包括运输和仓储服务；管理存货和接受订单；提供咨询或其他行政管理服务等。

融资或租赁优惠制度

85. 融资租赁优惠制度对融资租赁和租赁活动给予税收优惠待遇。其他问题外，这些制度可能存在的主要问题包括形资产和人为随意确定税率。同上所述，这些问题仍然可以通过现行判定因素予以解决。

86. 融资或租赁公司的核心创造收入活动可以包括：签订融资条款、物价和购买资产作租赁用途（在租赁的情况下），设定融资或租赁的条款和期限，监测和修订协议内容以及管理风险。

基金管理优惠制度

87. 基金管理优惠制度对基金管理人获得的收入给予税收优惠待遇。基金管理人提供服务并根据事先约定的公式取得佣金报酬。需要关注的不是基金本身的收入或投资者所获得的税收问题，而是基金管理人通过基金管理所获取的收入。对于基金管理取得的佣金报酬如何征税，在何地征税可能会引起透明度的问题。在某种程度上可以通过强制性自发交换情报解决这一类问题。

88. 就实质性活动而言，基金管理的核心创造收入活动可以包括对持有或出售投资做出决策，计算风险和储备，对汇率或利率变动以及对冲做出决策，以及为政府机关和投资者准备相关的文件或报告。

26. 基金经理是指提供金融服务的人或自然人，包括为投资公司或其投资者作出投资决策。

27. 参见《实质性法规汇编》（CAND）第261段。FHTP的工作是关于基金管理而非基金本身的征税问题。
the fund. The remuneration of the fund manager and how and where this is taxed may raise issues of transparency and these could in part be dealt with by the compulsory spontaneous exchange of rulings.

88. In terms of substantial activity the core income-generating activities for a fund manager could include taking decisions on the holding and selling of investments; calculating risks and reserves; taking decisions on currency or interest fluctuations and hedging positions; and preparing relevant regulatory or other reports for government authorities and investors.

Banking and insurance regimes

89. Banking and insurance regimes provide preferential tax treatment to banking and insurance activities. The main concern is linked to the benefits that they provide to income from foreign activities. If benefits are only provided to foreign income, then this could be addressed through the existing ring-fencing factor. In terms of substance, the regulatory environment, where applicable, should already ensure that a business is capable of bearing risk and undertaking its activity. However, in the context of insurance, it may be more difficult to easily identify those activities and regimes that raise concerns in respect of substance versus those that do not because of the possibility that risks may have been re-insured.

90. The core income-generating activities for banking companies depend on the type of banking activity undertaken, but they could include raising funds; managing risk including credit, currency and interest risk; taking hedging positions; providing loans, credit or other financial services to customers; managing regulatory capital; and preparing regulatory reports and returns. The core income-generating activities for insurance companies could include predicting and calculating risk, insuring or re-insuring against risk, and providing client services.

Shipping regimes

91. Shipping company regimes provide a preferential tax treatment to shipping activities and are designed taking into considerations significant non-tax considerations. In addition to issues of ring-fencing and transparency already discussed in the CAN (OECD, 2004b), they may also raise concerns under the substantial activity analysis where they permit the separation of shipping income from the core activities that generate it.

92. The core income-generating activities for shipping companies could include managing the crew (including hiring, paying, and overseeing crewmembers); hauling and maintaining ships; overseeing and tracking deliveries; determining what goods to order and when to deliver them; and organising and overseeing voyages.

Holding regimes

93. Holding company regimes can be broadly divided into two categories: (i) those that provide benefits to companies that hold a variety of assets and earn different types of income (e.g. interest, rents, and royalties) and (ii) those that apply only to companies that hold equity participations and earn only dividends and capital gains. In the context of (i) above, to the extent that holding company regimes provide benefits to companies that earn income other than dividends and capital gains, the substantial activity requirement should require qualifying taxpayers to have engaged in the core activities associated with those types of income.

94. Holding companies that fall within category (ii) above and that provide benefits only to dividends and capital gains, however, raise different policy considerations than other preferential regimes in that they primarily focus on alleviating economic double taxation. They therefore may not in fact require much

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27 CAN, paragraph 261. The work of the FHTP is focused on fund management and not the taxation of the fund itself.
银行和保险优惠制度

89. 银行和保险优惠制度对银行和保险业务活动给予税收优惠待遇。此优惠制度的问题主要在于对国外业务活动收入提供的优惠待遇。如果仅仅给予国外收入税收优惠待遇，那么这个优惠可以由现行的环形税和判定标准予以解决。就实质性而言，监管环境，如适用，应当已经确保了企业具备承担风险以及开展业务活动的能力。然而，对于保险业而言，则可能更难识别哪些活动和优惠制度会引起实质性问题而那些不会，因为相关风险可以通过再保险予以转移。

90. 银行类企业的核心创造收入活动取决于其开展的银行业务活动类型，可包括吸纳存款；风险管理（包括信用、汇率和利率风险）；对冲；提供贷款、信用或其他金融服务；监管资金管理和提供管理报告和表。保险公司的核心创造收入活动包括预测和计算风险，风险保险或再保险，以及提供客户服务。

航运公司优惠制度

91. 航运公司优惠制度给予航运活动税收优惠待遇。此优惠制度的设计也考虑了重要的非税收因素。除了OECD（OECD，2004b）讨论的环形税和透明度问题之外，这项制度允许将航运收入的产生的核心活动分离，因而得到实质性活动分析后也可能会引起有关问题。

92. 航运公司的核心创造收入活动可以包括管理人员（包括招聘、支付报酬以及监督船员）；牵引和维护船舶；监督和跟综交货；确定货物订单及交付时间；以及组织监督航行。

控股公司优惠制度

93. 控股公司优惠制度大致分为两类：(i) 为持有各种资产并取得多种类型收入（比如利息、租金以及特许权使用费）的公司提供税收优惠；(ii) 仅针对持有股权而取得股息和财产收益的企业提供税收优惠。对于第一种情况而言，优惠制度对控股公司获得股息和财产收益以外的其他收入提供税收优惠，其实质性活动要求应当要求符合条件的纳税人从事与其收入类型相关的核心业务活动。

94. 对于上述第二类控股公司税收优惠制度，即对股息和财产收益给予优惠待遇的，通常会引起另一些政策考虑，因为它们较其他优惠制度更注重缓释经济双重征税问题。因而，这类制度可能事实上并不会要求企业具有实质性的从事与控股和管理股权相关的活动。也正因为此，通常引起的问题是实质性的无直接联系的其他政策问题。各国所关注的控股优惠制度往往涉及透明度以及无法确认股息受益所有人的问题。相关的考虑还包括控股公司是否使得付款方和收款方享受本来不能享受的协定待遇优惠，以及控股公司制度是否存在环形税等。当某些问题可能已经在BEPS其他工作或文件提到的其他现行因素中得到解决，例如：

- 情报交换：情报交换的国际标准不仅包括情报交换，还包括所有权、银行以及账户信息的可获取性。监管这项标准的工作由税收透明度和情报交换全球论坛（全球论坛）展开。在其修订过的参考条款中，全球论坛已将金融行动特别工作组（FATF）中的受益所有人标准涵盖其中。鉴于此，在相关情况下，以及在作为情
substance in order to exercise their main activity of holding and managing equity participations. These regimes could, however, raise policy concerns that are not directly related to substance. Countries’ concerns about holding regimes are often related to transparency and their inability to identify the beneficial owner of the dividends. Related concerns include whether holding companies enable the payer and payee to benefit from treaty benefits in circumstances that would not otherwise qualify for benefits and whether holding company regimes are ring-fenced. Some of these concerns may already be addressed in other work or under other existing factors. For instance:

- **Exchange of Information** - The international standard on information exchange upon request covers not only the exchange of information but also the availability of information, including ownership, banking, and account information. The work on monitoring this standard is carried out by the Global Forum on Transparency and Exchange of Information on Tax Purposes. Under its revised terms of reference, the Global Forum has incorporated the principles of the Financial Action Task Force (FATF) standard of beneficial ownership and as a result countries will be assessed on their ability to provide information on beneficial ownership where relevant and where this forms part of a request for exchange of information.

- **Action 5 to prevent treaty abuse** - The result of this Action takes the form of new model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances. The work done under this Action should address concerns about the use of holding companies to receive treaty benefits.

- **Action 2 to neutralise the effects of hybrid mismatch arrangements** - The result of this Action takes the form of new model treaty provisions and recommendations regarding the design of domestic rules to neutralise the effect of hybrid instruments and entities. The work done under this Action has led to a recommendation to deny a dividend exemption and other types of relief granted to relieve economic double taxation on deductible payments. This could again address some of the concern that “dividend” income can go untaxed.

- **Ring-fencing** - If countries are concerned that equity holding companies are providing benefits to income only from foreign companies and that this income is not already taxed anywhere or the regime is otherwise targeting foreign investors, this concern is already addressed under the existing ring-fencing factor.

- **Other work** - Such as the work done under Action 3 of the BEPS Action Plan to strengthen controlled foreign company (CFC) rules.

95. Once these other policy considerations have been addressed, there should be less of a concern that these regimes are used for base erosion and profit shifting. Therefore, to the extent that holding company regimes provide benefits only to equity holding companies, the substantial activity factor requires, at a minimum, that the companies receiving benefits from such regimes respect all applicable corporate law filing requirements and have the substance necessary to engage in holding and managing equity participations (for example, by showing that they have both the people and the premises necessary for

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28 According to the CAN, paragraph 65, the ring-fencing factor is not implicated in connection with measures designed to eliminate or mitigate double taxation but “it must have some features to ensure that it only applies where double taxation may arise.” In the context of holding company regimes paragraph 244 adds that the holding company regime must, therefore, provide for the operation of effective measures to achieve this objective. Such measures may include, for instance, subject to tax clauses, controlled foreign company legislation (or similar rules that apply at the time of distribution of dividends or disposition of shares), the use of exemptions methods in the context of income tax conventions following the OECD Model Tax Convention, or the use of anti-abuse measures.
报交换要求的一部分的情况下，（全球论坛）将评估各国是否有能力提供受益所有人信息。

- 行动6 防止协定滥用：该项行动的成果是对税收协定范本相关条款以及国内法进行修订及提出建议，防止国内法下协定待遇的不当授予。该项行动计划的工作成果将解决利用控股公司获得协定待遇的问题。

- 行动2 消除混合错配安排的影响：该项行动的成果是对税收协定范本相关条款以及国内法进行修订及提出建议，以消除混合工具和混合体错配的影响。该项行动计划的工作成果是：针对可扣除的支付形式，建议废除相关的股息免税以及其他相关的消除经济双重征税的优惠政策。这将解决对“股息”不征税的部分相关问题。

- 环形箱：各国如果担心控股公司制度只就从外国企业取得的收入提供优惠待遇，且该笔收入并未在任何地方缴税，或者相关优惠制度只针对外国投资者，那么这一问题已经通过现行的环形箱因素予以解决。

- 其他工作：比如最近已完成的BEPS行动计划监测外国企业规则的工作。

95. 一旦上述种种政策问题得以解决，这些优惠制度导致BEPS的情况将会减少。因此，如果控股公司制度仅仅对公司提供优惠待遇，实质性活动因素应至少要求享受优惠的企业遵守所有适用的公司法律申报要求，并具备从事控股和管理股权参与的实质（例如，证明企业具备开展活动的人员和办公地点条件）。这否定了邮箱公司和空壳挂牌公司享受控股公司税收优惠的可能性。

参考文献

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

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根据《实施细则汇编》（CIT）第65段，环形箱因素与消除或减轻双重征税而设计的措施不相相关。该条款“必须具备一些协议确保它适用于可能产生双重征税问题的情况”。关于控股公司优惠制度，第244段增加：

控股公司制度必须通过有效措施来达到这一目标。相关措施包括：税收立法，受控外国企业立法（或类似类似适用于股息分配或资本利得的规则），根据OECD税实际基础在所得到税条件下使用消除方法，或使用反滥用协定条款。
these activities). This precludes the possibility of letter box and brass plate companies from benefiting from holding company regimes.

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CHAPTER 5

REVAMP OF THE WORK ON HARMFUL TAX PRACTICES:
FRAMEWORK FOR IMPROVING TRANSPARENCY IN RELATION TO RULINGS

I. Introduction

96. The second priority under Action 5 for revamping the work on harmful tax practices is to improve transparency, including the compulsory spontaneous exchange of information on certain rulings. This work contributes to the third pillar of the BEPS project which has the objective of ensuring transparency while promoting increased certainty and predictability.

97. The FHTP decided to take forward the work on improving transparency in three steps:

1. The first step focused on developing a framework for compulsory spontaneous information exchange in respect of rulings related to preferential regimes. This framework was set out in the FHTP’s 2014 Progress Report (OECD, 2014a) and has been modified, and is now superseded by the guidance in this report. The 2014 Progress Report made it clear that the framework would be dynamic and flexible and that further work would be undertaken.

2. In the second step of the work, the FHTP has considered whether transparency can be further improved and has considered the ruling regimes in member and associate countries. This work, which included a questionnaire completed by members and associates on existing rulings practices, has informed further developments of the framework on the compulsory spontaneous exchange of information. It has led to the conclusion that the requirement to undertake compulsory spontaneous information exchange should generally cover all instances in which the absence of exchange of a ruling may give rise to BEPS concerns. This approach builds on the fact that Action 5 is not limited to exchanging information on rulings related to preferential regimes but allows for broader transparency. In this context, the FHTP focuses on specific instances where the absence of exchanges can cause BEPS concerns rather than suggesting that in all such instances the country providing the ruling operates a preferential regime. This also reflects the fact that a meaningful transparency discipline may have to go wider than the related substantive discipline. For instance, there is no suggestion that a unilateral Advance Pricing Arrangements (APAs) program is by itself a preferential regime. However, a preferential regime, especially one of an administrative nature, may be operated, in whole or in part, via an APA or Advance Tax Ruling (ATR) regime. In such cases, it is only once information on the ruling is exchanged that a fully informed decision can be made. Rather than engaging in a line drawing exercise that would have been very challenging in practice and would have put the issuing tax administration in the difficult position of having to determine the nature of its own regime, the FHTP opted for simplicity and clarity. In so doing, the FHTP also noted that under Action 13 on transfer pricing documentation APAs and ATRs are to be included in the local and master file and felt that the spontaneous exchange of key information on such APAs and ATRs between tax administrations would provide a useful cross-check with the information provided by the taxpayer.

3. In a third step, the FHTP developed a general best practices framework for the design and operation of ruling regimes.
第五章

更新有害税收实践工作：
提高有关裁定透明度的框架

1.  简介

96. 行动 5 确定的关于更新有害税收实践工作的第二项优先事项为提高透明度，包括就相关特定裁定开展强制性自发起情报交换。本项工作为整个 BEPS 项目的第三大核心支柱，其目的在确保透明度的同时，亦提高确定性和可预见性。

97. FHTP 决定推进以下三个步骤以提高透明度：

1. 第一步重点是制定与优惠制度相关的特定裁定开展强制性自发起情报交换的框架。该框架由 FHTP 的 2014 年进度报告（OECD, 2014a）提出并已经过修改，现被本报告中的有关指引所取代。2014 年的进度报告明确表示该框架将是动态且兼具灵活性的，而针对该框架的工作也将进一步开展。

2. 在第二步工作中，FHTP 仔细考虑了是否能进一步提高透明度，并考虑了各成员国及合作伙伴国间有关特定裁定制度。本项工作——包括各个成员国及合作伙伴国针对各自现行的裁定制度的实施情况完成的一份调查问卷——传达了强制性自发起情报交换框架进一步发展的相关信息。调查结果显示，要求强制性自发起情报交换的国家已可涵盖所有由于缺乏裁定信息交换而引致的 BEPS 问题。这一方法建立的基础在于：行动 5 并不仅仅限于与优惠税制的特定裁定进行情报交换，而支持更为广泛的透明度。在这方面，FHTP 更着重关注因缺乏相关裁定的信息交换而可能引发 BEPS 问题的特定情形，而并非指在任何情况下一切税种都提供了相关裁定意味着实施了优惠制度。这也反映了事实上一项有实际意义的透明度原则的范围，可能要比相关的实质性原则更为泛。举例来说，单一预约定价安排（APAs）其本身从未被认为是一项优惠制度。但是，一项优惠制度，尤其是一项具备行政管理性质的优惠制度，可以通过一个 APA 或一项事先税收裁定（ATRs）制度来部分或全部达成。在这样的情况下，只有通过将裁定所包含的信息进行情报交换，才能借此在充分知情的情况下做出准确的判断。FHTP 选择了简明及清晰的处理原则，而不选择一刀切的方式，因为一刀切的方式通常在实践中可能具挑战性，同时由于作为程序发布方的税务机关需要对自己发布的优惠制度进行判定，一刀切的方式也更容易把税务机关置于困境。在这种情况下，FHTP 指出，行动 13 转让定价同期资料部分内容将把 APAs 和 ATRs 包含在本地文档以及文档中，同时 FHTP 也认为，税务机关之间针对 APAs 和 ATRs 的关键信息进行自发起情报交换，将有助于与纳税人提供的资料进行对比检查。

3. 在第三步工作中，FHTP 针对裁定制度的设计和实施制订了适用的最佳实践框架。
98. Combining the first and the second step described above, this Chapter sets out the agreed OECD framework for the compulsory spontaneous exchange of information in respect of rulings. This includes six categories of taxpayer-specific rulings which in the absence of compulsory spontaneous exchange of information could give rise to BEPS concerns. These six categories are: i) rulings relating to preferential regimes; ii) unilateral APAs or other cross-border unilateral rulings in respect of transfer pricing; iii) cross-border rulings providing for a downward adjustment of taxable profits; iv) permanent establishment rulings; v) related party conduit rulings; and vi) any other type of ruling agreed by the FHTP that in the absence of spontaneous information exchange gives rise to BEPS concerns. This does not mean that such rulings or the legal or administrative procedures under which they are given represent preferential regimes. Instead it reflects countries' concerns that a lack of transparency can lead to BEPS, if countries have no knowledge or information on the tax treatment of a taxpayer in a specific country and that tax treatment affects the transactions or arrangements undertaken with a related taxpayer resident in their country. The availability of timely and targeted information, contained in a template discussed below in Section V of this Chapter and Annex C, is essential to enable tax administrations to quickly identify risk areas.

