

**Everything but BEPS ...  
International, EU and Swiss  
tax developments**

***TTN Nice – 25 September 2015***

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# Agenda

- Automatic Exchange of Information (AEOI)
- EU Directive UBO register
- Registration of bearer shares (LU & CH) and UBO (CH)
- EC Tax Action Plan 2015
- EC Tax Directives
- EU Exchange of rulings
- EU Fiscal State Aid
- EC-Swiss Corporate Tax Dispute
- 3<sup>rd</sup> Swiss corporate tax reform

# Automatic Exchange of Information (AEOI) (1)

- Information **exchange upon request** was the international standard for decades
- Since 2009 pressure exercised a/o by OECD and G20, aiming for **transparency** and attacking tax evasion
- **FATCA** Agreements since 2010 drove the trend
- **Tax havens and bank secrecy jurisdictions** becoming slowly but surely **transparent**
- 6 September 2013 **Adoption of automatic exchange of information (AEOI)** as the new global standard

# Automatic Exchange of Information (AEOI) (2)

- 15 July 2014 - OECD adopts the **Standard for AEOI**
- AEOI of financial account information, incl. **balances, interest, dividends, and sales proceeds** from financial assets, reported by financial institutions and covering **accounts held by individuals and entities, including trusts and foundations**
- First AEOI expected **by September 2017**, some jurisdictions collect in 2017 and exchange in 2018
- **Swiss parliament (national council) approved AEOI on 16 September 2015**. Senate to vote in November.

# Automatic Exchange of Information (AEOI) (3)

## Common Reporting Standard (CRS):

- **Individuals:** the name, address, TIN and date and place of birth of each Reportable Person that is (i) an **Account Holder** or that is (ii) a **Controlling Person of an Entity** that is an Account Holder
- **Entities (if Reportable Persons):** the name, address, jurisdiction(s) of residence and TIN of the Entity and the name, address, jurisdiction(s) of residence, TIN and date and place of birth of its **Controlling Persons**

# Automatic Exchange of Information (AEOI) (4)

- the **account number**
- the name and identifying number of the **Reporting Financial Institution**;
- the **account balance or value** as of the end of the relevant calendar year or other reporting period
- if the account was closed during such period, the **account balance or value** as of the closure of the account;

# Automatic Exchange of Information (AEOI) (5)

## **Custodial Account:**

- total gross amount of interest, dividends and other income generated with respect to the assets held in the account during the calendar year or other appropriate reporting period; and
- total gross proceeds from the sale or redemption of property during the same reporting period

**Depository Account:** total gross amount of interest paid or credited during the reporting period

# EU Directive UBO register (1)

- European Parliament adopted on 20 May 2015 the **4<sup>th</sup> EU anti-money laundering and anti-terrorist financing directive**
- Includes a **central register of ultimate beneficial owners (UBO's)** of legal entities, trusts, foundations, mutuals, etc.
- Threshold for UBO registration will generally be **25% of votes or economic ownership**
- Information will be **fully accessible automatically to competent authorities, banks and financial institutions, accountants, tax advisers, notaries, lawyers, real estate brokers, trust companies and corporate service providers**



# EU Directive UBO register (2)

- Access granted upon request to any person with a **legitimate interest**, including investigative **journalists**
- Information regarding **Trusts will NOT be accessible to the public/journalists** (concession made to UK, IE, MT and CY).
- Entry into force of Directive **20 May 2015**
- Member States have two years to implement, i.e. by **20 May 2017** the EU UBO register should be in place

# Registration of bearer shares (1)

- **Identification of holders of bearer shares** required by the Financial Action Task Force (FATF) and the Global Forum on Transparency and Exchange of Information for Tax Purposes
- For example **Luxembourg** law as per 18 August 2014: bearer shares must be deposited with a depositary appointed by the board.
- Depositary must maintain in Luxembourg a register of the bearer shares, which includes: (i) the details of each holder of bearer shares, with an indication of the number of its shares; (ii) the date on which the shares were deposited; and (iii) any transfer of these shares or their conversion into registered shares

# Registration of bearer shares (2)

- Information in the register **not intended for the public**, but for judicial and tax authorities
- Luxembourg companies that issued bearer shares before the entry into force must appoint a depositary **within six months** thereafter (i.e., by 17 February 2015).
- Bearer shares issued by companies before the entry into force must be deposited with the depositary **within 18 months** thereafter (i.e., by 17 February 2016), failing which such shares must be cancelled through a capital reduction.

