



# Substance & Transparency under BEPS Action Plan Reactions in a Dynamic Context

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## Substance & Transparency under BEPS Action 5



### CONTENT OF THE PRESENTATION

- Update of Global Context
- Focus on Action 5: Substance & Transparency
- Uruguay and Switzerland as representative examples
- Conclusions



## Global Context



Global Financial Meltdown (2008)

Leading cases:



among many others.

G-20 Initiative: OECD Base Erosion and Profit Shifting Project (2013)

## BEPS Action 5



“Countering Harmful Tax Practices More Effectively, taking into account Transparency & Substance”

### Quick Review of Action 5

1998

OECD Report on Harmful Tax Competition

2013

OECD BEPS Action Plan

2014

OECD Initial Progress Report

2015

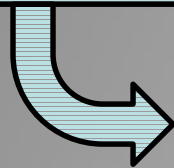
OECD Final Report (endorsed by G-20 on October 2015)



## 1998 OECD Report on “Harmful Tax Competition”



Four Key Factors to determine whether a preferential regime was potentially harmful



1. Low or no effective tax rate
2. Ring-fenced regime
3. Lack of transparency
4. No effective exchange of information

“Substance” was NOT regarded a Key Factor (but as “other factor”)

## 2015 OECD Final Report. Action 5



General  
Objective

Profits taxed where the economic activities that generate them are carried out and where value is created

Concerns

Preferential regimes that risk being used for artificial profit shifting

Lack of Transparency (e.g. secret rulings)

## 2015 OECD Final Report. Action 5

Preferential Regimes must require Substantial Activity

Nexus Approach

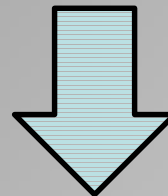
- IP Regimes
  - Direct nexus between R&D activities / expenditures / income
  - R&D actual expenditures as a proxy
  - Nexus Approach could be used as a presumption
  - Greater Record Keeping
- Non IP Regimes
  - Nexus between core income generating activities / income
  - Actual engagement in the core activity related to preferential income
  - Examples: headquarters regimes, holding company regimes, etc.
  - Greater Record Keeping



## 2015 OECD Final Report. Action 5



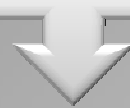
### Improving Transparency



- Framework for improving transparency in relation to rulings
- Compulsory spontaneous exchange of information on certain rulings
- Action 5 must be considered together with:
  - The whole Action Plan re transparency
  - Convention on Mutual Administrative Assistance in Tax Matters
  - The new Standard on Automatic Exchange of Information
- Protection of the information exchanged: confidentiality safeguards



# Switzerland

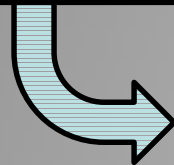


2013

Signed OECD Declaration on BEPS

2013

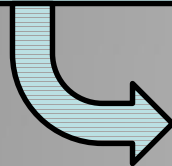
Signed OECD Multilateral Convention on Mutual Administrative Assistance



However, not yet entered into force (did not deposit ratification)

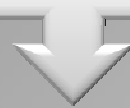
2015

Signed agreement with EU re Automatic Exchange of Information



Collect data from 2017, exchange it from 2018

# Switzerland



2015

Corporate Tax Reform (under process)

Mixed Company Regime



In the process of being eliminated

Holding Company Regime



In the process of being eliminated

New Patent Box Regime



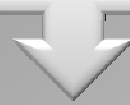
Would be released in accordance with  
BEPS standards

Note, however, that reform expected to be in force in 2018 or 2019...

2015

Civil Society: Tax Justice Network regards Switzerland as the less transparent country in the world (ranked N° 1 in the Financial Secrecy Index released on Nov 2015)

# Uruguay

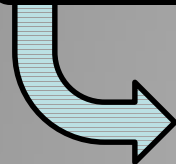


2009

Was included for a few days in OECD “Black List”

2009 -  
2015

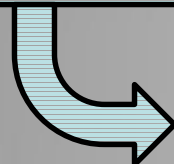
Signed significant number of TIEAs and DTAs



However, did not yet signed OECD Multilateral Convention on Mutual Administrative Matters

2014

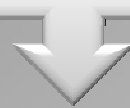
Committed to adopt OECD Standard Automatic Exchange of Information



First exchange in 2018



Uruguay



### Zona Franca Regime (Preferential Regime)

Current Regime



Has been more strictly construed and applied by Uruguay authorities

Amendment Project



Oriented to more control and substance

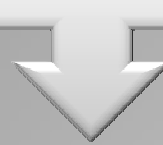
2015



Still maintains a territorial tax regime (save for certain limited exceptions)

2015

Civil Society: Tax Justice Network regards Uruguay as one of the 30 less transparent countries in the world (ranked N° 28 in the Financial Secrecy Index released on Nov 2015)

## Substance & Transparency What to expect in the near future



- OECD design of a more inclusive framework to support Action 5 measures
- OECD and G-20 monitoring preferential regimes and the application of the transparency framework
- Increased implementation of Action 5 in domestic laws of OECD and Non-OECD Countries: more substance, more transparency
-  and  (typically, source countries) would benefit from this approach.

### **However...**

- Competition among nations may affect the speed of changes (competition for foreign direct investment and tax collection). Example: Switzerland.
- Certain Key Players did not yet fully backed up BEPS Initiative (e.g. USA).



**Thank you!**

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