99. The framework was designed with a view to finding a balance between ensuring that the information exchanged is relevant to other tax administrations and that it does not impose an unnecessary administrative burden on either the country exchanging the information or the country receiving it. The framework builds on the guidance contained in the CAN (OECD, 2004) and also takes into account the Convention on Mutual Administrative Assistance in Tax Matters (MAC, OECD, 2008) and the European Union's Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation (including its work on spontaneous information exchange in the context of transfer pricing and cross-border rulings). These sources all have a common goal in that they seek to encourage spontaneous information exchange in circumstances where it is assumed that information obtained by one country will be of interest to another country.

100. Whilst it is recognised that rulings are a useful tool for both tax administrations and taxpayers, providing for certainty and predictability and thus avoiding tax disputes from even arising, concerns over transparency are not new and ruling regimes have been an area of focus since the start of the OECD's work on harmful tax practices. There is extensive guidance in the CAN on transparency. As the 1998 Report (OECD, 1998) and the CAN make clear, transparency is often relevant in connection with rulings, including unilateral APAs and administrative practices more widely, where spontaneous notification may be required. Ruling regimes can also be used to attract internationally mobile capital to a jurisdiction and they have the potential to do this in a manner that contributes to, or constitutes, a harmful tax practice.

101. This Chapter deals with the following: (i) which rulings are covered; (ii) which countries information needs to be exchanged with; (iii) application of the framework to past and future rulings; (iv) information subject to the exchange; (v) practical implementation issues; (vi) reciprocal approach to exchange of information; (vii) confidentiality of the information exchanged; and (viii) recommendations on best practices in respect of rulings.

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1 For information on the MAC, see: www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistancetaxmatters.htm.
结合上述第一、二步工作，本章规定了六步通过有关于特定类型的强制性自发情报交换的OECD框架协议。其包括因缺乏强制性自发情报交换而可能引发BEPS问题的六类针对特定纳税人的裁定，即：i) 优惠制度相关的裁定；ii) 单边APAs，或与转让定价相关的其他途径的单边裁定；iii) 下列应对税目的错误裁定；iv) 常设机构的裁定；v) 关联方与实体公司的裁定；以及vi) 经HFTP同意的。因缺乏自发情报交换而可能引发BEPS问题的其他任何类型的裁定。这并不意味着这些规定或裁定所依据的法律或行政程序代表优惠制度。相反，这反映了各国对上述这种情况的担忧。如果各国对于某个纳税人在某一特定国家的税收待遇全然不知，而该税收待遇又影响该纳税人与处于前者这些国家（或地区）的关联方居民纳税人的交易或安排，在此情况下，若缺乏透明度则可能引发BEPS问题，及时地获取具有针对性的信息——即涵盖在本章下述第五节以及附件C中所规定模板中的相关信息——对于税务机关快速识别风险区域至关重要。

该框架在设计中力图平衡，即，既要确保交换的信息对其他税务机关有用，又要确保不对进行信息交换的双方国家带来不必要的行政负担。此框架基于CAN（OECD, 2014）中涵盖的指引而建立，同时也考虑到了《多边税收征管互助公约》（MAC, OECD, 2008）以及欧盟委员会2011年2月15日发布的2011/16/EU：关于在税收领域开展行政合作的指令（包括该委员会有关于转让定价背景下以及在跨境裁定方面开展自发情报交换的工作）。所有这些参考文件都有一个共同目标：鼓励开展自发情报交换，只要一个国家获得的信息对另一个国家将会有用。

然而，裁定的准确对税务机关和纳税人双方都有用的信息，其提供了确定性和可预见性，从而避免了税收争议的产生。同时，对透明度的关注并非新事物，自OECD开展打击有害税收实践的工作以来，裁定制度就成为重点关注的领域。CAN中对透明度方面的内容提供了广泛的指引。正如1998年度报告（OECD, 1998）和CAN明确指出的，透明度通常与裁定相关，包括单边APAs和更为广泛的管理实践措施，这种情况可能需要通过自发情报交换通知。裁定制度可以被用来将国际流动资本到某一国家或地区，而这些裁定制度又有可能会促成或构成有害税收实践的产生。

本章主要内容包括：(i) 该框架所涵盖的裁定类型；(ii) 需要与哪些国家进行信息交换；(iii) 针对过去和未来的裁定适用情况；(iv) 需要进行交换的信息内容；(v) 实际操作方面的问题；(vi) 互换信息的方法；(vii) 所交换信息的保密性；以及(viii) 关于裁定的最佳实践方面的建议。

有关MAC信息，请参见：www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm。
II. **Rulings covered by the spontaneous exchange framework**

A. **Definition of a ruling**

102. Rulings are “any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and on which they are entitled to rely.”

103. Whilst the terms of a ruling may be relied upon by the taxpayer, this is typically subject to the condition that the facts on which the ruling is based have been accurately presented and that the taxpayer abides by the terms of the ruling. This definition is wide and includes both general rulings and taxpayer-specific rulings. However, the framework for compulsory spontaneous exchange of information only applies to taxpayer-specific rulings.

104. **Taxpayer-specific rulings** are rulings that apply to a specific taxpayer and on which that taxpayer is entitled to rely. Such rulings can be given both pre-transaction (this includes ATRs or clearances and APAs) and post-transaction, in each case in response to a ruling request by the taxpayer. The definition of rulings therefore excludes, for example, any statement or agreement reached as a result of an audit carried out after a taxpayer has filed its tax return or accounts. This does not however, exclude any ruling or agreement, on the treatment of future profits, given as a result of an audit if that ruling falls within any of the categories set out in this report.

105. **Advance tax rulings** are specific to an individual taxpayer and provide a determination of the tax consequences of a proposed transaction on which the particular taxpayer is entitled to rely. Advance tax rulings may come in a variety of forms and may include rulings or clearances that are given as part of a statutory process or an administrative practice, including rulings that are given informally. They frequently determine whether, and in some cases of particular law and administrative practice will be applicable to a proposed transaction undertaken by a specific taxpayer. Such rulings may also provide a determination of whether or how a general ruling applies to the facts and circumstances of a particular taxpayer. Typically, the taxpayer concerned will make an application for a ruling before undertaking the transaction concerned, although some regimes provide guidance to taxpayers after a transaction has been carried out and these post-transaction rulings will also be covered. The ruling will provide a determination of the tax consequences of the relevant transaction on which the taxpayer is entitled to rely, assuming that the facts are as described in the advance tax ruling request. Such rulings are tailor-made for the taxpayer concerned as they take into account the factual situation of the taxpayer and are thus not directly applicable to other taxpayers (although, when published in anonymised or redacted form, such rulings may provide guidance to taxpayers with similar facts and circumstances). This category of rulings could include, for example, rulings on transfer pricing matters that fall short of an advance pricing arrangement. It may also include a view or determination of the future tax treatment of the taxpayer on which they are entitled to rely.

106. **Advance pricing arrangements** are defined in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (TP Guidelines, OECD, 2010) as “an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria … for the determination of the transfer pricing for those transactions over a fixed period of time.” They provide taxpayers with

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3 This definition was included in Chapter V of the CAN and was also included in 2014 Progress Report.

4 In their anonymised or redacted form, such rulings fall within the category of “general rulings”, unless they are in fact written in response to a taxpayer-specific ruling request. Of course, in their non-anonymised, non-redacted form, such rulings fall within the category of “taxpayer-specific rulings”.

4 APAs may determine the attribution of profit in accordance with Article 7 of the OECD Model Tax Convention (OECD, 2014b) as well as transfer pricing between associated enterprises. Such APAs
II. 自发情报交换框架所涵盖的协定类型

A. 裁定的定义

102. 裁定是指“税务机关向选定纳税人或纳税人群体提供有关其税收待遇的任何通知、信息或保证，而相关纳税人有权限对此作依赖的。”

103. 虽然纳税人的依赖协定的条款，但是一个裁决的生效典型受制于以下条件：该裁决应基于纳税人的请求陈述，且纳税人应同意裁决的条款。裁决的定义相当广泛，包括一般性裁决，也包括与纳税人有关的特定裁决。但是，强制性自发情报交换的框架只适用于针对纳税人的特定裁决。

104. 针对纳税人的特定裁决是指适用于特定纳税人而且该纳税人有权对此作依赖的。根据纳税人的不同裁决请求，税务机关可以在交易前作出裁定（包括事先税收裁定或税务确认以及APAs），也可以在交易进行后作出裁定。因此裁决的定义并不包括例如，税务机关对纳税人的申请书进行税务审计并根据审计的结果作出的任何结论或决议。但是，不包括税务机关对纳税人进行税务审计，而针对未来预期的税收处理作出裁定或者决议，而该裁定或决议又属于本报告所规范的裁定类型。

105. 事先税收裁决（ATR）是针对单个纳税人，对一个交易提案的税收处理，事先作出裁决。单个纳税人有权对此作依赖的。ATR可以有多种形式，包括作为发行合同程序或行政管理措施的一部分，包括以非正式方式作出的裁定。这类裁决通常针对特定法律及行政法规对特定纳税人进行的交易是否适用，以及如何适用。此类裁决还可以针对某些特定纳税人的情况和事实，就其一般性裁决是否以及如何适用于该纳税人作出决定。通常，相关纳税人一般会在进行交易之前申请裁定，虽然有些情况下在纳税人交易完成后提供指引，而且这些交易后的裁决也被包含在裁定义里。裁定可以就税行政的税收影响作出纳税人可以依赖的裁定，前提是ATR申请中说明的事实属实。由于此类裁定将纳税人的实际情况纳入考虑，可以被看作是作为相关纳税人量身定制的裁决。因此不能直接适用于其他纳税人（虽然在匿名或经编改公布后，此类裁决也可能为适用于类似情形的纳税人提供相同指引）。此类裁决还可能涉及诸如有关转让定价问题但是又不适用于APAs的裁决。同时也还可以包括针对纳税人未来税收待遇作出的可让纳税人有权对此作依赖的裁定。

106. 预约定价安排的定义已在OECD跨国公司与税务机关转让定价指南（以下简称“转让定价指南”）中描述，即“在受控交易发生之前，就某一国定期限内，决定此类交易的转让定价的一系列相关适用条件的一项安排。”此类安排为纳税人提供了确定性，即确认转让定价规则将如何适用于APA范围内的未来交易。为达此目的，APA通常会确定一系列

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\[\text{67}\]
certainty about how transfer pricing rules apply to future transactions within the scope of the APA. They normally do this by determining an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto and critical assumptions as to future events) for the determination of the transfer pricing.\footnote{See the definition of APA in the first sentence of paragraph 4.123 of the TP Guidelines.}

107. The TP Guidelines distinguish APAs from other rulings procedures, such as advance tax rulings, in the following way:

The APA differs from the classic ruling procedure, in that it requires the detailed review and to the extent appropriate, verification of the factual assumptions on which the determination of legal consequences is based, before any such determinations can be made. Further the APA provides for a continual monitoring of whether the factual assumptions remain valid throughout the course of the APA period.\footnote{See paragraph 3 of the Annex to Chapter IV of the TP Guidelines.}

108. APAs may be unilateral, bilateral or multilateral. Bilateral and multilateral APAs are concluded between two or more tax authorities under the mutual agreement procedure of the applicable tax treaties. Typically, the associated enterprises applying for an APA provide documentation to the tax authorities concerning the industry, markets and countries to be covered by the agreement, together with details of their proposed methodology, any transactions that may serve as comparables, and a functional analysis of the contribution of each of the relevant enterprises. Because APAs govern the methodology for the determination of transfer prices for future years, they necessitate assumptions or predictions about future events.

109. General rulings apply to groups or types of taxpayers or may be given in relation to a defined set of circumstances or activities, rather than applying to a specific taxpayer. They typically provide guidance on the position of the tax authority on such matters as the interpretation of law and administrative practice\footnote{Law and administrative practice includes statutory law (including relevant treaty provisions), case law, regulations, administrative instructions and practice.} and on their application to taxpayers generally, to a specified group of taxpayers or to specified activities. This guidance typically applies to all taxpayers that engage in activities or undertake transactions that fall within the scope of the ruling. Such rulings are often published and can be applied by taxpayers to their relevant activities or transactions without them needing to make an application for a specific ruling. The framework does not apply to general rulings but the best practices do apply.

B. Taxpayer-specific rulings related to preferential regimes

110. The FHTP has already agreed to a framework, described in the FHTP’s 2014 Progress Report in respect of the compulsory exchange of information on rulings related to preferential regimes. A filter approach is used for such rulings so that there is an obligation to spontaneously exchange information on cross-border taxpayer-specific rulings related to regimes that (i) are within the scope of the work of FHTP; (ii) are preferential; and (iii) meet the low or no effective tax rate factor.\footnote{Where rulings are given in respect of these regimes there will be an obligation to spontaneously exchange information.} Where rulings are given in respect of these regimes there will be an obligation to spontaneously exchange information.

\footnotetext{where would also fall within the scope of the definition of “ruling” for the purposes of the obligation to spontaneously exchange on rulings.}
相关适用条件（如：方法、可比交易、恰当调整以及有关未来事项的关键假设等）以确定转让定价。

107. 转让定价指南通过以下方式将APAs区别于其他裁定程序：

APAs不同于典型的裁定程序，其原因在于APAs要求在作出具有法律效力的决定之前，对决定依据的事实假设进行详细的研究和恰当程度的核实。另外，一个APAs会议在其整个有效期内针对相关事实假设是否依然有效一直予以持续监控。

108. APAs既可以是单边，也可以是双边或多边。基于相关适用的税收协定中的相互协商程序，双边或多边的APAs在两个或多个国家税务机关之间达成。通常，申请预约定价安排的企业需要向税务机关提供以下文件记录：有关协议涵盖的行业、市场以及所有涉及国家的详细信息；拟采取的方法的详细资料、可比交易以及各企业贡献相关的功能分析等。由于APAs是用以确立未来一段时间的转让定价方法，因此其有必要对未来事项进行假设或预测。

109. 一般性原则适用于某个特定纳税人群体或某个特定类型的纳税人，又或者某一些纳税人党与某种特定情形或业务相关，而不是适用于某一特定纳税人。它通常是税务机关针对关乎若干法律和行政法规措施的特定“对称”以及如何对纳税人的一般性应用等问题，向一个特定群体的纳税人或一种特定业务提供的指引。该指引一般适用于从事或进行裁定涵盖境内的业务或交易的所有纳税人。此类裁定通常会予以公布。纳税人可以将其判断是否适用于自己所处的特定情形或交易，而不需即单独提出特定裁定申请。本节讨论的框架并不适用于一般性原则，但最佳实践指引适用于该类裁定。

B. 与优惠制度相关的针对特定纳税人的裁定

110. FHTP已经在2014年进展报告中同意了关于就与优惠制度相关的裁定进行强制性情报交换的框架。该框架针对此类裁定采用国际法确定自权利情报交换义务。如果跨境纳税人相关裁定制度具备以下特征：则有义务进行自权利情报交换：（i）适用于HTP的工作范围；（ii）与优惠制度有关；（iii）符合“不征税或免税或虽征税但实际税率极低”要素。

依照上述制度作出的裁定，将负有进行自权利情报交换的义务。

5 请参阅转让定价指南第4.123段第一条关于APA的定义。
6 请参阅转让定价指南第四章附录中第3款。
7 法律及行政法规措施包括条文法（包括相关裁定条款）、判例法、法规以及行政命令或其他措施。
8 请参阅本章第三节。
111. The obligation to spontaneously exchange information arises for rulings related to any such preferential regime. That is, a regime does not need to have been reviewed or found to be potentially or actually harmful within the meaning of the 1998 Report for the obligation to arise. Therefore, the obligation will also apply to any ruling (as defined) in connection with preferential regimes that have not yet been reviewed or that have been reviewed but that have not been found to be potentially or actually harmful and that have therefore been cleared.

112. Countries that have preferential regimes that have not yet been reviewed by the FHTP will need to self-assess and take a view on whether the filters are satisfied. Where this is the case, the obligation to spontaneously exchange information arises immediately, without the FHTP first needing to formally review the relevant regime. In case of doubt as to the applicability of the filters, it is recommended that the relevant country spontaneously exchange information. The expectation is that a country that has a preferential regime which has not yet been reviewed by the FHTP will in the meantime self-report this regime for review by the FHTP. 113. As the framework now includes six categories of rulings some of the procedures that were described in the FHTP’s 2014 Progress Report have been modified and simplified and this report supersedes the 2014 Progress Report.

C. Cross-border unilateral APAs and any other cross-border unilateral tax rulings (such as ATRs) covering transfer pricing or the application of transfer pricing principles

114. Unilateral APAs are APAs established between a tax administration of one country and a taxpayer in its country.

115. “Other cross-border unilateral tax rulings covering transfer pricing or the application of transfer pricing principles” cover, for example, ATRs on transfer pricing issues that fall short of an APA, for instance, because the ruling is limited to addressing questions of a legal nature based on facts presented by a taxpayer (unlike an APA which generally deals with factual issues) or because the ruling is binding only for a particular transaction (unlike an APA, which usually covers several transactions, several types of transactions on a continuing basis, or all of a taxpayer’s international transactions for a given period of time).