# Registration of bearer shares (3)

**Swiss Federal Law of 12 December 2014 implementing FATF recommendations, entry into force 1 July 2015:**

- Bearer shares will need to be registered with the company
- Buyer has to announce and identify himself within 1 month. Existing shareholders must report **before 31 December 2015**
- **Proper identification:** (i) copy of original shares and (ii), for individuals, name, first name, date of birth, nationality and copy of passport or, for entities, trade register extract. Any changes need to be reported as well.
- Failure to register means that the shareholders rights (votes, dividends, etc.) of shareholder in question are suspended

# Registration of UBO (Switzerland)

## Registration of Ultimate Beneficial Owner (UBO) - Swiss Federal Law implementing FATF recommendations since 1 July 2015:

- Shareholder acquiring alone or together with a third person **25% or more** of the **share capital** or **votes** of a Swiss company must announce and identify the **ultimate beneficial owner(s) (UBO)** of such shares or votes within 1 month to the company.
- **Proper identification:** name, first name and address of each individual UBO. Any changes need to be reported as well.
- Failure to register means that the shareholders rights (votes, dividends, etc.) of shareholder in question are suspended

# EC Tax Action Plan 2015 (1)

17 June 2015 - Commission adopts **Action Plan** for for fair and efficient corporate taxation in the EU - **5 Key Areas for Action have been identified:**

1. Re-launching the Common Consolidated Corporate Tax Base (CCCTB)
2. Ensuring fair taxation where profits are generated
3. Creating a better business environment
4. Increasing transparency (*a/o exchange of rulings*)
5. Improving EU coordination

A map of non-cooperative tax jurisdictions was also published, in a move to reinforce the EU's response to external threats to Member States' tax bases:

[http://ec.europa.eu/taxation\\_customs/taxation/gen\\_info/good\\_governance\\_matters/lists\\_of\\_countries/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/gen_info/good_governance_matters/lists_of_countries/index_en.htm)

# EC Tax Action Plan 2015 (2)

European Commission


TAXATION AND CUSTOMS UNION

European Commission > Taxation and Customs Union > ... > Good\_governance\_matters > Lists\_of\_countries

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## Tax good governance in the world as seen by EU countries

A number of EU Member States assess how countries and territories around the world apply standards of tax good governance (transparency, exchange of information, and fair tax competition). The **criteria** (partly common and partly their own) used by the relevant EU countries in their assessment are [listed](#) (62 kB). The **following map** shows the results based on Member States lists in December 2014. The Commission will amend this list at least once a year to reflect changes to Member States' national lists.



Click on an EU country to see the countries and territories it considers as non-compliant.  
Click on a country or territory to see which EU countries (if any) consider it as non-compliant.

The map was drawn up on the basis of work done by the [Platform for Tax Good Governance](#) and the information provided by EU Member States.

# EC Parent-Subsidiary Directive (1)

- ECOFIN Council 9 December 2014 – **General Anti-Avoidance Rule (GAAR)** in EU Parent-Subsidiary Directive
- Member States **required to deny benefits** of the Directive if (a) (one of) the **main purpose(s)** of an arrangement is to obtain a tax advantage defeating the object or purpose of the Directive and (b) such arrangement is **not genuine** having regard to all relevant facts and circumstances
- Not genuine means **no valid commercial reasons reflecting economic reality**



# EC Parent-Subsidiary Directive (2)

## 27 January 2015 - Amendment to the EC Parent-Subsidiary Directive:

2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the **main purpose** or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.
3. An arrangement may comprise more than one step or part.
4. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for **valid commercial reasons** which reflect economic reality.
5. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse.

# EC Parent-Subsidiary Directive (3)

- This new GAAR goes further than previously (8 July 2014) adopted **rules against double non taxation and hybrid financing arrangements rules**
- Member States must implement by **31 December 2015** at the latest
- **Domestic or agreement (treaty) based provisions** for the prevention of tax evasion, tax fraud or abuse **not precluded**
- Announced that **similar GAAR** will be included in the **EU Interest & Royalty Directive**

# EC Interest & Royalty Directive (1)

## 11 November 2011 - Proposed amendment to the Interest and Royalty Directive:

- **Extending the list of companies**
- Reduce the shareholding requirements from a 25% direct holding to a **10% direct or indirect holding**;
- Member States have to grant the benefits of the Directive **only when the interest or royalty payment concerned is not exempt from corporate taxation**. Addresses the situation of a company which, while subjected to corporate tax, also benefits from a **special national tax scheme** exempting foreign interest or royalty payments received.