116. Unilateral APAs and other unilateral tax rulings are in the scope of covered rulings, not because they are preferential but because, in the absence of transparency, they can create distortions and may give rise to BEPS concerns and either directly or indirectly impact on the tax position in another country. In some countries, unilateral APAs can adjust profits both upwards and downwards from the starting position. In addition unilateral APAs can set a future transfer pricing methodology or a future pricing or profit apportionment structure. If the terms of such agreements are not available to the tax administrations dealing with related taxpayers then there can be mismatches in how two ends of a transaction are priced and taxed with the result that profits go untaxed resulting in base erosion or profit shifting concerns.

117. There is an interaction between the obligation to spontaneously exchange information on this category of rulings and the transfer pricing documentation requirements under Action 13. In particular, the master file will contain a list and brief description of the MNE group’s existing unilateral APAs and other tax rulings relating to the allocation of income among countries. The local file will contain a copy of existing unilateral and bilateral/multilateral APAs and other tax rulings to which the local jurisdiction is not a party and which are related to the relevant material controlled transactions.

118. However, the obligation to spontaneously exchange information on unilateral APAs and other transfer pricing rulings could potentially cover a wider range of transfer pricing rulings than those captured in the local file and the master file. For example, only rulings related to “relevant material controlled transactions” will be contained in the local file which creates a higher threshold than that required under
111. 上述的任何优惠制度相关的裁定都会产生自发情报交换义务。也就是说，并非一定在审议审理相关的制度时或实际有害时（根据1998年报告）才需要履行该义务。因此，该义务适用于所有与优惠制度有关的裁定、而不论该优惠制度是否经过审议或虽已经审议但未被决定为潜在有害或已被决定为实际有害而已被撤销的。

112. 在执行优惠制度但是相关制度尚未经过FHTF审议的国家需要进行自我评估，以确定是否满足上述评估法提到的合格标准。对于符合相关标准的国家，应立即开始履行自发票交换的义务。而无需经由FHTF先完成对其的审议。如果对上述评估法的相关因素的适用性产生疑问，则建议该国家应立即主动地交换信息。同时，优惠制度但还未经过FHTF审议的国家也应该在此期间主动将制度提交给FHTF进行审议。

113. 由于框架目前包括六类裁定，FHTF2014年的进展报告中一些相关的程序描述业已被修订和简化，因此本报告取代2014年进展报告。

C. 跨境单边税收裁定（如ATRs）包括转让定价或适用转让定价的原理

114. 单边 APA 是指—国税务机关与该国纳税人之间确定的单边预约定价安排。

115. “其他跨境单边税收裁定包括转让定价或适用转让定价原则”相关内容包括，比如，不构成 APA 的与转让定价问题相关的 ATR。这类裁定不构成 APA 的原因较多，比如，该裁定仅针对纳税人提供的事实，不处理法律性质的问题（有别于通常解决实际问题的 APA）；又比如，该裁定仅适用于某一特定交易（而 APA 通常在某一特定时期内持续适用于多项交易或多种类型的交易或某一纳税人某一特定时期内发生的所有国际交易等）。

116. 单边 APA 和其他单边税收裁定之所以属于被本框架涵盖的裁定类型，并不是因为它们提供优惠待遇，而是因为如果缺乏透明度，它们则可能造成事实扭曲并引发 BEPS 风险，从而对另一国的税收产生直接或间接的影响。在一些国家，单边 APAs 可以对利润进行调整和调整。此外，单边 APAs 也可以提供一个未来年度的转让定价方法、一个未来的定价政策一个利润分配架构。如果对方关联方纳税人所属国的税务机关对这些信息不了解，那么很可能造成交易双方的定价和征税不匹配，从而导致对利润不征税，并引发税基侵蚀与利润转移方面的风险。

117. 这类裁定的自发情报交换义务与行动13中的转让定价同期资料要求相互关联，特别是，主文档报告将包含跨国企业集团现有的单边 APAs 信息及简要概述，以及国与国之间关于收入分配的其他税收裁定的相关信息。而本地文档报告将包含有关单边、双边和多边 APAs 以及其他税收裁定的副本，其本地管理区并非相关签署—方且这些安排及裁定与重大受控交易相关。

118. 然而，基于自发情报交换义务的单边 APA 及其他转让定价裁定范围通常广泛于本地文档报告和主文档报告中涵盖的转让定价裁定。具体来说，本地文档报告中只包含与重
Action 5. Also, certain information in the local file may be subject to local materiality thresholds so certain taxpayers may not be required to produce a local file.

119. Lastly, those two sets of obligations are mutually reinforcing, allowing tax administrations to cross-check the information reported by taxpayers against the information exchanged from another tax administration and vice versa. This dual requirement may also give rise to additional information which could help tax administrations identify cases where they want to formulate a request for an additional exchange of information with another tax authority.

D. **Cross-border rulings providing for a unilateral downward adjustment to the taxpayer’s taxable profits that is not directly reflected in the taxpayer’s financial/commercial accounts**

120. This covers, for example, informal capital or similar rulings, to the extent not already covered by Section II.C above. The CAN specifically refers to advance tax rulings or unilateral APAs providing for a downward adjustment that is not reflected in the company’s financial accounts as being examples that could result in a lack of transparency where the tax authority does not notify the other tax authority of the existence of the ruling. Moreover, the 2000 Report (OECD, 2001) recognised that regimes that allow negative adjustments to profits could be preferential regimes.9

121. A regime that provides for negative adjustments to profits has the potential to result in no or low taxation and MNEs have the incentive to shift profits. This incentive exists where the downward adjustment is predictable, for example, where it is part of a ruling or other administrative practice. In such cases, effective exchange of information is particularly important in order to give other countries the opportunity to apply their transfer pricing rules. In many cases the affected country will not be able to determine that such an adjustment has been made because, for example, the adjustment is made in a domestic tax computation without being reflected in an enterprise’s accounts or it is made retrospectively.10

122. Excess profits rulings, informal capital rulings and other similar rulings recognise the contribution of capital or an asset, generally by the parent company or another related party, and provide an adjustment that reduces the taxable profits, for instance, through a deemed interest deduction in the case of an interest free loan. An example of this would be where the price paid by a subsidiary to its parent company is stated to be lower than the arm’s length price and this is done intentionally to favour the subsidiary. In such circumstances a country may make a downward adjustment to the subsidiary’s taxable profits to reflect the price that it would have paid had the transaction been undertaken at arm’s length. The downward adjustment will reflect the difference between the actual price paid and the arm’s length price so that in the company’s tax computations (but not in the company’s commercial/statutory accounts), the difference will be treated as having been paid by the subsidiary to its parent. This will create a tax deduction and reduce the subsidiary’s effective tax rate, but there is unlikely to be any corresponding additional taxation in the parent company jurisdiction unless it is aware of the adjustment and its amount. Further, it has been agreed that countries where an informal capital contribution or excess profits regime can lead to downward adjustments and that do not require taxpayers to obtain a ruling to benefit from this regime, will ensure that the tax administration is aware of all cases where the regime has been utilised. Information on those cases will also be provided to other relevant tax authorities.

123. This category of ruling is neither intended to cover downward adjustments made following audits of filed accounts and returns where there is no separate ruling nor unilateral relief for items such as foreign tax credits.

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9 See paragraph 152 of the CAN.
10 See paragraph 153 of the CAN.
大受控交易相关”之裁定，与行动 5 中的要求相比，后者门槛明显较高。此外，本地文档可能根据当地的重要性标准来决定是否包含相关信息，从而导致未达标准的一些纳税人可能将不需要准备相关的本地文档。

119. 最后，这两类义务是相辅相成的，并使税务机关可以将纳税人提交的信息与从另一方税务机关获取的信息进行交互对比，反之亦然。这一双重要求也可能会带来更多的信息，从而帮助税务机关分析决定是否需要请求另一方税务机关额外的信息进行情报交换。

D. 单边调整被异常利润且不会直接反映在纳税人财务账目中的跨境裁定

120. 本系列包括那些而未包含在上述第二节第C部分的其他相关裁定，例如非正式资本项目类型的裁定或其他类似的裁定。例如特别协定单边调整使纳税人应税利润和没有直接反映在纳税人财务账目中的 ATRs，或单边 APAs，并以此阐明如果一方税务机关没有通知另一方税务机关这类裁定或安排的存在，那么很有可能导致透明度的缺失。此外，2000 年报告（OECD，2001）指出，允许调减利润的制度可被认为是优惠制度。9

121. 一项允许对利润进行下调的制度可能导致不征税或虽征税但税负极低，而跨国企业集团便有机会通过这一途径来转移利润。如果这种下调利润是可以预见的，比如作为某项裁定或其他行政法规措施中的一部分，那么这无疑对国际税制产生了。在这种情况，有效的情报交换显得尤为重要，因为这可以给予其他国家应用转让定价规则的机会。在大多数情况下，受影响的国家很难确定利润调减的原因，比如，可能是由于该项调整在国际税计算的过程中发生但没有反映在企业的账目中或者该调整是由于追溯调整引致的。10

122. 超额利润裁定，非正式资本项目以及其他类似的裁定确认一般由母公司或其他关联方的资金或资产方式的出资额，并可以通过某些方式来调减利润，例如，对无息贷款视同息税利予以扣除利息。一个例子可以是：子公司向母公司支付的价格低于独立交易原则下的价格，且该支付价格是为有利于子公司而设定的。在这种情况下，一般可能需要调减子公司的应税利润以反映独立交易原则下的交易价格。这项调整可以反映真实的价格与独立交易原则下的价格之间的差异，在该子公司的税务核算表单（非公司的商业或法定账目中）中，该调整部分将被视为子公司已向母公司支付。这部分将为税收扣减项目并降低子公司的实际税率，然而除非母公司所在地对这项调整及其调整金额完全知情，否则该调整可能采取相应的调整税务措施。此外，目已达成共识的是，如果在某些国家存在能够导致应税利润调减的非正式资本出资或超额利润制度，并且纳税人无须获得裁定就可享受这项优惠制度的，那么这些国家应当确保自己的税务机关必须知晓已经适用了此类制度的案件，同时也应向其他相关税务机关提供此类案例的相关信息。

123. 这一类型的裁定既无意包括那些在检查已申报账目后实施的并不涉及单独裁定的调减，也无意涵盖单边税收减免例如境外税收抵免等。

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9 请参见 152 段。
10 请参见 153 段。
E. **Permanent Establishment (PE) rulings**, i.e. rulings concerning the existence or absence of, and/or the attribution of profits to, a permanent establishment in the country giving the ruling

124. This covers rulings, to the extent not already covered by Section II.C above, which explicitly determine or decide on the existence or absence of a PE (either inside or outside of the country giving the ruling) or any ruling that provides for how much profit will be attributed to a PE.

F. **Related party conduit rulings**

125. To the extent not already covered by Section II.C above, this includes rulings, covering arrangements involving cross-border flows of funds or income through an entity in the country giving the ruling, whether those funds or income flow to another country directly or indirectly (i.e. through another domestic entity first).

126. Indirect conduit arrangements include, for example, arrangements whereby a lower tier domestic entity receives cross-border income payments (i.e. an interest payment on a loan) from underlying operating companies, which it then pays to a higher tier domestic entity as an interest payment on a loan, leaving a small taxable margin in the lower tier entity. The higher tier entity is treated as a tax transparent entity under domestic law and only has non-resident partners thereby avoiding taxation. The effect of this is an interest deduction in the underlying operating companies with no corresponding income pick-up in domestic entities (except the small margin) or in the non-resident partners.

G. **Any other type of ruling that in the absence of spontaneous information exchange gives rise to BEPS concerns**

127. If at a later date, the FHTP agrees, this category could be used for any other type of ruling that, in the absence of compulsory spontaneous exchange of information, gives rise to BEPS concerns. This language is intended to give the FHTP flexibility in the future to broaden the obligation to spontaneously exchange to additional categories of rulings. This would only therefore apply where the FHTP subsequently agrees that other rulings give rise to similar concerns as the rulings already included within the framework and should therefore be added.

III. **Jurisdictions receiving the information**

128. As a general rule, exchange of information on rulings for the six categories need to take place with:

a) The countries of residence of all related parties with which the taxpayer enters into a transaction for which a ruling is granted or which gives rise to income from related parties benefiting from a preferential treatment (this rule also applies in a PE context); and

b) The residence country of the ultimate parent company and the immediate parent company.

129. The related party threshold has been set at 25% but the FHTP agreed that this is to be kept under review. Accordingly, two parties would be considered related if the first person has a 25% or greater investment in the second person or there is a third person that holds a 25% or greater investment in both. A person will be treated as holding a percentage investment in another person if that person holds directly or indirectly through an investment in other persons, a percentage of the voting rights of that person or of the value of any equity interests of that person.

130. The general two-part rule above applies in the case of (i) shipping company regimes; (ii) banking regimes; (iii) insurance regimes; (iv) financing and leasing regimes; (v) fund management regimes; (vi)
E. 常设机构（PE）的裁定，即是否存在PHE及（或）利润归属问题的裁定

124. 这一类的裁定包含第2节第3部分尚未包含的裁定类型。此类裁定将明确判断或决定常设机构的存在与否（无论常设机构位于国家境内或境外），或确定归属于常设机构的利润多少。

F. 关联方导管公司的裁定

125. 除第2节第3部分已涵盖的税种外，这类裁定包括的安排类型：资金或收入通过位于做出裁定国家的实体的跨境流动安排，无论这些资金或收入是直接还是间接（通过该国国内另一实体）流向另一国家。

126. 间接导管安排包括，例如，低级层次的境内实体从其附属公司取得跨境收入（即贷款利息收入），然后这笔收入作为贷款利息再次支付给国内较高层次的实体，只在较低层次的实体留存较少的应税利润。根据国内法，较高层次的实体被视作税收透明体时又仅包括非居民合伙人，从而避免纳税。这样的结果是，附属运营公司可以享受利息税前扣除，而导管国内实体或非居民合伙人并不存在相应的金额（除了小额应税利得外）纳入其自己的应纳税所得额缴纳。

G. 任何其他在缺乏自发票报交换前提下可引发BEPS风险的裁定类型

127. 如果在将来经过FHTP批准，这一类别将包括其他所有因缺乏强制性自发票报交换而引发BEPS风险的裁定。这一结果给FHTP的工作带来灵活性，在未来可以将发票报交换的义务扩大到其他种类的裁定中。然而，只有在随后经过FHTP认可同意哪些是可能产生类似框架下已包含的裁定所引发的风险的其他裁定，才能加入框架体系并适用上述自发票报交换义务。

III. 接收信息的管辖地

128. 作为一般性的规则，针对上述六类裁定需要与其进行情报交换的对方国家和地区包括：

a) 所有关联方的居民所在国，该关联方与纳税人发生交易且该交易亦符合在裁定中或被关联方由此交易产生了可享受优惠待遇的收入（这项规则也适用于常设机构）；

b) 最终母公司所在国以及直接母公司的居民所在国。

129. 判定关联公司的控制比例标准为25%，但FHTP认为，需要对这一标准不断进行审议。当一方直接或间接持有另一方的股份总和达到25%或以上，或者双方直接或间接同为第三方所持有的股份达到25%或以上，或构成关联方关系。如果一方通过直接或间接投资来持有另一方一定比例的表决权或股权价值，那么前者将被视为持有另一方一定比例的投资。

130. 上述提到的两项交换信息原则适用于以下制度：(i) 航运公司制度；(ii) 银行制度；(iii) 保险制度；(iv) 融资租赁制度；(v) 资金管理制度；(vi) 总部制度；(vii) 分销中
headquarters regimes; (vii) distribution centre regimes; (viii) service centre regimes; (ix) IP regimes; (x) holding company regimes; and (xi) other miscellaneous regimes identified as preferential regimes by the FHTP.

131. The same two-part exchange rule applies for (i) cross-border unilateral APAs and any other cross-border unilateral tax rulings and (ii) cross-border rulings providing for a unilateral downward adjustment. For PE rulings, the information is exchanged with the residence country of the head office, or the country of the PE, as the case may be, and the residence country of the ultimate parent company and the immediate parent company. For conduit rulings, the information is exchanged with (i) the country of residence of any related party making payments to the conduit (directly or indirectly); (ii) the country of residence of the ultimate beneficial owner (which in most cases will be the ultimate parent company) of payments made to the conduit; and (iii) to the extent not already covered by (ii), the residence country of (1) the ultimate parent company and (2) the immediate parent company.

132. The table below summarises the countries with which information should be exchanged, with respect to all the rulings discussed above. The first column of the table describes what rulings are covered by the obligation to spontaneously exchange and the second column sets out with which countries information needs to be exchanged.
心制度；(viii) 服务中心制度；(ix) IP 制度；(x) 控股公司制度；以及(xi) FHTP 认定为优惠制度的其他各项制度。

131. 事项交换信息原则同样适用于：(i) 境外单边 APA 和任何其他跨境单边税收裁定；(ii) 关于单边调整的跨境裁定。对于常设机构裁定而言，根据具体案情，可能涉及的情报交换方包括总部居民所在国、常设机构所在国，最终母公司居民所在国以及直接母公司居民所在国。对于导管公司裁定而言，情报交换所涉及包括：(i) 直接或间接向导管公司支付款项的任何关联方居民所在国；(ii) 支付给导管公司的款项的最终受益所有人（通常为最终母公司）居民所在国；(iii) 款项可能未包含的 (1) 最终母公司居民所在国以及(2) 直接母公司居民所在国。

132. 下表针对上述讨论的所有裁定，总结了须与其进行情报交换的对方国家和地区。该表第一列为需承担自发情报交换义务的裁定类型，第二列为需要与其进行情报交换的国家信息。
Table 5.1 Summary of the countries with which information should be exchanged

<table>
<thead>
<tr>
<th>What rulings are covered?</th>
<th>With which country does information need to be exchanged?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rulings related to a preferential regime, shipping company regimes, banking regimes,</td>
<td>The countries of residence of all related parties (a 25%</td>
</tr>
<tr>
<td>insurance regimes, financing and leasing regimes, fund management regimes, headquarters</td>
<td>threshold would apply), with which the taxpayer enters into</td>
</tr>
<tr>
<td>regimes, distribution centre regimes, service centre regimes, IP regimes, holding company</td>
<td>a transaction for which a preferential treatment is granted</td>
</tr>
<tr>
<td>regimes, and other miscellaneous regimes identified as preferential regimes by the</td>
<td>or which gives rise to income from related parties</td>
</tr>
<tr>
<td>FHTP.</td>
<td>benefiting from a preferential treatment (this rule also</td>
</tr>
<tr>
<td>Cross-border unilateral APAs and any other cross-border unilateral tax ruling (such</td>
<td>applies in a PE context); and</td>
</tr>
<tr>
<td>as an ATR) covering transfer pricing or the application of transfer pricing principles</td>
<td>The residence country of (a) the ultimate parent company</td>
</tr>
<tr>
<td>Cross-border rulings giving a unilateral downward adjustment to the taxpayer’s</td>
<td>and (b) the immediate parent company.</td>
</tr>
<tr>
<td>taxable profits in the country giving the ruling.</td>
<td></td>
</tr>
<tr>
<td>PE rulings</td>
<td>The residence country of the head office, or the country of</td>
</tr>
<tr>
<td></td>
<td>the PE, as the case may be; and</td>
</tr>
<tr>
<td>Related party conduit rulings</td>
<td>The residence country of (a) the ultimate parent company</td>
</tr>
<tr>
<td></td>
<td>and (b) the immediate parent company.</td>
</tr>
<tr>
<td></td>
<td>The country of residence of any related party making</td>
</tr>
<tr>
<td></td>
<td>payments to the conduit (directly or indirectly);</td>
</tr>
<tr>
<td></td>
<td>The country of residence of the ultimate beneficial</td>
</tr>
<tr>
<td></td>
<td>owner (which in most cases will be the ultimate parent</td>
</tr>
<tr>
<td></td>
<td>company) of payments made to the conduit; and</td>
</tr>
<tr>
<td></td>
<td>To the extent not already covered by ii), the residence</td>
</tr>
<tr>
<td></td>
<td>country of (a) the ultimate parent company and (b) the</td>
</tr>
<tr>
<td></td>
<td>immediate parent company.</td>
</tr>
</tbody>
</table>

IV. Application of the framework to rulings

A. Past rulings

The obligation to spontaneously exchange applies not only to future rulings, but also to past rulings that relate to earlier years. It has been agreed that information on rulings that have been issued on or after 1 January 2010 and were still in effect as from 1 January 2014 must be exchanged.

11 Countries that do not currently have the necessary legal framework in place for spontaneous exchange of information on rulings covered in this Chapter will need to put in place such a framework in order to comply with the obligations under Action 5. In such cases the timelines contained in this section are subject to a country’s legal framework. This also takes into account the entry into force and effective date of application of provisions of the relevant exchange of information instruments.
### 表 5.1 应与其进行情报交换的国家信息摘要

<table>
<thead>
<tr>
<th>所涉裁定类型</th>
<th>需要与哪些国家进行情报交换？</th>
</tr>
</thead>
<tbody>
<tr>
<td>优惠制度相关的裁定</td>
<td>所有关联方居民国—与纳税人发生交易且该交易享受优惠待遇或由此交易产生了可享受优惠待遇的收入（将采用 25%控股比例标准）（这项规则也适用于常设机构）；最终母公司居民国以及直接母公司居民国。</td>
</tr>
<tr>
<td>跨境单边 APAs 及任何其他跨境单边预约定价安排（例如 ATR）涵盖转让定价或转让定价原则的应用</td>
<td>所有关联方居民国与纳税人发生交易且该交易涵盖在所签订的预约定价安排中的；最终母公司居民国以及直接母公司居民国。</td>
</tr>
<tr>
<td>跨境裁定单边税收在裁定中与双方国家的应税利润</td>
<td>所有关联方居民国与纳税人发生交易的关联方的居民国；(a)最终母公司居民国以及(b)直接母公司居民国。</td>
</tr>
<tr>
<td>常设机构裁定</td>
<td>总部居民国或常设机构所在国，视情况而定；最终母公司居民国以及直接母公司居民国。</td>
</tr>
<tr>
<td>关联方导管公司的裁定</td>
<td>任何关联方居民国—直接或间接向导管公司付款项；支付给导管公司的款项的最终受益所有人（通常为最终母公司）居民国；前款 ii)未包含的，(a)最终母公司居民国以及(b)直接母公司居民国。</td>
</tr>
</tbody>
</table>

### IV. 裁定框架的应用

#### A. 以往的裁定

133. 自发情报交换义务不仅适用于将来的裁定，同时也适用于往的裁定。目前所达成的共识是：对 2010 年 1 月 1 日（含）之后发布且在 2014 年 1 月 1 日起依旧有效的裁定的相关信息必须进行交换。

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由于本表所涉裁定自发情报交换相关必要的法律框架的国家，需进一步细化落实到位，以落实《G20》中的相关规定。在这种情况下，本节所列时间表将受到一定法律框架的影响。在考虑情报交换工具相关生效执行的时间时，需考虑此点因素。

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79
In order to exchange with the relevant countries identified in Section III above, jurisdictions will need to be able to identify related parties, the ultimate parent, the immediate parent, and/or the ultimate beneficial owner, as the case may be. For past rulings there will be many cases (such as unilateral APAs and other cross-border transfer pricing rulings) where much of the information, especially in relation to related parties, is available. Also, information on immediate and ultimate parent entities will typically be in the possession of the tax administration. However, this may not be the case in respect of all relevant related parties, for instance, in connection with rulings relating to IP regimes, or where an APA has focused on the transfer pricing methodology rather than specific transactions. In these cases, countries may not have routinely identified related parties who undertake transactions.

Where a ruling does not contain sufficient information to enable identification of all the relevant countries with which the information needs to be exchanged, a country is not expected to contact the taxpayer but can instead use “best efforts” to identify the countries with which to exchange information on the ruling. This requires a tax administration to check the information that it has in its possession, for instance, in the rulings or wider taxpayer file, including any relevant transfer pricing documentation. Where such information is not already in the possession of the tax administration but is available from sources easily accessible to the tax administration (e.g., a corporate registry system) tax administrations would be expected to extend their efforts to such sources.

Future rulings

For future rulings, countries will need to take the necessary measures to ensure they have, or are able to obtain, information that identifies the countries they must exchange with. For future rulings, this may mean that countries will need to amend their rulings practice to require taxpayers to provide that information as part of the ruling process. Given that countries that issue rulings covered by this report may need to amend their ruling practices, future rulings will only be those issued on or after 1 April 2016.

Information subject to the exchange

Another aspect of the FHTP’s work is to balance the need for greater transparency with not placing too great an administrative burden on tax administrations. As such, a two-step process for exchanging information has been agreed. Under the first step a tax administration provides a summary and some basic information on the ruling. This is done using the template set out at Annex C. Use of a common template streamlines and simplifies the process.

The information required to complete the template essentially documents the decision making process that needs to be undertaken by the tax administration that has issued the ruling to determine whether (i) the ruling is covered by the framework; and (ii) to determine with which country it should be exchanged. It does this in a format where entries are largely numeric or use check boxes including dropdown menus if an electronic version is used. It is therefore designed to create minimal extra burden or delay for the issuing tax administration while serving as a useful filter, easily understood in all languages, on the basis of which receiving tax administrations can determine whether to request the ruling itself which would then happen in a second step.

Practical implementation questions

The 2014 Progress Report anticipated that the framework set out in that report would apply following the FHTP’s 2014 autumn meeting. However, the application of the framework for compulsory spontaneous exchange of information has not yet begun because the inclusion of additional categories of

\[12\] The OECD will translate the template into an XML schema with related user guide that can be used for larger transfers of templates.
为了与上文第三节确定的有关国家进行情报交换，各国有必要根据具体情况，识别关联方。最终母公司，直接母公司以及（或）最终受益所有人。就《协定》规定而言，在大多数情况下（如单边 APA 和其他跨境转让定价协定），其中许多信息，尤其是关于关联方的信息，都是可获取的。此外，税务机关通常掌握了直接母公司和最终母公司的相关信息。然而，并不是对于所有关联方关系来说，情况都是如此，例如，对于 IP 制度相关的裁定，或某项 APA 是针对转让定价方法而非具体交易的情况下，国家可能不会常规地确定交易中所涉及的各个关联方。

当裁定缺乏足够的信息而导致一国无法识别所有应当进行情报交换的其他国家时，并不要求该国与纳税人进行联系，但是应尽最大努力来识别需要交换情报的其他国家。这需要税务机关审查其掌握的信息，比如，任何相关的转让定价同期资料的裁定或更广泛的纳税人档案等。如果税务机关并不拥有这些信息，但是可以较为容易地从其他渠道获得相关信息（例如公司注册系统），那么税务机关应当尽可能地通过这些渠道获取信息。

### B. 未来的裁定

对于未来的裁定，各国将需要采取必要的措施，以确保其拥有或能够获得相关信息以确定有关情报交换的国家。对于未来的裁定而言，这可能意味着各国将需要修改与裁定相关的措施，要求纳税人提供这些信息并将其作为裁定过程的一部分。鉴于发布本报告所涉及的各国可能需要修改有关裁定的实践措施，未来的裁定将只适用于 2016 年 4 月 1 日（含）之后作出的裁定。

### V. 需交换的信息

FHTP 另一方面的工作是确保在提高透明度的同时，避免过多增加税务机关的行政负担。有鉴于此，FHTP 通过了情报交换的“三步骤”：第一步，由税务机关提供关于裁定的概述以及一些基本信息。这项工作需要通过使用附件 C 中的模板来完成，采用一个通用模板来简化工作流程。

提供模板所需要的关键信息基本上记录了作出裁定的税务机关需要采取的决策过程，并据此确定：（i）本裁定是否属于框架所涵盖的范围；（ii）需要与哪些国家进行情报交换。如果使用电子版的模板，将主要通过数字或使用包含下拉功能表的各选框或勾选框来填写数据。因此，设计这样一个模板可以将作出裁定的税务机关的额外负担降至最低，作为一项有用的筛选工具，该模板在各种语言环境下都极易被理解，而信息接收方税务机关也能根据该模板来确定是否需要对方提供裁定，进而开展第二步的工作。

### VI. 实际执行问题

2014 年进度报告预计该报告中设定的框架将在 FHTP2014 年秋季会议之后可以应用。然而，迄今为止自发情报交换框架尚未应用。其原因是新包括的裁定类型增加了

12 OECD 将该模板转化为 XML 文件，并提供相关的用户指南，以便于更大量的模板传输。
rulings increases the volume of information that will need to be exchanged. This has therefore required more consideration of the implementation process and the practical implementation issues set out below.

A. Method of exchange

Method for future rulings – exchange on a regular basis

140. Where a country has provided a ruling that is subject to the obligation to spontaneously exchange it must exchange the relevant information on that ruling with any affected country as quickly as possible and no later than three months after the date on which the ruling becomes available to the competent authority of the country that granted the ruling. Countries must also put in place appropriate systems to ensure that rulings are transmitted to their competent authority without undue delay.

141. However, where a delay is caused by a legal impediment (for example, because of a legal requirement to notify the taxpayer; an appeal filed by the taxpayer against the exchange of information or other judicial procedure), the three month time limit is extended but the relevant country should exchange without undue delay once the legal impediment ceases to exist.

Method for past rulings

142. Information on past rulings that were issued on or after 1 January 2010 and were still in effect as from 1 January 2014 will also need to be exchanged. This also applies to rulings that have been modified during this period. This process should be completed by the end of 2016. Countries can apply a phased approach to the exchange of past rulings if desired, as long as the exchange of information on rulings is completed by the end of 2016.

VII. Reciprocity

143. There are a number of benefits associated with a reciprocal approach to exchange of information. However, the benefits of reciprocity do not appear to have any relevance where the legal system or administrative practice of only one country provides for a specific procedure. Accordingly, a country that has granted a ruling that is subject to the obligation to spontaneously exchange information cannot invoke the lack of reciprocity as an argument for not spontaneously exchanging information with an affected country, where the affected country does not grant, and therefore cannot exchange rulings which are subject to the obligation to spontaneously exchange information. This assumes of course that the affected country is committed to applying the framework and to spontaneously exchanging information if it were to grant rulings which would trigger the obligation to spontaneously exchange information.

VIII. Confidentiality of the information exchanged

144. Both the country exchanging information and its taxpayers have a legal right to expect that information exchanged pursuant to the framework remains confidential. The receiving country must therefore have the legal framework necessary to protect information exchanged.

145. All treaties and exchange of information instruments contain provisions regarding tax confidentiality and the obligation to keep information exchanged confidential. Under those provisions, information may only be used for certain specified purposes and disclosed to certain specified persons.

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13 Regarding the timelines contained in this section see footnote 11.
14 See paragraph 15.1 of the 2014 Update to the OECD Model Tax Convention which sets out the principle in the context of information exchange on request.
需交换的信息量，因此也要进一步考虑实施过程以及下文所述的执行的相关问题。

A. 情报交换的方法

针对未来的裁定的情报交换方法 - 定期交换

140. 当一国所提供的裁定需承担自发表情报交换的义务时，该国必须尽早向裁定相关的信息与任何受其影响的国家开展情报交换。该工作应于裁定作出后的税务主管当局自可以获取裁定信息之日起的三个月内完成。此外，各国还应建立相应的制度，确保裁定传递给相关税务主管当局不受无故延误。

141. 然而，如果有关延迟是由法律障碍所引起的（比如法律要求告知纳税人，纳税人就情报交换或其他司法程序提出上诉），可以适当延长三个月期限，但是一旦法律障碍不复存在，相关国家应当立即开展情报交换工作。

针对以往裁定的情报交换方法

142. 2010 年 1 月 1 日（含）之后作出但是自 2014 年 1 月 1 日起依旧有效的裁定，包括在此期间被修订的裁定，也需要就相关信息进行情报交换。这项工作应当在 2016 年年底前完成。如有需要，各国可以采用阶段化方法对以往的裁定进行情报交换，但要确保所有情报交换工作在 2016 年年底前完成。

VII. 互惠原则

143. 信息交换的互惠原则具有众多好处。然而，互惠原则与单一国家的法律制度或管理的特定程序无关。相应地，如果受影响的国家没有作出可能引发自发表情报交换义务的裁定，从而没有相关的信息可以进行交换，作出了具有自发表情报交换义务裁定的国家，不能以缺少互惠为理由而拒绝与受影响的国家自发表情报交换信息。14 当然，我们这里假定，受影响国家已承诺汇率平价，若作出具备自发表情报交换义务的裁定时，也必须自发表情报交换信息。

VIII. 所交换信息的保密性

144. 交换信息的国家以及其纳税人在法律上有权要求按照该框架交换的信息应予以保密。接收国必须建立法律框架保护所交换的信息。

145. 所有的条约以及信息交换工具都包含关于税收信息保密的条款以及规定对所交换的信息具有保密义务。根据这些条款，所交换的信息只能用于某些特定目的而且只能向某些特定人员披露，如果没有恰当的保护措施或者以前违反过保密义务，而且双方对问题未

13 关于本节中的财团建请参见原著者注11。
14 参见OECD税收协定第26条第15.1段，该段列出了在按他国要求交换信息时的原则。
Information exchange partners may suspend or limit the scope of the exchange of information if appropriate safeguards are not in place or if there has been a breach in confidentiality and they are not satisfied that the situation has been appropriately resolved.

146. Domestic laws must be in place in the receiving country to protect confidentiality of tax information, including information exchanged. Effective penalties must apply for unauthorised disclosures of confidential information exchanged.

147. Information exchanged pursuant to this framework may be used only for tax purposes or other purposes permitted by the relevant information exchange instrument. If domestic law allows for a broader use of the information than the applicable instrument, it is expected that international provisions and instruments will prevail over provisions of domestic law.

IX. Best practices

148. The following best practices are intended to reinforce the transparency advancements made in the OECD framework for compulsory spontaneous exchange of information on rulings. They are applicable to both general and taxpayer-specific cross-border rulings, except where appropriate distinctions are made between taxpayer-specific rulings, APAs and general rulings. When no distinction is made, the best practices apply to all cross-border rulings which fall within the definition of a ruling set out in this Chapter.

A. Process of granting a ruling

a) Official rules and administrative procedures for rulings should be identified in advance and published, and they should include: (i) the conditions for the applicability of the ruling process; (ii) the grounds for denying a ruling; (iii) the fee structure, if applicable; (iv) the legal consequences of obtaining a ruling; (v) possible sanctions for incomplete or false information provided by a taxpayer; (vi) the conditions for revoking, cancelling or revising a ruling; and (vii) any other guidance that is deemed necessary in order to make the rules sufficiently comprehensive and clear to taxpayers and their advisors.

b) Tax rulings should be issued, and any administrative discretion in granting a ruling should be exercised, only within the limits of, and in accordance with, the country’s relevant domestic tax law and administrative procedures, and should be limited to determining how that law and/or any administrative procedures apply to one or more specific operations or transactions intended, planned or undertaken by the taxpayer.

c) Tax rulings should respect applicable international obligations that are incorporated into domestic tax law, for instance, obligations under relevant bilateral treaties.

d) Tax rulings should be issued in writing.

e) Tax rulings should only be issued by the competent government office or authority in charge of this task. Where a ruling is granted by another government office, it should be subject to approval by the competent office.