# EC Interest & Royalty Directive (2)

**27 January 2015:** a main purpose test similar to the one for the EC Parent-Subsidiary Directive may be introduced in the I&R Directive

**11&12 September 2015:** amendment again discussed during informal ECOFIN in Luxembourg on but no date set yet because of the complexity

# EU exchange of rulings (1)

- **18 March 2015** European Commission proposes amendment to **Directive 2011/16/EU** on administrative cooperation in the field of taxation
- Introducing **mandatory automatic exchange** of information on (a) **advance cross-border rulings** and (b) **advance pricing arrangements (APA's)**
- *“any agreement, communication, or any other instrument or action with similar effects, including one issued in the context of a tax audit “*

# EU exchange of rulings (2)

**Member States must exchange basic information of a ruling, such as:**

- Identification of taxpayer and group, if applicable
- Content of ruling and description of relevant business or transactions
- Other Member States likely concerned
- Other legal persons likely affected
- For APA's: set of criteria and transfer price

**Member States may request full text of the ruling**

# EU exchange of rulings (3)

- Only applies to rulings concluded **in advance** of the transactions or of the activities
- Rulings exclusively covering one or more **individuals** are excluded.
- Exchange with the Commission and **with all 28 Member States !**
- Applies to new rulings (cat. 1) **AND** to rulings issued on or after **1 January 2006** and still in force on 1 January 2016 (cat. 2)

# EU exchange of rulings (4)

- **New rulings** (cat. 1) must be exchanged **within 1 month after the quarter** they are issued
- **Existing rulings** (cat. 2) must be exchanged before **31 December 2016**
- Likely entry into force **1 January 2016** – *vote to be held on next ECOFIN meeting of 6 October 2015*



# Minimum Effective Tax Rate

## **EU and third state minimum effective tax requirement**

discussed during informal ECOFIN in Luxembourg on 11&12 September 2015:

- *“just one of the ways in which to fight against tax evasion and avoidance”*
- *“joint assessment of all Member States that cannot accept very low or non-existent tax rates for multinational companies”*
- *“there is an agreement on the fact that we must fight against aggressive taxation and that non-double taxation must be avoided”*

# EU investigates Fiscal State Aid (1)

- June 2013 – European Commission asks for **Luxembourg tax rulings**. Followed by an order in March 2014. On 18 December 2014 Luxembourg announced to provide the rulings
- Since June 2013 Commission also **investigates IP / Patent Box regimes** in 10 Member States (BE, CY, FR, HU, LU, MT, NL, PT, ES and UK)
- 11 June 2014 – opening of Fiscal State Aid investigations against **Ireland (Apple), Luxembourg (Fiat) and the Netherlands (Starbucks)**

# EU investigates Fiscal State Aid (2)

- 1 October 2014 - European Commission extends in-depth investigation to **Gibraltar tax ruling practice**
- 7 October 2014 – investigation against **Luxembourg in relation to Amazon**
- 3 February 2015 – in-depth investigation into **Belgian “excess profit” rulings**
- 17 September 2015 – EP Hearing, commissioner Vestager getting ready to render **final State Aid decisions**

**→ If found to be fiscal state aid, beneficiary required to pay back up to 10 years of tax benefits !**

# EC-Swiss cantonal tax dispute (1)

- Since 2005 EC-CH dispute on **cantonal corporate taxation**. EU claims that the Swiss cantonal tax privileges constitute **forbidden state aid** (based on FTA 1972)
- 14 October 2014 - EC-Swiss Agreement signed to abolish criticized cantonal regimes, likely as per **31 December 2018**:
  - the cantonal administrative/**domicile** company status;
  - the cantonal mixed/base/auxiliary company status;
  - the cantonal holding company status;
  - Circular Number 8 on **principal companies**, and;
  - the current practice regarding finance branches.
- Moreover, any possible replacement measures will need to be in line with generally accepted international standards