15 In order to follow the best practices, changes in domestic legislation or current ruling practice may be required.

16 All references in the best practices section to general rulings mean cross-border general rulings. A ruling will be considered to be a cross-border ruling where it falls within one of the six categories in the table in Section III.

17 See paragraph 102 above which references the definition of a “ruling”.

84
得到妥善解决感到不满意，信息交换双方可以停止信息交换或者限制信息交换的范围。

146. 接收信息国必须具有对涉税信息（包括交换信息）保密的国内法。对于未得到授权而披露所交换的保密信息的情形必须予以有效惩罚。

147. 按照该框架交换的信息只能用于与税收有关的目的，或者相关信息交换工具允许的目的。如果与适用的信息交换工具相比，国内法对信息的使用标准更加宽松，在这种情形下，各方应该以国际标准及工具为准。

IX. 最佳实践模式

148. 设立以下最佳实践模式的目的是为了巩固 OECD 强制性自发情报交换框架中的透明度的相关进展。除针对特定纳税人的裁定、APAs和一般裁定之间有一定区别之外，这些模式均统一适用于一般跨境裁定和针对特定纳税人的特别跨境裁定。如无特别的区分，最佳实践模式适用于本章所定义的裁定内容中的所有跨境裁定。17

A. 给予裁定的过程

a) 与裁定有关的官方规则和行政程序应事先确定并予以公布，具体内容应包括：
(1) 适用裁定过程的条件；
(2) 拒绝裁定的理由；
(3) 费用结构（如适用）；
(4) 获得裁定的法律后果；
(5) 纳税人提供不完整或虚假信息可能受到的制裁；
(6) 撤销、取消或修改裁定的条件；以及
(7) 纳税人及其顾问获得足够全面且清晰的规则所需要的信息的其他指引。

b) 税收裁定的发布以及任何授予裁定的行政自由裁量权的行使，都必须依照且不能超越该国的国内税收法律和行政程序的相关规定，并应限制在仅就适用该法律和（或）行政程序如何适用于纳税人预算，计划或实施的一个或多个特定业务或交易。

c) 税收裁定应当已纳入国内法有关遵守国际层面的义务，例如，有关双边税收协定中的义务。

d) 税收裁定应当以书面形式发布。

e) 税收裁定只能由负责此项任务的相关政府政府部门或机关发布。凡是由另一政府机关给予的裁定，须经主管部门批准。

15 为了得到最佳实践模式，可能需要更改国内法或目前的执行实践。
16 最佳实践模式中所提及的一般裁定均指跨境一般裁定。满文第三章未提及一般裁定中的任何一裁定，都被视为跨境裁定。
17 “裁定”的定义请见上文第102段。
It is recommended that at least two officials are involved in the decision to grant a ruling or there is at least a two-level review process for the decision, in particular in cases where the applicable rules and administrative procedures explicitly refer to discretion or the exercise of judgement by one of the relevant officials.

g) Tax rulings should be binding on the tax authority (to the extent permitted by domestic law), provided that the applicable legislation and administrative procedures and the factual information on which the ruling is based do not change after the ruling has been granted.

h) Taxpayers should apply for a ruling in writing and provide a full description of the underlying operations or transactions for which a ruling is requested. The information should be included in a file supporting the ruling application (the "ruling file"). The ruling file should also include information on the methods and facts for determining the key elements of the tax authority's view (e.g. transfer prices, mark-ups, interest rates, profit margins). There will often be very specific documentation requirements for APAs or other rulings that relate to transfer pricing. Any additional information or relevant facts which are brought to the attention of the tax authority (i.e. in meetings or oral presentations) should be recorded in writing and also be included in the ruling file.

i) Information concerning the applicant (including taxpayer's name, tax residency, tax identification number, commercial register number for corporations and companies) and tax advisor/tax consultant involved should be included in the ruling file and/or the ruling itself.

j) Before taking a decision, the person(s) providing the ruling should check that the description of the facts and circumstances is sufficient and justifies the envisaged outcome of the ruling. They should also check that the ruling outcome is consistent with any previous rulings concerning similar legal issues and factual circumstances.

B. Term of the ruling and subsequent audit/checking procedure

a) APAs should only be for a fixed period of time and should be subject to review before being extended.

b) Taxpayers should notify the tax authority about any material changes in the facts or circumstances on which a taxpayer-specific ruling (including an APA) was based, as soon as possible so that the tax administration can assess whether to exchange this information with another country. As part of this notification process, taxpayers should notify tax administrations of any material changes to the related parties with which they transact (for transactions covered by the ruling) and any other changes which would impact on who information should be exchanged with.

c) Effective administrative procedures should be in place to periodically verify that the factual information relied upon and assumptions made when granting taxpayer-specific rulings remain relevant throughout the period of validity of the ruling. This may be particularly necessary in the case of APAs where any underlying assumptions and decisions could be affected by changes in economic circumstances.

d) Rulings should be subject to revision, revocation or cancellation, as the case may be, in the following circumstances:

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18 Tax rulings may not be binding where a tax authority made a mistake in the interpretation or application of the law, where it has withdrawn its ruling by written notice that has prospective effect only, or where a ruling contravenes countries' international obligations.
f) 建议至少应有两名官员参与作出裁定的决定，或者针对该决定设立至少两个层级的审议过程，尤其是当所适用的规则或行政程序是由相关官员其中一人来裁量或执行的情况下。

g) 在国内法允许的范围内，税收裁定对税务机关具有约束力。而前提是裁定在授予前，其所依据的法律、行政程序以及相关事实依据未发生改变。

h) 在申请裁定时，纳税人应当以书面形式对相关业务或交易进行详细描述。相关信息应当被包含在申请裁定的相关证明文件中（以下简称“裁定相关信息文件”）。该裁定相关信息文件还应包含确定税务机关决定要素的方法和事实依据（如转让价格、成本加成、利率、利润率）的相关信息。对于 APAs 或其他转让定价相关的裁定而言，通常需要提供更为详细的资料。其他通过会议或其他途径引起税务机关关注的任何信息或相关事实依据，都应当以书面形式记录并包含在裁定相关信息文件中。

i) 有关申请人的相关信息（包括纳税人名称、税务识别号以及企业和公司的商业登记号码）和相关税务咨询人员/税务顾问的信息都应当被包括在裁定相关信息文件中，以及（或）裁定本身中。

j) 在做出决定之前，作为裁定方应当检查相关事实和情况的描述是否充分，是否其逻辑判断为裁定所预设的结果。此外，还应当检查这一裁定结果，在所涉及的法律问题和事实类似的情况下，是否与以往所作的裁定相一致。

B. 裁定有效期以及后期审计：检查程序

a) APAs 应当仅在一个固定时间内有效，如延期，之前应经过相关审核。

b) 如果针对纳税人的裁定（包括 APA）的事实依据或所处情况发生重大改变，纳税人在应知会税务机关，税务机关如评估事实是否需要就相关信息与可能影响交叉。作为通知内容的一部分，纳税人还应当告知税务机关关于其裁定涉及交换的关联方所发生的重大变化，以及其他可能对交换方产生影响的信息。

c) 应当制定有效的行政管理程序，定期检查在做出裁定时所依据的事实信息以及做出的相应假设是否在裁定的整个有效期内部保持相关有效真实性。这一工作应当在 APA 的情形下显得尤为必要，因为 APA 所依据的任何假设以及决定都可能被经济环境的变化影响。

d) 如下事项发生，应当修订、撤销或取消裁定：

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18 存在以下三种情况之一的，相关税收裁定将可能不再具有约束力：1.税务机关对法律的解释和应用错误；2.税务机关通过书面形式撤销了税收裁定；3.裁定违反了相关国家的国际义务的规定。
1. if the taxpayer makes a misrepresentation or omission in applying for the ruling that calls into question the validity of the ruling;
2. if the relevant laws change;
3. if there is a relevant and significant change (i) in the facts or circumstances upon which the ruling was based or (ii) in the validity of the assumptions made.

C. Publication and exchange of information

a) General rulings should be published and made easily accessible to other tax administrations and taxpayers. Ideally, general rulings should be published on the tax administration’s website. If not published in full, the website should contain short summaries with links to where the ruling is accessible in full. Also, the published general rulings should be accompanied with a short overview in one of the official languages of the OECD. Publication should take place as soon as it is practicable after the ruling is granted and where possible within six months.

b) For taxpayer-specific rulings, where the ruling issued falls within the scope of the OECD framework for compulsory spontaneous exchange of information on rulings or other applicable commitment to exchange (e.g. under EU law or bilateral treaty), the relevant authority should transmit that ruling to their competent authority without undue delay, in order for that competent authority to exchange information on the ruling with any relevant country as quickly as possible and no later than three months after that in which the ruling becomes available to it (subject to any legal impediments).
1. 纳税人在申请裁定的过程中存在歪曲或遗漏事实的情况，导致对裁定的有效性产生质疑；

2. 相关法律发生变化；

3. 裁定所依据的事实或情况发生显著变化，或所作假设的有效性发生显著变化。

C. 情报的公布和交换

a) 一般裁定应予以公布，并应使其便于其他税务机关和纳税人获取。理想的情况是，该类裁定应在税务机关的官网上予以公布。如果网站未公布裁定全文，应提供裁定的概要并附上可获取裁定全文的链接。此外，在公布一般裁定的同时，应当用 OECD 的官方语言之一对裁定进行简短的概述。应当在做出裁定之后，只要是可行的，尽快进行公布，同时，尽可能在六个月内公布。

b) 对于针对特定纳税人的裁定，如其为 OECD 框架涵盖范围内的须进行强制性自发情报交换裁定或其他（如根据欧盟法律或双边协定）承诺情报交换的裁定，相关税务机关应及时将该类裁定传递给其主管当局，以便主管当局尽快与相关国家开展情报交换，并根据法律障碍之日起的三个月之内交换。
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CHAPTER 6

REVIEW OF MEMBER AND ASSOCIATE COUNTRY REGIMES

I. Introduction

149. The current review of member country regimes commenced in late 2010 with the preparation of a preliminary survey of preferential tax regimes in member countries, based on publicly available information and without any judgement as to the potential harmfulness of any of the regimes included. Further regimes were subsequently added to the review process based on member countries' self-referrals and referrals by other member countries.

150. Each member country was requested to provide a description of its regimes, along with a self-review using a standard template. The self-reviews were followed by extensive analysis and peer reviews. The reviews were based on the principles and factors set out in the 1998 Report (OECD, 1998) and, where necessary, relevant economic considerations. With the adoption of the BEPS Action Plan (OECD, 2015), G20 countries joined the OECD member countries on an equal footing in the FHTP work. The reviews were extended to cover both member and associate countries and advanced as follows:

- **IP regimes**: As all the IP regimes of both member and associate countries have been considered together, they have been considered not only in light of the factors as previously applied but also in light of the elaborated substantial activity factor described in Chapter 4 of this Report.

- **Non-IP regimes**: As the current review commenced before the publication of the BEPS Action Plan, all of the regimes of both member and associate countries have been assessed against the factors as previously applied so that there is a consistent approach applied to similar types of regimes such as those for holding companies. With regard to non-IP regimes, the elaborated substantial activity factor has not yet been applied but the FHTP is planning to do this.

- **Rulings**: FHTP has agreed a framework which will be applied to rulings provided by both member and associate countries.

151. Different aspects of the FHTP's work place different requirements on countries in respect of specific regimes. For instance, even if an IP regime is consistent with nexus approach set out in Chapter 4, a country would still need to exchange any rulings related to that regime under the framework set out in Chapter 5.

II. Conclusions on sub-national regimes and when they are in scope

152. In the course of the current review, the question arose as to whether sub-national regimes offering tax benefits at sub-national level alone are within the scope of the FHTP’s work. Given that the no or low effective tax rate gateway factor looks at the combined effective tax rate for both the national and sub-national levels, a sub-national regime will fall outside the scope of the FHTP’s work where the tax rate at the national level or the sub-national level fails to meet the no or low effective tax factor on its own.

153. The 1998 Report does not, however, preclude sub-national regimes from the FHTP's scope of work as a matter of principle, and there is nothing in the history of the FHTP's work precluding sub-national regimes from the scope of its work. In addition, it would be inconsistent with the
第六章
对成员国及合作伙伴国制度的审议

I. 简介

149. 对成员国（相关税收优惠）制度的审议始于2010年年底，其基于公开可获得的信息，为展开初步调查成员国的优惠税收制度做准备，但并未对其中的任何制度是否潜在有害做出判定。之后，根据成员国自我判断提交以及参照其他成员国的意见，更多的制度被陆续纳入审议流程。

150. 根据要求，各成员国应按照标准模板提供一份关于本国优惠制度的说明，以及一份自我审查报告。随后对各国的自审报告作出了深入地分析以及同行审议。审议工作根据1998年报告（OECD, 1998）确定的原则及因素进行；同时，在必要时，也考虑相关经济因素。随着BEPS行动计划（OECD, 2013）的采纳，G20国家以平等身份参与了OECD成员国的FHTP工作。审议工作同时覆盖成员国和合作伙伴国，其进展如下：

- 无形资产制度：由于对成员国和合作伙伴国有无形资产制度的审议同时进行，因此，审议工作不仅按照以往适用的因素，同时还参照了本报告第四章所述的实质性活动要素。

- 非无形资产制度：由于当前的审议工作始于BEPS行动计划发布之前，因此对成员国和合作伙伴国有非无形资产的评估工作均按照以往适用的因素进行。以确保对相似制度的审议采取一致的方法，如对控股公司的审议方法。目前对于非无形资产制度尚未运用实质性活动要素，但FHTP正计划将其应用在部分审议工作中。

- 税收裁定：FHTP就成员国和合作伙伴国有关税收裁定所适用的框架达成了共识。

151. 涉及不同方面的FHTP工作对各国的具体制度提出了不同的要求。例如，即使某国的无形资产制度与第四章所述的关联法规则是相同的，该国仍需根据第五章所述的框架要求提交与该制度相关的裁定信息。

II. 关于地方性制度以及在何种情形下对其纳入FHTP工作范围作结论

152. 在当前审议工作过程中，产生了对仅在地方层面提供税收优惠的地方性制度是否属于FHTP工作范围的问题。由于“非征税或虽征税但实际税率极低”这一问题在各国家税与地方税相加后的综合税率，如果国家层级或地方层级的税率综合税率并不满足“非征税或虽征税但实际税率极低”这一问题要素，则该国家或地方性制度各单独的制度将不同于FHTP的工作范围。

153. 但是，1998年报告并未从原则上将地方性制度排除在FHTP的工作范围之外。且从历史上看，FHTP一直以来也从未将地方性制度排除在其工作范围之外。另外，将只在
1998 Report's broader objective of establishing a “level playing field” to exclude regimes offering tax benefits at the sub-national level alone from the scope of the FHTP's work, particularly where the tax rate at sub-national level represents (or could represent, in the case of a discretionary tax rate) a significant portion of the combined effective tax rate. Bearing this in mind, the FHTP agreed to include sub-national regimes within the scope of its work where both of the following two criteria are satisfied:

8. The national government is ultimately responsible for the general design of the relevant regime and leaves limited discretion to the sub-national government as to whether or not to introduce the regime and/or as to the key features of the regime. The rationale is that in such a case, there is no fundamental difference between the relevant regime and regimes enacted and administered at national level;

9. The tax rate at sub-national level represents (or could represent, in the case of a discretionary tax rate) a significant portion of the combined tax rate and the combined effective tax rate for both the national and sub-national levels meets the no or low effective tax factor.

III. Conclusions reached on regimes reviewed

The review process of the FHTP includes the following 43 preferential regimes. The tables below identify the country and the name of the regime and provide the conclusion reached.

<table>
<thead>
<tr>
<th>Table 6.1 IP regimes</th>
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<tbody>
<tr>
<td><strong>Country</strong></td>
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<td>15.</td>
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<td>16.</td>
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</table>

1 See paragraph 8 of the 1998 Report.
地方层级提供税收优惠的制度单独在FHTP的范围之外也不符合1998年报告关于创造“公平竞争环境”大目标，特别是当地方层级的税率在综合有效税率中（或适用自行决定税率的情形下）占较高的比例时。意识到一点，FHTP同意在同时满足以下两个条件时，将地方性制度纳入其工作范围：

8. 中央政府对相关税收优惠政策的整体设计负最终责任。在是否设立该制度或者在设计该制度的主要方面，只保留有限的裁量权给地方政府。该标准的理论基础是，在此情形下，相关地方制度与在国家层级制度的立法与管理之间并没有本质差别。

9. 地方层级的税率在综合有效税率中（或者在适用自行决定税率的情形下）占较高比例时，并且国家税与地方税相加后的综合有效税率满足了“不征税或虽征税但实际税率极低”这一因素。

III. 审议制度后得出的结论

154. FHTP的审议涵盖了以下43项优惠制度，以下各表列出了各相关国家及其制度的名称以及有关审议结论。

表 6.1 无形资产制度

<table>
<thead>
<tr>
<th>国家</th>
<th>制度</th>
<th>结论</th>
</tr>
</thead>
<tbody>
<tr>
<td>比利时</td>
<td>专利收入扣除</td>
<td></td>
</tr>
<tr>
<td>中国</td>
<td>对高新技术企业的优惠税率</td>
<td></td>
</tr>
<tr>
<td>哥伦比亚</td>
<td>软件制度</td>
<td></td>
</tr>
<tr>
<td>法国</td>
<td>对长期财产转让所得以及对无形资产特许权使用费的利润的优惠税率</td>
<td></td>
</tr>
<tr>
<td>匈牙利</td>
<td>特许权使用费及无形资产转让所得税制度</td>
<td></td>
</tr>
<tr>
<td>以色列</td>
<td>享受优惠待遇的公司</td>
<td></td>
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<tr>
<td>意大利</td>
<td>专利金</td>
<td></td>
</tr>
<tr>
<td>卢森堡</td>
<td>对来源于特定无形资产权利的收入/所得实行部分免税</td>
<td>参见第155段</td>
</tr>
<tr>
<td>荷兰</td>
<td>创新金</td>
<td></td>
</tr>
<tr>
<td>葡萄牙</td>
<td>对来源于特定无形财产的收入实行部分免税</td>
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<tr>
<td>西班牙</td>
<td>对来源于特定无形资产的收入实行部分免税</td>
<td></td>
</tr>
<tr>
<td>西班牙 - 巴布亚新几内亚</td>
<td>对来源于特定无形资产的收入实行部分免税</td>
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</tr>
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<td>西班牙 - 维多利亚地区</td>
<td>对来源于特定无形资产的收入实行部分免税</td>
<td></td>
</tr>
<tr>
<td>瑞士 - 下瓦尔登区</td>
<td>特许权使用金</td>
<td></td>
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<tr>
<td>土耳其</td>
<td>技术开发区</td>
<td></td>
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<tr>
<td>英国</td>
<td>专利金</td>
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</tbody>
</table>

2 参见1998年报告第8段。
The IP regimes listed in Table 6.1 were all considered under the criteria in the 1998 Report as well as the elaborated substantial activity factor. These regimes are inconsistent, either in whole or in part, with the nexus approach as described in this report. This reflects the fact that, unlike other aspects of the work on harmful tax practices, the details of this approach were only finalised in this report while the regimes had been designed at an earlier point in time. Countries with such regimes will now proceed with a review of possible amendments of the relevant features of their regimes. Where no amendments are made, the FHTP will proceed to the next steps in its review process.

### Table 6.2 Non-IP regimes

<table>
<thead>
<tr>
<th></th>
<th>Country</th>
<th>Regime</th>
<th>Conclusion</th>
</tr>
</thead>
<tbody>
<tr>
<td>17</td>
<td>Argentina</td>
<td>Promotional regime for software industry</td>
<td>Not harmful</td>
</tr>
<tr>
<td>18</td>
<td>Australia</td>
<td>Conduit foreign income regime</td>
<td>Not harmful</td>
</tr>
<tr>
<td>19</td>
<td>Brazil</td>
<td>PADIS - Semiconductors Industry</td>
<td>Not harmful</td>
</tr>
<tr>
<td>20</td>
<td>Canada</td>
<td>Life insurance business regime</td>
<td>Potentially harmful but not actually harmful</td>
</tr>
<tr>
<td>21</td>
<td>China</td>
<td>Reduced rate for advanced technology service enterprises</td>
<td>Not harmful</td>
</tr>
<tr>
<td>22</td>
<td>Colombia</td>
<td>Foreign portfolio investment regime</td>
<td>Not harmful</td>
</tr>
<tr>
<td>23</td>
<td>Greece</td>
<td>Offshore engineering and construction</td>
<td>Amended</td>
</tr>
<tr>
<td>24</td>
<td>India</td>
<td>Deductions in respect of certain incomes of offshore banking units and international financial services centre</td>
<td>Not harmful</td>
</tr>
<tr>
<td>25</td>
<td>India</td>
<td>Special provisions in respect of newly established units in special economic zones</td>
<td>Not harmful</td>
</tr>
<tr>
<td>26</td>
<td>India</td>
<td>Special provisions relating to income of shipping companies – tonnage tax scheme</td>
<td>Not harmful</td>
</tr>
<tr>
<td>27</td>
<td>India</td>
<td>Taxation of profit and gains of life insurance business</td>
<td>Not harmful</td>
</tr>
<tr>
<td>28</td>
<td>Indonesia</td>
<td>Publicly listed company regime</td>
<td>Under review</td>
</tr>
<tr>
<td>29</td>
<td>Indonesia</td>
<td>Investment allowance regime</td>
<td>Under review</td>
</tr>
<tr>
<td>30</td>
<td>Indonesia</td>
<td>Special economic zone regime</td>
<td>Under review</td>
</tr>
<tr>
<td>31</td>
<td>Indonesia</td>
<td>Tax holiday regime</td>
<td>Under review</td>
</tr>
<tr>
<td>32</td>
<td>Japan</td>
<td>Special zones for international competitiveness development</td>
<td>Not harmful</td>
</tr>
<tr>
<td>33</td>
<td>Japan</td>
<td>Measures for the promotion of research and development</td>
<td>Not harmful</td>
</tr>
<tr>
<td>34</td>
<td>Latvia</td>
<td>Shipping taxation regime</td>
<td>Not harmful</td>
</tr>
</tbody>
</table>

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2 Given its particular features the Chinese regime for High and New Technology will often be more restrictive than the nexus approach and there are only limited circumstances in which income may benefit in excess of the amount computed under the nexus approach.

3 This conclusion was reached by the FHTP without reaching any conclusion that Colombia’s regime was within the scope of the work of the FHTP.

4 This regime was considered prior to the approval of the BEPS Action Plan.

5 See footnote 4.
对于上表的无形资产制度全部是按照 1998 年报告中的标准以及实际性活动因素进行评估的。这些制度，无论从整体或部分角度出发，都与本报告中所述的关联法不一致。这反映出一个事实，与有关税收实施工作的其他方面不同，关联法的实施情况是在本报告产生时确定的，而上述无形资产制度的设立却是在此之前。从现在开始，设立了上述无形资产制度的国家将就其制度相关特性

### 表 6.2 无形资产制度

<table>
<thead>
<tr>
<th>国家</th>
<th>制度</th>
<th>结论</th>
</tr>
</thead>
<tbody>
<tr>
<td>17. 阿根廷</td>
<td>促进软件业发展的制度</td>
<td>无害</td>
</tr>
<tr>
<td>18. 澳大利亚</td>
<td>管道公司境外收入制度</td>
<td>无害</td>
</tr>
<tr>
<td>19. 巴西</td>
<td>PADIS 优惠制度 - 半导体行业</td>
<td>无害</td>
</tr>
<tr>
<td>20. 加拿大</td>
<td>人寿保险业务制度</td>
<td>潜在有害但不实际有害</td>
</tr>
<tr>
<td>21. 中国</td>
<td>对技术先进型服务企业适用优惠税率</td>
<td>无害</td>
</tr>
<tr>
<td>22. 哥伦比亚</td>
<td>境外投资组合制度</td>
<td>无害</td>
</tr>
<tr>
<td>23. 希腊</td>
<td>境外工程及建筑制度</td>
<td>已修订</td>
</tr>
<tr>
<td>24. 印度</td>
<td>境外银行单位和国际金融服务中心的收入扣除制度</td>
<td>无害</td>
</tr>
<tr>
<td>25. 印度</td>
<td>对经济特区内新设单位的特别规定</td>
<td>无害</td>
</tr>
<tr>
<td>26. 印度</td>
<td>船运公司收入的特别规定 - 权益税制度</td>
<td>无害</td>
</tr>
<tr>
<td>27. 印度</td>
<td>人寿保险业务利润和所得的课税</td>
<td>无害</td>
</tr>
<tr>
<td>28. 印度尼西亚</td>
<td>开关/上市公司制度</td>
<td>审议中</td>
</tr>
<tr>
<td>29. 印度尼西亚</td>
<td>投资补贴制度</td>
<td>审议中</td>
</tr>
<tr>
<td>30. 印度尼西亚</td>
<td>经济特区制度</td>
<td>审议中</td>
</tr>
<tr>
<td>31. 印度尼西亚</td>
<td>免税期制度</td>
<td>审议中</td>
</tr>
<tr>
<td>32. 日本</td>
<td>国际竞争力发展特区</td>
<td>无害</td>
</tr>
<tr>
<td>33. 日本</td>
<td>促进研发的措施</td>
<td>无害</td>
</tr>
<tr>
<td>34. 拉脱维亚</td>
<td>航运税收制度</td>
<td>无害</td>
</tr>
</tbody>
</table>

2. 基于其相关特性，中国高新技术企业优惠制度的采购比关联法更为严格，且其价在有限情况下企业享受优惠的数额可能会超过关联法计算的优惠额。
3. FHITP得出该结论，但未对其他优惠的制度是否适用其工作范围形成结论。
4. 对相关规则的评估在税收优惠与利润转移行动（BEPS）方案获得批准之后。
5. 参见注释。
<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>35.</td>
<td>Luxembourg</td>
<td>Private asset management company (Société de gestion de patrimoine familiale)</td>
</tr>
<tr>
<td>36.</td>
<td>Luxembourg</td>
<td>Investment company in risk capital (Société d'investissement en capital à risques) regime</td>
</tr>
<tr>
<td>37.</td>
<td>South Africa</td>
<td>Headquarter company</td>
</tr>
<tr>
<td>38.</td>
<td>South Africa</td>
<td>Exemption of income in respect of ships used in international shipping</td>
</tr>
<tr>
<td>39.</td>
<td>Switzerland – Cantonal level</td>
<td>Auxiliary company regime (previously referred to as domiciliary company regime)</td>
</tr>
<tr>
<td>40.</td>
<td>Switzerland – Cantonal level</td>
<td>Mixed company regime</td>
</tr>
<tr>
<td>41.</td>
<td>Switzerland – Cantonal level</td>
<td>Holding company regime</td>
</tr>
<tr>
<td>42.</td>
<td>Switzerland – Federal level</td>
<td>Commissionaire ruling regime</td>
</tr>
<tr>
<td>43.</td>
<td>Turkey</td>
<td>Shipping regime</td>
</tr>
</tbody>
</table>

156. This Report also establishes the meaning of substantial activities in the context of non-IP regimes, but as mentioned above this analysis has not yet been applied to the regimes. The FHTP will carry out further work to consider in which instances it may be necessary to revisit regimes in light of the agreed substantial activity factor as it applies to non-IP regimes.

IV. Regimes relating to disadvantaged areas

157. Certain countries (e.g. Switzerland and Latvia) have introduced tax incentive regimes designed to encourage development in disadvantaged areas. Whilst they do not specifically provide a preferential treatment for income from intellectual property, they may include (or do not specifically exclude) such income. The FHTP has considered that these regimes, provided they meet certain conditions, do not pose a high risk of base erosion and profit shifting and should be monitored. These regimes will not be further reviewed unless there is an indication of adverse economic effects. To be considered as such a low risk

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8 See footnote 4.
7 This conclusion was reached by the FHTP without reaching any conclusion that Luxembourg’s regime was within the scope of the work of the FHTP.
9 On 5 June 2015, the Swiss Government has submitted a bill for approval in Parliament, wherein it has proposed to abolish the regime (as well as the following three regimes). Subject to the Swiss parliamentary/constitutional approval process, the intention is for the new Federal legislation to be completed by 1 January 2017, followed by a two-year period for the 26 Cantons to revise their laws accordingly.
8 See footnote 8.
9 See footnote 8.
10 See footnote 8.
11 See footnote 8.
12 See footnote 4.
13 Swiss relief for newly established or re-designed enterprises.
14 Latvia taxation regime related with the taxpayers investments in special economic zones and free ports (Special economic zones).
| 35. | 卢森堡 | 私人财产管理公司 | 无害\(^8\) |
| 36. | 卢森堡 | 风险资本投资公司制度 | 无害\(^7\) |
| 37. | 南非 | 总公司 | 潜在有害但不实际有害 |
| 38. | 南非 | 对国际海运船舶取得的收入实行免税 | 无害 |
| 39. | 瑞士-州级 | 辅助公司制度（以前称为永久户籍公司制度） | 废除进程中\(^8\) |
| 40. | 瑞士-州级 | 混合公司制度 | 废除进程中\(^9\) |
| 41. | 瑞士-州级 | 控股公司制度 | 废除进程中\(^10\) |
| 42. | 瑞士-联邦级 | 代理安排裁定制度 | 废除进程中\(^11\) |
| 43. | 土耳其 | 航运制度 | 无害\(^12\) |

156. 本报告也阐明了非无形资产制度下实质性活动的含义，但是如上所述，该实质性活动分析目前尚未应用于非无形资产制度。FHTF将开展进一步工作，研究在何种情形下有必要根据实质性活动因素对现行的非无形资产制度进行重新审议。

IV. 待发展地区的制度

157. 某些国家（如瑞士\(^3\)和拉脱维亚\(^4\)）已经引入了专门扶持待发展地区的税收优惠制度。尽管这些国家并未对知识产权有关收入专门给予优惠待遇，但是可以将该类收入纳入税收优惠的范围（或者不特别排除在优惠范围之内）。FHTF认为，这些制度在满足一定条件的情况下，就不会引起税基侵蚀与利润转移的高风险，但是仍应当予以监督。除非有迹象表明这些制度对经济有负面影响，否则将不再进一步审议。如果优惠制度满足以下条件，可认定为上述的适用于待发展地区的低风险制度：（i）税收优惠待遇适用于相对小范围地区（就面积和/或人口而言），该地区的结构、经济和社会发展水平低于国家整体水平；（ii）该制度的制定旨在创造新的就业机会和吸引无形资产投资，而非吸引无形资产收入或其他流动性收入；（iii）为取得税收优惠待遇，企业需满足显著的实质性要求（即

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\(^6\) 参见脚注62。
\(^7\) FHTF得此结论，但尚未对卢森堡的制度是否属于其工作范围形成结论。
\(^8\) 2015年6月5日，瑞士政府已经提交了一份法案要求国会通过，并提议修改制度（以及以下修正）。根据瑞士国会/宪法审查程序，瑞士政府将于2017年1月1日前完成联邦法律修订，其后需26周内随后两年时间内对各自的法律进行相应修订。
\(^9\) 参见脚注8。
\(^10\) 参见脚注8。
\(^11\) 参见脚注8。
\(^12\) 参见脚注4。
\(^13\) 瑞士对新成立或重新设计的公司提供优惠待遇。
\(^14\) 依据欧盟有关公司法在经济特区投资有关的税收优惠待遇。
regime applying to disadvantaged areas, the following cumulative conditions would need to be met: (i) the preferential tax treatment is only applicable to a relatively small area (in terms of surface and/or population) selected by reference to the low level structural, economic and social development in the region relative to the country as a whole; (ii) the regime is mainly designed to create new jobs and attract tangible investments and has not been designed to attract IP income or other mobile income; (iii) an entity has to meet significant substance requirements in order to access the preferential tax treatment (e.g. it has to show the generation of new employment, assets and investments); and (iv) the country agrees to keep relevant data (such as the number of entities benefiting from the regime, their sector of activity and the aggregated amount of exempted income) to allow monitoring of the impact of the regime as relevant under the FHTP criteria.

V. Downward adjustments

158. The FHTP considered informal capital and excess profit regimes. The FHTP agreed that a lack of transparency was the main concern with such regimes. It was therefore agreed that in addition to exchanging information on rulings for downward adjustments, information should also be exchanged on downward adjustments where there is no ruling issued. On this basis, the FHTP considered that at this time, it was not necessary to further review these regimes, but that it would be appropriate to monitor the impact of the exchange of information.

BIBLIOGRAPHY


需要证明其能够带来新的就业机会、资产和投资；以及（iv）国家同意保存相关数据（如享受该项优惠制度的企业数量、经营活动所属领域以及累计免税收入额），以便可以
根据FHTP的相关标准监控该项制度的执行影响。

V. 对一些调减制度实行信息交换

158. FHTP亦考虑了非正式资本和超额利润制度。FHTP同意对这些制度的关注点主要在其缺乏透明度。为此，一致认同除了交换有关调减利润的裁定信息外，也应交换没有裁定文件但仍然实施了的调减的信息。在此基础上，FHTP认为目前尚无必要进一步审查这两项制度，但监督信息交换产生的影响是恰当的。

参考文献

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http://dx.doi.org/10.1787/9789264162945-en
CHAPTER 7

FURTHER WORK OF THE FHTP

159. This Chapter sets out the next steps in the work of the FHTP. The next steps fall into three broad categories: (i) the ongoing work, including monitoring of preferential regimes and the application of the agreed transparency framework; (ii) further development of a strategy to expand participation to third countries, and (iii) considerations of revisions or additions to the existing FHTP criteria.

1. Ongoing work including monitoring

160. Chapters 4 and 5 respectively set out the application of the substantial activities analysis to preferential regimes and the framework for enhanced transparency on rulings. The next steps in this area will include the following.

- **IP regimes:** The FHTP will monitor preferential IP regimes, and countries should update the FHTP on the legislative progress made in respect of changes to their existing legislation. Existing IP regimes listed in Table 6.1 in Chapter 6 must be amended to comply with the nexus approach (and, if jurisdictions choose to benefit from grandfathering, to comply with the safeguards related to grandfathering and new entrants set out in Chapter 4). Future monitoring will consider any such amendments, and, where no amendments are made to existing IP regimes, the FHTP will move to the next stage of the review process. Chapter 4 provides that, in certain circumstances, countries may permit the use of the nexus ratio as a rebuttable presumption. In these circumstances, certain forms of enhanced transparency and monitoring, set out in Chapter 4, will become applicable, and the FHTP will monitor the implementation and application of the requirements set out in that Chapter. Jurisdictions must also inform the FHTP if they provide benefits under their IP regimes to the third category of IP assets set out in Chapter 4. Finally, Chapter 6 recognises that some regimes designed to promote development in disadvantaged areas will need to be monitored and that countries will be required to keep data on the companies benefiting from those regimes.

- **Non-IP regimes:** The FHTP will monitor preferential non-IP regimes, noting also that to date the substantial activity factor has only been applied to IP regimes. If countries have concerns about substantial activities in other preferential regimes, these will also need to be reviewed under the elaborated substantial activity factor.