# EC-Swiss cantonal tax dispute (2)

- Cantonal tax regimes becoming **Eurocompatible**:
  - **NE** Overall effective tax rate of approx. 22.2% in 2011 reduced to approx. **15.6%** by 2016.
  - **NW** introduced a **license box** whereby the cantonal corporate income tax rate on net license income is reduced by 80% to an overall effective rate of only 8.8%
- Swiss federal council proposes the **3<sup>rd</sup> Swiss corporate income tax reform** (see hereafter)
- Corporate income tax reductions to **12 to 14%**
- **Stamp duties** and **corporate net wealth tax** reduced or abolished

# EC-Swiss cantonal tax dispute (3)

## Corporate income tax could be reduced to 12 to 14%:

- NE 2016: 15.61% (2015: 17.01%)
- BE 2018-2021: 17.96%/16.37% (2015: 21.60%)
- VD 2019: 13.79% (2015: 22.79%)
- GE 2019: 13% ? (2015: 24.18%)

## Already there:

- SZ 2015: 14.86%
- ZG 2015: 14.30%
- NW 2015: 12.66%
- LU 2015: 12.32%

# 3<sup>rd</sup> Swiss Enterprise Tax Reform (1)

## FEDERAL CORPORATE TAX:

- ~~Participation exemption~~
- Notional interest deduction (NID) - maybe
- ~~Exit tax and entry step up~~
- ~~Unlimited loss carry forward~~
- ~~Tax grouping for losses~~
- Stamp tax reform
- ~~Special R&D incentives~~
- ~~Tonnage tax (judged unconstitutional)~~

# 3<sup>rd</sup> Swiss Enterprise Tax Reform (2)

## CANTONAL CORPORATE TAX:

- Reduction of the effective corporate income tax rates
- Reduce or abolish the cantonal corporate net wealth tax
- Step-up and exit tax – Tax treatment of hidden reserves
- Option for the cantons to apply special, higher tax deductions for R&D expenses
- Notional interest deduction (NID) - maybe
- **PATENT BOX (≠ LICENSE BOX)**



# New Swiss cantonal patent box (1)

- Qualifying income from patents can benefit from a reduction of up to maximum 90%
- Corporate taxpayer needs to (i) (economically) own the patent and (ii) have made a crucial contribution to the development of the underlying invention (creation and continuous development)
- In group context: control/oversight or crucial contribution by group company in case of usufruct or exclusive license

# New Swiss cantonal patent box (2)

## Also applies to:

- Supplementary Protection Certificates (SPC)
- Exclusive licenses
- Protection of first applicant (Swiss pharma)

# New Swiss cantonal patent box (3)

**Qualifying patent income =**

Overall income of the company less:

- financial income
- production, trading and services income insofar as not related to an eligible patent
- an amount relating to routine functions and all income from brands, trademarks

# New Swiss cantonal patent box (4)

- Not a license box, limited to income from patents → **PATENT BOX** (based on UK model)
- ≤90% only on cantonal level (ETR 9 to 12%)
- Strict conditions
- International comparison ?
- State Aid / Harmful Tax Competition ?
- Future ?

# New Swiss cantonal patent box (5)

## International comparison

- Royalty boxes exist among others in BE, NL, LU and UK (IT ?)
- BE: patent deduction of **80%**, both for generated and acquired patents, but not for other kinds of IP - **ETR 6.8%**
- NL: innovation box with a **5% ETR** for royalty income on patents and specific approved R&D projects
  - does not apply to other intellectual property, restricted to patents linked with R&D activities in the Netherlands
- LU: 80% exemption for income from and capital gains realized with IP (larger definition than NL and BE) - **ETR 6%**
- UK (since 2013): patent box with a **10% ETR**

# New Swiss cantonal patent box (6)

## State Aid analysis of royalty box regimes:

- Patent box not considered State Aid if it forms an integral part of the general tax system and is not selective but accessible to all enterprises (in terms of conditions, restrictions, etc.)
- But ... beware of discretionary and/or standardized rulings
- Not a harmful tax regime if no distinction is made based on source (e.g. domestic or foreign source, from related companies or from third parties)
- Even if it were State Aid, it could still be a justified regime if and to the extent it promotes the investment in innovation and R&D

# New Swiss cantonal patent box (7)

## Future ?

- **Germany** called for the abolition of IP boxes in the EU
- **EU Commission** investigating **LU** IP boxes – requested rulings - dispute taken to ECJ – **Lux Tax Leaks**
- **IP boxes without R&D or innovation at risk – OECD Modified Nexus Approach**

# Any questions ?

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