- **Transparency Framework:** Chapter 5 provides a framework for improving transparency in relation to rulings. Information on future rulings should start to be exchanged from 1 April 2016 and countries have until the end of 2016 to exchange information on past rulings. An ongoing monitoring and review mechanism will be put in place to ensure countries' compliance with the

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1 Countries that do not currently have the necessary legal framework in place for spontaneous exchange of information on rulings covered in Chapter 5 will need to put in place such a framework in order to comply with the obligations under Action 5. In such cases the timelines for spontaneous exchange of information on rulings will be subject to a country's legal framework. This also takes into account the entry into force and effective date of application of provisions of the relevant exchange of information instruments.
第七章
FHTP的下一步工作

159. 本章内容对于FHTP的下一步工作做出了规划。下一步工作可分为以下三大类：
(i) 持续进行的工作，包括对于优惠制度的监控以及对已通过的透明度框架体系的运用实施状况；
(ii) 进一步制定涵盖第三国（OECD成员国及BEPS合作伙伴国以外的国家）的参与战略；及
(iii) 考虑修改或增补现有FHTP的判定标准。

1. 持续进行的工作，包括监督工作

160. 第四章及第五章分别陈述了如何将优惠制度予以实质性活动分析，以及对于强化有关信息
有关裁定的信息透明度框架如何予以实施。该领域的下一步工作将包括以下内容：

- IP制度：FHTP将监督各国的IP优惠制度，同时相关国家应把其修订有关国内法相关
规定的进程，随时更新信息反馈至FHTP。列于第六章表6.1中的IP制度必须按照关
税法予以修订，此如相关国家和地区选择使用过渡期规定，则须遵守第四章中有关
过渡期和新准入企业的理想性条款。之后，FHTP将考虑有关上述内容的修订情
况。如果未作相关修订，则FHTP将直接进入下一步的审议程序。第四章规定，在
某些情形下，各国可以允许使用关联度比例作为可推翻假设。在这种情况下，则可
以选用第四章中所规定的一些强化后的透明度和监督的形式。FHTP将根据第四章
中所规定的要求监督相关措施的实施及运用。同时，各国及地区还要向FHTP报告
其在国内IP优惠制度中对上述第四章规定的第三类无形资产提供优惠。最后，
第六章承认需对一些旨在促进一国发展地区发展的优惠制度予以监督，同时还明
确相关国家须保留上述优惠制度的企业信息。

- 非IP制度：FHTP将监督各国的非IP优惠制度，对目前等待，实质性活动因素仅适用于IP制
度。如有国家愿意对实质性活动因素该不适用于其他优惠制度，这也将由FHTP基
于详尽的实质性活动因素予以审议。

- 透明度框架：第五章对于如何提升针对特定裁定的透明度制定了框架。对未来作出
裁决的交换信息将自2016年4月1日开始实施。同时，对于之前作出的裁定，
各国应在2016年末之前完成信息交换为确保相关国家遵从框架协议的承诺开展
自情信息交换。FHTP将建立持续性的监督和审议制度。这包括FHTP将于2017年初
度审议。作为相关工作的其中一部分，FHTP也将评估框架的有效性，同时考虑
其裁定所涵盖的范围。税务机关所须提供的信息是否高集恰当地在决定BEPS风
险的评估和加入信息提供方和接收方的行政负担之间体现了平衡。作为审议工作
的一部分，对有助于特定纳税人的决策的国家——如果其适用框架所涵盖的范围——

1 目前尚未对第五章所述自情信息交换建立必要法律框架的国家应建立此类框架，以履行
行动5规定的义务。在这种情况下，关于裁定的自情信息交换的时间将取决于该国家的法律
框架设立情况。这也将关系到相关双边情信息交换工具的适用和生效日期。
obligation to spontaneously exchange information under the framework. This will involve an annual review by the FHTP starting at the beginning of 2017. As part of that process the FHTP will also evaluate the effectiveness of the framework and whether the scope of the rulings covered, and the information provided by tax administrations, appropriately balances the need to identify BEPS risks with the administrative burden for the sending and receiving jurisdictions. As part of the review process countries that provide taxpayer-specific rulings that fall within the framework will be expected to provide statistical information that includes the following: (i) the total number of spontaneous exchanges sent under the framework, (ii) the number of spontaneous exchanges sent by category of ruling, and (iii) for each exchange, which country or countries information was exchanged with. Countries should also provide details of the cases where they had insufficient information to identify all the countries that they needed to exchange with and therefore applied a best efforts approach. This information should be broken down by category of ruling and should include a brief description of the efforts undertaken to identify relevant related parties.

II. Development of a strategy to expand participation to third countries

161. The need for global solutions to shared challenges is at the heart of the BEPS Project. For this reason, all OECD and G20 countries have worked on an equal footing with the direct participation of an increasing number of developing countries. Action 5 of the BEPS Action Plan (OECD, 2013) explicitly recognise the need to involve third countries and requested the FHTP to develop a strategy to engage non-OECD/ non-G20 countries into the work on harmful tax practices. This is needed to ensure a level playing field and avoid the risk of harmful tax practices being simply displaced to third countries, but also entails involvement and engagement with third countries whether they have preferential regimes or they are otherwise concerned with the work. Against this backdrop the FHTP agreed on the following elements of an engagement strategy with third countries:

- The FHTP’s engagement should include third countries that have preferential regimes, as well as other countries that have a stake in the work.
- As part of the engagement, the FHTP will communicate the purpose and objectives of its work also setting out the level of involvement and participation of third countries.
- Additional work will be carried out to implement the engagement strategy in 2016 in the context of the wider objective of designing a more inclusive framework to support and monitor the implementation of the BEPS measures.

III. Consideration of revisions or additions to the existing FHTP criteria

162. The current framework for considering preferential regimes is described in Chapter 3 and uses four key factors and eight other factors to determine whether a preferential regime is potentially harmful. Two of the existing factors (transparency and substantial activity) have already been elaborated as a result of the work on the first output of Action 5. The OECD and G20 countries involved in the FHTP therefore consider that it is too early to accurately identify areas in which the existing criteria might fall short because the impact of the work on substance and transparency cannot yet be fully evaluated. In addition the benefits of involving third countries in this aspect of the work are recognised.

163. Nevertheless, some areas have been identified as ones that could benefit from further consideration once the FHTP is better able to identify the impact of the other outputs considered in this report. These include the fifth factor set out in the 1998 Report (OECD, 1998) and the application of the ring-fencing factor.
应每年提供一次相关统计数据信息，包括以下内容：（i）该框架下进行自发表声明交换的总次数；（ii）根据裁决类别进行自发表声明交换的总次数；以及（iii）每次所进行信息交换的对方的一个或多个国家。当一国在缺乏足够信息的情况下，应根据信息的类别进行信息交换的国家，应采取最佳实践方案时，该国提供相应的案例详情。相关信息应根据裁决的类别归类，并简要说明与相关信息交换国家所采取的努力。

II. 制定一个扩大到第三方国家参与的战略

161. BEPS 行动计划的核心是有必要寻求方案以解决全球共同面临的挑战。因此，所有 OECD 成员国及 G20 国家及一些不断增加的发展中国家在平等的基础上直接参与相关工作。BEPS 行动计划的第三项行动计划（OECD，2013 版）明确地指出了第三国家加入的必要性，并要求 FHTP 制定策略以吸引非 OECD、非 G20 成员国加入有关有害税收实践的工作。目的是为了确保公正的竞争环境、避免发生有害税收实践简单地转移至第三方国家的风险。同时也是因为必须有第三方国家的参与和加人才能了解其是否有相关优惠制度。然而，是否对相关工作有不同考虑。基于此背景，FHTP 审查通过了下列关于一项让第三方国家参与战略的考量因素：

- FHTP 的参与国应包括实施优惠制度的第三国家，以及其他有利害关系国。
- 作为参与内容的一部分，FHTP 将与第三国家欲工作的目标及其参与度沟通。
- 要如期实施 2016 年要战略，更多工作目标须要展开，以期设计一个更具广泛内涵的框架，将会支持和监督 BEPS 措施的执行。

III. 有关修订以及补充现有 FHTP 标准的考量

162. 现有框架对于优惠制度的考量已于第三章中予以阐述，其采用多项主要因素和八项其他因素用于判断一项优惠制度是否可能导致潜在有害。各项现有因素（透明度及实质性活动）已在行动 5 中作为第一批工作成果被予以详细阐释。因此，鉴于对于实质性和透明度工作的效果尚未予以充分评估，参与 FHTP 的 OECD 及 G20 成员国认为，达到能够正确识别现存标准中尚存不足的方面还为时尚早。此外，就此方面的工作而言，引入第三方国家的参与所带来的好处也被予以认同。

163. 尽管如此，一些领域已经被认定为能受益于补充现有 FHTP 标准的考量。一旦 FHTP 能够更好地确定在报告中其他成果的影响的时候，便可进一步落实。这些补充的考量包括 1998 年报告（OECD，1998）中的第五项因素以及“环形货盘”因素的适用。
164. The fifth factor which can assist in identifying harmful preferential regimes is “an artificial definition of the tax base.” This recognises that rather than offering a preferential tax rate a country can attract mobile income by having a narrow definition of the tax base that subjects less income to tax. This can be achieved, for example, by exempting certain categories of income or by allowing deductions for expenses that are deemed to have been incurred. The 1998 Report notes that such measures may also suffer from a lack of transparency. Some countries have suggested that this factor could also be elevated in importance, as has been done with the twelfth factor; however, the transparency framework set out in Chapter 5 may address many of the transparency concerns raised by such regimes.

165. Ring-fencing is one of the key factors in the 1998 Report and it applies (i) where a regime implicitly or explicitly excludes resident taxpayers from taking advantage of its benefits or (ii) where an entity that benefits from the regime is explicitly or implicitly prohibited from operating in the domestic market. Further guidance on the application of the ring-fencing factor is contained in the CAN (OECD, 2004), which envisages that the ring-fencing factor could apply where the tax result for a wholly domestic transaction is in practice different from that arising for a cross border transaction. In this context it has been suggested that the application of the ring-fencing factor to such scenarios could be made clearer.

BIBLIOGRAPHY

http://dx.doi.org/10.1787/9789264202719-en


http://dx.doi.org/10.1787/9789264162945-en
有助于识别导致有害税收优惠制度的最重要的因素是“人为随意确定税基”。其主要表达这种与一国与其利用提供优惠税率，达到吸引流动收入的目的。比如制定一个狭窄的税基以减少应税收入。举例而言，一国可以对某些类型的收入实行免税或对一些费用予以税前扣除。1998年报告中指出上述措施可能也会导致透明度的缺失。一些国家已提出建议将此因素的重要性与第十二项因素一样予以提升。然而，第五章所确定的透明度框架可处理此类制度下所涉及的多项透明度问题。

165. “环形箱道”是1998年报告中所述的一项重要因素，其适用于（i）某项制度明确或不明确地将居民纳税人排除在可享受优惠的范围之外；或（ii）享受某项优惠制度的企业被明确或不明确地禁止在境内外市场从事经营活动。更多有关“环形箱道”适用性的指引已在《适用注释综合》（Consolidated Application Notes CAN, OECD 2004）中予以明确。其中阐述了“环形箱道”因素的适用情形，即当全部发生于境内的交易与涉及跨境的交易在实际操作中将导致不同的税务结果时可予以适用。在此前提下，对“环形箱道”因素在上述情形的适用性，建议可更清楚地阐明。

參考文献

http://dx.doi.org/10.1787/9789264202719-en

OECD (2004), Consolidated Application Note: Guidance in Applying the 1998 Report to Preferential Tax Regimes, OECD.  

http://dx.doi.org/10.1787/9789264162945-en
ANNEX A: EXAMPLE OF A TRANSITIONAL MEASURE FOR TRACKING AND TRACING

1. Country P implements an IP regime in 2016 that requires tracking and tracing. Taxpayer Q is a technology company that sells products which use multiple IP assets that Taxpayer Q has developed. Prior to 2016, Taxpayer Q did not track and trace either expenditures or income to individual IP assets or products, but Taxpayer Q does have information on the overall R&D expenditures that Taxpayer Q itself incurred, as well as its overall expenditures for related party outsourcing and its overall acquisition costs for 2014 and 2015. Taxpayer Q can then track and trace to product families starting in 2016. Taxpayer Q’s expenditures are listed below:

<table>
<thead>
<tr>
<th>Year</th>
<th>All qualifying expenditures (i.e. all R&amp;D expenditures incurred by Taxpayer Q):</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>All overall expenditures (i.e. all R&amp;D expenditures incurred by Taxpayer Q, all expenditures for related party outsourcing, and all acquisition costs):</td>
<td>5 000</td>
</tr>
<tr>
<td>2015</td>
<td>All qualifying expenditures: 3 000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>All overall expenditures: 3 000</td>
<td></td>
</tr>
<tr>
<td>2016</td>
<td>All qualifying expenditures: 2 000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Qualifying expenditures for Product Family A: 400</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Qualifying expenditures for Product Family B: 1 600</td>
<td></td>
</tr>
<tr>
<td></td>
<td>All overall expenditures: 5 000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Overall expenditures for Product Family A: 2 400</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Overall expenditures for Product Family B: 2 600</td>
<td></td>
</tr>
<tr>
<td>2017</td>
<td>All qualifying expenditures: 2 000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Qualifying expenditures for Product Family A: 1 300</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Qualifying expenditures for Product Family B: 700</td>
<td></td>
</tr>
<tr>
<td></td>
<td>All overall expenditures: 3 000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Overall expenditures for Product Family A:</td>
<td></td>
</tr>
</tbody>
</table>
附录A: 有关过渡期措施的跟踪记录示例

1. P国于2016年开始实施一项IP税收优惠制度，该制度按要求须进行跟踪记录。纳税人Q是一家科技公司，销售产品中含有多项自主研发的知识产权。2016年前，纳税人Q并未将支出或收入分别归属于单个IP或产品进行跟踪记录，但对于2014年和2015年的支出却均有相关信息：其自己发生的全部研发（R&D）支出、外包给关联方的研发费用，以及全部购置成本。纳税人Q由此自2016年起就可对其名下所有产品进行跟踪记录。纳税人Q的支出如下：

表A.1 纳税人Q的支出情况

<table>
<thead>
<tr>
<th>年份</th>
<th>符合条件的支出总额（即纳税人Q所发生的R&amp;D支出总额）</th>
<th>所有支出总额（即纳税人Q的R&amp;D支出、关联方外包支出以及全部外购成本）</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>5,000</td>
<td>10,000</td>
</tr>
<tr>
<td>2015</td>
<td>3,000</td>
<td>3,000</td>
</tr>
<tr>
<td>2016</td>
<td>2,000</td>
<td>5,000</td>
</tr>
<tr>
<td></td>
<td>A产品系列所发生的符合条件的支出总额：400</td>
<td></td>
</tr>
<tr>
<td></td>
<td>B产品系列所发生的符合条件的支出总额：1,600</td>
<td></td>
</tr>
<tr>
<td></td>
<td>所有支出总额：2,400</td>
<td></td>
</tr>
<tr>
<td></td>
<td>A产品系列所发生的所有支出总额：2,400</td>
<td></td>
</tr>
<tr>
<td></td>
<td>B产品系列所发生的所有支出总额：2,600</td>
<td></td>
</tr>
<tr>
<td>2017</td>
<td>2,000</td>
<td>3,000</td>
</tr>
<tr>
<td></td>
<td>A产品系列所发生的符合条件的支出总额：1,300</td>
<td></td>
</tr>
<tr>
<td></td>
<td>B产品系列所发生的符合条件的支出总额：700</td>
<td></td>
</tr>
<tr>
<td></td>
<td>所有支出总额：3,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>A产品系列所发生的所有支出总额：2,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>----------------</td>
<td>------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2,000</td>
<td></td>
</tr>
<tr>
<td>Overall</td>
<td>expenditures for Product Family B:</td>
<td></td>
</tr>
<tr>
<td>expenditure</td>
<td>1,000</td>
<td></td>
</tr>
<tr>
<td>2018</td>
<td>Qualifying expenditures for Product Family A: 800</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Qualifying expenditures for Product Family B: 200</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Overall expenditures for Product Family A: 800</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Overall expenditures for Product Family B: 800</td>
<td></td>
</tr>
</tbody>
</table>

2. If Country P allows the use of a three-year "average" as a transitional measure, the nexus ratio would be calculated as follows. In 2016, Taxpayer Q therefore calculates the nexus ratio using the average of all of its R&D expenditures over three years. The ratio for 2016 would be 10,000/18,000 before applying the up-lift. For purposes of calculating the three-year average, this ratio does not include any expenditures incurred before 2014, even if the R&D to create IP Asset Q began before that time, and it uses all expenditures because Taxpayer Q had not yet begun tracking and tracing to product families in 2016. At the same time, Taxpayer Q starts tracking and tracing the expenditures incurred to continue developing IP Asset Q. In 2017, Taxpayer Q would again calculate the nexus ratio using the average of all of its R&D expenditures because it did not yet have three years of expenditures tracked to product families. The ratio for 2017 would be 7,000/11,000 before applying the up-lift. In 2018 and all following years, Taxpayer Q would transition to a cumulative approach using expenditures for product families since it would now have three years of expenditures that were tracked by product family. The ratio for Product Family A in 2018 would therefore be 2,500/5,200 before applying the up-lift, and all subsequent qualifying and overall expenditures for Product Family A will be added to that ratio in future years. The ratio for Product Family B in 2018 would be 2,500/4,400 before applying the up-lift, and all subsequent qualifying and overall expenditures for Product Family B will be added to that ratio in future years.

3. This Annex provides only one example of how a transitional measure could be designed to ensure that taxpayers had sufficient time to adapt to tracking and tracing requirements while still complying with the general principles of the nexus approach. Country P could, for example, allow the use of a five-year "average", which would then permit Taxpayer Q to calculate the nexus ratio based on all qualifying and overall expenditures in 2019 and 2020 as well as in 2016, 2017, and 2018.
### 表格

<table>
<thead>
<tr>
<th>年份</th>
<th>发生的产品系列支付总额</th>
</tr>
</thead>
<tbody>
<tr>
<td>2018</td>
<td></td>
</tr>
<tr>
<td></td>
<td>A产品系列支付总额：800</td>
</tr>
<tr>
<td></td>
<td>B产品系列支付总额：200</td>
</tr>
<tr>
<td></td>
<td>A产品系列支付总额：800</td>
</tr>
<tr>
<td></td>
<td>B产品系列支付总额：800</td>
</tr>
</tbody>
</table>

2. 如根据采用三年的“平均数”作为过渡期措施，则关联度比例可计算如下。2016年，纳税人Q可将其三年研发支出总额的平均数计算关联度比例。在适用于上表调整之前，2016年的关联度比例为10,000/18,000。在计算三年平均值时，仅就三年平均值的计算而言，即使纳税人Q研究开发IP资产Q的活动在2014年之前就已经开始，此比例计算也并未包括2014年之前发生的支出。此外，因为纳税人Q到2016年为止尚未对所有产品系列分类支出进行跟踪和记录，上述比例是根据所有支出总额计算而得出的。与此同时，纳税人Q开始对知识产权Q的后续研发支出进行跟踪和记录。2017年，由于纳税人Q仍然没有三年的所有产品的分类跟踪记录，因此，其可再次以其所有研发支出的平均数计算关联度比例。在适用于上表调整之后，2017年的比例为7000/11000。从2018年开始到以后的所有年度，鉴于纳税人Q相应的产品支出已具有三年的分类跟踪记录，则可以过渡至对产品使用累计法。在适用于上表调整之后，2018年产品A系列的关联比例为2500/5200，且后续所有与产品A系列相关的条件的支出金额以及支出总额将被在以后年度都将加在此公式中计算比例。在适用于上表调整之前，2018年产品B系列的关联比例为2500/4400，且后续所有与产品B系列相关的条件的支出金额以及支出总额将在以后年度都将加在此公式中计算比例。

3. 本附录提供了以上所述的“平均数”方法可如何设置，以保证纳税人既有充足的时间对其产品采用跟踪记录的同时也勿需从关联度的基本原则，举例而言，P国可以允许使用“五年平均法”以允许纳税人Q根据其2019年和2020年以及2016、2017、2018年的所有符合条件的支出金额以及支出总额计算其关联度比例。
ANNEX B - SPONTANEOUS EXCHANGE ON TAXPAYER-SPECIFIC RULINGS UNDER THE FRAMEWORK

Is there a taxpayer-specific ruling giving rise to BEPS concerns in the absence of compulsory spontaneous information exchange because:

- It is a cross-border ruling related to a preferential regime?
  - yes
  - no

  Exchange with the residence country of the ultimate parent and the immediate parent company, and the residence country of all related parties with which the taxpayer enters into a transaction for which a preferential treatment is granted, from which income is derived from related parties benefiting from a preferential treatment.

- It is a cross-border unilateral APA and any other cross-border unilateral tax ruling (such as ATR) covering TP principles?
  - yes
  - no

  Exchange with the residence country of the ultimate parent and the immediate parent company and the residence country of all related parties with which the taxpayer enters into a transaction for which it gives rise to unilateral downward adjustment, not directly reflected in the taxpayers' accounts.

- It is a cross-border ruling providing for a unilateral downward adjustment not directly reflected in the taxpayers' accounts?
  - yes
  - no

  Exchange with the residence country of the ultimate parent and the immediate parent company and the residence country of the head office or the country where the permanent establishment is established.

- It is a permanent establishment ruling?
  - yes
  - no

  Exchange with the residence country of the ultimate parent, of the immediate parent company, of any related party making the payments to the recipient and of the ultimate beneficial owner of payments made to the recipient.

- It is a related party conduit ruling?
  - yes
  - no

  No obligation to spontaneously exchange information on the ruling.

1 As explained in paragraph 132, it has been agreed that in certain circumstances information will be provided to other relevant tax authorities even where there is no ruling.
附录B —— 在框架下对纳税人的特定裁定进行自发情报交换

针对特定纳税人的裁定，若不进行强制性自发情报交换，则会引起BEPS问题，因为：

- 是否是于优惠制度相关的跨境裁定？
- 是否是单边预约定价安排或其他包含转让定价规则的跨境或其他跨境税收裁定（例如事先税收裁定）？
- 是否是单边下网且不会直接反映在纳税人账户账簿中的跨境裁定？

（注1）

- 是否是税务局机构裁定？
- 是否是关联方导管公司裁定？
- 是否属于其他者缺乏自发情报交换将引起BEPS问题的裁定？

是

- 与最终母公司居民国、直接母公司所在国以及与纳税人发生交易且该交易享受优惠待遇或其交易产生可享受优惠待遇的收入的所有关联方居民国进行情报交换

否

- 与最终公司居民国、直接母公司所在国以及与纳税人发生交易且该交易享受优惠待遇或其交易产生可享受优惠待遇的收入的所有关联方居民国进行情报交换

不需要进行自发情报交换

注1：根据第122段落的说明，在某些特定的情形下，即使没有作出裁定，也需向相关税务机关提供相关信息。
ANNEX C – TEMPLATE AND INSTRUCTION SHEET FOR INFORMATION EXCHANGE

All fields are mandatory unless otherwise indicated.

1. Ruling reference number, if any.

<table>
<thead>
<tr>
<th>Taxpayer identification number (TIN) or other tax reference number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal name of the entity</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Address</th>
<th>Street</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Building(optional)</td>
</tr>
<tr>
<td></td>
<td>Suite (optional)</td>
</tr>
<tr>
<td></td>
<td>Floor (optional)</td>
</tr>
<tr>
<td></td>
<td>District Name (optional)</td>
</tr>
<tr>
<td></td>
<td>Post Office Box (optional)</td>
</tr>
<tr>
<td></td>
<td>Post Code</td>
</tr>
<tr>
<td></td>
<td>City</td>
</tr>
<tr>
<td></td>
<td>Country</td>
</tr>
<tr>
<td></td>
<td>State/Province/Canton (optional)</td>
</tr>
</tbody>
</table>

| Taxpayer’s main business activity (optional) |

| Name of MNE group, if different |

附录C——情报交换表格模板及填表说明

除另有特别指明外，以下所有项目均为必填项。

1. 裁定的参考编号，若无

| 纳税人识别号或其他涉税参考编号 |
| 实体判定名称 |

| 地址 | 街道 |
|      | 大厦（选填） |
|      | 房间（选填） |
|      | 楼层（选填） |
|      | 区名（选填） |
|      | 邮箱（选填） |
|      | 邮政编码 |
|      | 市 |
|      | 国家 |
|      | 州/省/行政区（选填） |

| 纳税人的主营业务活动（选填） |
| 跨国企业集团名称（若与纳税人名称不同） |
3. Date of issuance.

4. Accounting periods/tax years covered by the ruling.

5. Type of ruling issued. Please check the appropriate box:

- Relating to preferential regime
- Unilateral APA or other TP ruling
- Downward adjustment ruling
- PE ruling
- Conduit ruling

6. Additional information regarding the ruling and the taxpayer (optional).

<table>
<thead>
<tr>
<th>Transaction amount, if any</th>
</tr>
</thead>
<tbody>
<tr>
<td>Entity’s annual turnover</td>
</tr>
<tr>
<td>Profit of the entity</td>
</tr>
</tbody>
</table>
3. 发布日期

4. 裁定所涉及的会计期间 / 纳税年度

5. 裁定的类型，请选择相应的选框

<table>
<thead>
<tr>
<th>与优惠制度相关</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>单边预约定价安排或其他转让定价裁定</td>
<td></td>
</tr>
<tr>
<td>调减裁定</td>
<td></td>
</tr>
<tr>
<td>常设机构裁定</td>
<td></td>
</tr>
<tr>
<td>导管公司裁定</td>
<td></td>
</tr>
</tbody>
</table>

6. 与裁定和纳税人相关的其他信息（选填）

<table>
<thead>
<tr>
<th>交易金额（若有）</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>实体的年营业额</td>
<td></td>
</tr>
<tr>
<td>实体利润</td>
<td></td>
</tr>
</tbody>
</table>
7. Short summary of the issue covered by the ruling ideally provided in one of the official languages of the OECD or other language bilaterally agreed. Where this is not possible this can be provided in the native language of the sending jurisdiction.

<table>
<thead>
<tr>
<th>Ultimate parent</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Immediate parent</td>
<td></td>
</tr>
<tr>
<td>Related party with which the taxpayer enters into a transaction for which a preferential treatment is granted or which gives rise to income benefiting from a preferential treatment</td>
<td></td>
</tr>
<tr>
<td>Related party with whom the taxpayer enters into a transaction covered by the ruling</td>
<td></td>
</tr>
<tr>
<td>Related party making payments to a conduit (directly or indirectly)</td>
<td></td>
</tr>
<tr>
<td>Ultimate beneficial owner of income from a conduit arrangement</td>
<td></td>
</tr>
<tr>
<td>Head office of permanent establishment/PE country</td>
<td></td>
</tr>
</tbody>
</table>
7. 对裁定的情况的简要概述，最好以OECD的官方语言之一或双方约定的其他语言，如果无法做到，也可以使用知情提供方管辖国母语。

8. 与接收方管辖区进行情报交换的理由

<table>
<thead>
<tr>
<th>最终母公司</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>直接母公司</td>
<td></td>
</tr>
<tr>
<td>与纳税人发生交易的关联方，该交易或者享受税收优惠或者产生了能够享受税收优惠待遇的收入</td>
<td></td>
</tr>
<tr>
<td>与纳税人发生在裁定范围内的交易的关联方</td>
<td></td>
</tr>
<tr>
<td>关联方向导管公司支付费用（间接或直接）</td>
<td></td>
</tr>
<tr>
<td>导管安排下的最终受益所有人</td>
<td></td>
</tr>
<tr>
<td>常设机构的总公司 / 常设机构所在国</td>
<td></td>
</tr>
</tbody>
</table>
9. Details of the entities in the recipient jurisdiction.

<table>
<thead>
<tr>
<th>No.</th>
<th>Name of entity</th>
<th>Address</th>
<th>TIN or other tax reference number, where available</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>...</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
9. 情报接收方管辖区内实体情况

<table>
<thead>
<tr>
<th>实体名称</th>
<th>地址</th>
<th>纳税人识别号或其他涉税参考编号（如可以获取）</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>...</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Instruction Sheet for the Template on Exchange of Information on Rulings

All fields are mandatory unless otherwise indicated.

1. **Ruling reference number, if any.**

   The ruling reference number should be provided, if it is available.

2. **Identification of the taxpayer and where appropriate the group of companies to which it belongs.**

   This box includes all the information necessary to identify the taxpayer and determine its association with an MNE group. In line with the “Organisation Party” block from the CRS the following fields are required: **taxpayer identification number (TIN) or other tax reference number, legal name of the entity** (i.e. name of the taxpayer), and **address.** Within the address field only the “street”, “post code” “city” and “country” where the taxpayer is registered are mandatory fields.

   **Taxpayer’s main business activity** field is optional and intended to be a drop-down menu with a list of predefined industry sector codes when used in an application that allows for such functionality.

   **Name of MNE group, if different** aims to provide information on the association of the taxpayer with the MNE group to which it belongs. In some cases the name of the subsidiary may differ from the name of the MNE group making it more difficult to identify the connection between the taxpayer and the MNE group.

3. **Date of issuance.**

   The date on which the ruling was issued is to be inserted in the box. This will generally be the date shown on the ruling or in certain countries where the ruling is held by the tax administrations, it could be the date provided on any written confirmation given to the taxpayer.

4. **Accounting periods/tax years covered by the ruling.**

   This box may have a drop-down menu with the accounting periods/tax years covered by the ruling.

5. **Type of ruling given.**

   These boxes identify the type of ruling that needs to be exchanged. All relevant boxes should be ticked so if a ruling combines several different elements, for instance, a unilateral APA and an agreement on the tax treatment of a PE, then both boxes should be ticked.

6. **Further information on the ruling and taxpayer.**

   These boxes are intended to provide some form of materiality filter to help tax administrations decide if they want to include further information. These boxes are optional, therefore there is no obligation to obtain such information.

   Transaction amount is the monetary value of the transaction. The entity’s annual turnover is the volume of business of an enterprise as contained in the profits and loss account. It is usually measured by reference to gross receipts, or gross amounts due, from the sale of goods or services by the entity. The
有关裁定的报告交换表填表说明

除另行指明外，以下所有项目均为必填项。

1. 裁定的参考编号

如有，需提供裁定的参考编号。

2.  纳税人及所属公司集团的身份信息

本栏包含纳税人及判定其与跨国企业集团关系的必要信息。根据《条例办法标准》（CRS）中的“非居民方”章节的相关规定，本栏目需填写以下信息：纳税人识别号（TIN）或其他涉税参考编号、实名的法定名称（即纳税人名称）以及地址。地址栏中，仅有纳税人注册地的街道、“邮政编码”、“市”以及“国家”为必填项。

纳税人主营业务活动：本栏为选填项，如在有关功能的（计算机）运用条件下，可以从下拉菜单中预设的行业编码中选择。

跨国企业集团名称（若与纳税人名称不同）：提供纳税人与所属跨国企业集团关系的相关信息。在某些情况下，子公司名称可能和跨国企业集团名称不同，导致更加难以识别纳税人与跨国企业集团之间的联系。

3. 发布日期

需要在本栏内填写裁定的发布日期，通常为裁定上显示的日期，或者对于某些以税务机关进行裁定的国家来说，该日期也可为税务机关向纳税人出具的书面确认的日期。

4. 裁定所覆盖的会计期间/纳税年度

本栏可设定功能表，功能表中包含裁定所覆盖的会计期间/纳税年度。

5. 裁定的类型

本栏需要填写裁定交换的裁定类型。如果一项裁定包含不同的因素，则在所有对应的不同项中打钩，例如，一项裁定覆盖所有预设的项目安排以及常设机构税务处理协议，则在相应的两个选项中均应打钩。

6. 裁定和纳税人的其他信息

本栏提供一些重要筛选选项以帮助税务机关决定是否需要包含更多的信息，这些选项均为选填项目，并非必须提供。

交易金额是指交易的货币价值。实体的年营业额为在报表表中予以体现的企业业务量，通常通过实际销售额或提供劳务所获得的总收入减去应收账款来计量。实体的利润是指业务收入总额减去可扣除的业务支出之后的净额。
profit of the entity is net profit reflecting the difference between gross receipts from business transactions and deductible business expenses.

Where Box 6 of the template is completed this should include the latest figures available from either the rulings file or the taxpayer file and should specify the currency, which should be the currency used in any document made available to the tax administration when it issued the ruling. For example, the transaction amount would be the latest figure for a specific transaction that is covered by the ruling.

7. **Short summary of the issue covered by the ruling.**

In this box the tax administration should provide a short summary of the issue covered in the ruling and should include a description of the transaction or activity covered by the ruling and any other information that could help the receiving tax administration risk-assess the potential BEPS risks posed by the ruling. For example, in the case of a unilateral APA the summary could set out the type of transaction or income covered and the transfer pricing methodology agreed. As the summary is intended to be high-level it should not generally include details of specific provisions in a country’s tax code. The information in the box should ideally be written in one of the official languages of the OECD or other language bilaterally agreed. Where this is not possible this can be provided in the native language of the sending administration.

8. **Reason for exchange with the recipient jurisdiction.**

The information provided in this field will tell the recipient jurisdiction why it is receiving the ruling. The recipient jurisdiction must be one of the relevant jurisdictions under the framework. The precise reason for the exchange will be indicated by the box ticked.

9. **Details of the entities in the recipient jurisdiction.**

This box provides further information on any entities to which the ruling relates and that are resident in the recipient jurisdiction. There is the ability to identify more than one entity where a ruling relates to more than one entity in that jurisdiction. The *name of the entity* and the *address* are mandatory and the *TIN or other tax reference number* should be provided where such information is available.
完成本栏目填写，需从裁定文件或纳税人文件中获得最终的数据并注明所使用的货币种类，同时应采用在税务机关发布的裁定时在任何文件中均有使用的货币种类。
举例来说，交易金额应为裁定所涉及的某项具体交易的最新数额。

7. 关于裁定所涵盖问题的简要概述

税务机关必须在本栏目对裁定所涵盖问题、所涉交易或活动予以概述。此外还需提供可以帮助裁定税务机关对裁定可能引发的BEPS风险进行评估的任何具体信息。举例来说，对于一项单边预约定价安排而言，概述中可包含交易的种类以及所采用的转让定价方法等内容。作为概念性的描述，本栏目一般不应当含有任何税法具体条款的详细规定。最好使用OECD的官方语言之一或双方约定的其他语言进行填写，如果无法做到这一点，也可以使用情报提供方管辖语文种填写。

8. 与裁定方管辖区进行情报交换的理由

本栏目填写的内容将告知情报接受方其收到本裁定相关信息的理由。裁定方管辖区必须为框架中规定的相关管辖区之一。进行情报交换的具体原因可以通过在具体的选框上打勾来加以说明。

9. 情报接收方管辖区的实体情况

本栏目提供与裁定相关的位于接收方管辖区的任何实体的信息。当裁定涉及接收方管辖区多个实体时，可以对多个实体的相关信息进行明确。实体名称与地址为必填项，此外还应提供纳税人识别号或其他涉税参考编号（如有）。

125