



Council of the  
European Union

Brussels, 16 October 2019  
(OR. en)

13205/19

FISC 393

## OUTCOME OF PROCEEDINGS

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From: General Secretariat of the Council  
To: Code of Conduct Group

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Subject: Switzerland's Circular Number 8 of the Federal Tax Administration  
on principal structures (principal regime) (CH004)  
– Final description and assessment

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## ROLLBACK REVIEW PROCESS (JANUARY 2019)

### Background

Member States signed a Joint Statement with Switzerland in October 2014<sup>1</sup>. In the Statement Switzerland agreed to amend or abolish its tax legislation in relation to 5 preferential regimes, including the Circular Number 8 of the Federal Tax Administration on principal structures regime (principal regime) (CH004). In return, Member States agreed to lift their national countermeasures linked to these regimes, once they are abolished.

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<sup>1</sup> See doc. 6972/18 ADD 43.

## Assessment

This regime has been closed to new entrants as of 1st January 2019<sup>2</sup>, which has the same practical effect as abolishing it.

Taxpayers already benefitting from this regime have been allowed to continue benefitting from it until the general corporate tax reform enters into force on 1st January 2020 after the positive outcome of the 19 May 2019 referendum. The regime will then be abolished without further grandfathering.

The COCG meeting of 13 September 2019 therefore approved the rollback of this regime. This conclusion was endorsed by the ECOFIN Council on 10 October 2019.

*Annex 1: Assessment of the old CH004 regime in 2017 (standstill review)*

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<sup>2</sup> [https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news\\_list.msg-id-72938.html](https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-72938.html)

## Annex 1: assessment of the old CH004 regime in 2017 (standstill)

### a. Description

This is a regime for multinationals locating their central sales and trading company to Switzerland. The scheme consists of a Swiss resident company ('principal') that is part of an international group and sells products, services or licenses through independent agents ('commissionaires') based abroad. All the central sales and management functions, responsibilities and risks are performed centrally from Switzerland. The principal company usually also engages in domestic trading activities. It has considerable substance in Switzerland and sometimes also acts as the (European) headquarter of the group.

### b. Preferential features

For federal tax purposes, a part of the commercial trade income will be exempt from federal tax subject to an advance tax ruling. The ruling states that a fixed part of the income is allocated to an agent Permanent Establishment abroad and therefore exempt from tax in CH, regardless of whether the income is actually taxed abroad. The ruling includes fixed allocation keys. Typically, 30% of non-financial income is regarded as manufacturing income (taxable in Switzerland). The remaining is regarded as commercial income. The ruling allows the Swiss principal to allocate up to 50% of this commercial income to the foreign (deemed) agent PE. The remaining income is ordinarily taxed at federal level.

The Swiss principal company is usually eligible for the Mixed Company Status for cantonal tax purposes.

### c. Possible concerns

The principal structure has three features that are potentially problematic under the Code:

- The first is the agent PE accepted by the CH authorities created by Principal trading via foreign Commissionaires. Under internationally accepted (OECD) standards it is not always clear that this constitutes an agent PE of the Principal and if there is, the profit allocable to this PE is usually limited. This implies that under the applicable DTC the foreign countries usually have limited or no taxing rights. As a result, a part of the foreign trade income will not be taxed anywhere.

- The second, related, issue would be the fixed allocation keys available under the ruling practice. This could be challenged under the OECD transfer pricing guidelines.
- And the third element would be the fact that the effective tax rates available under these types of rulings are de-facto highly negotiable and basically depend on the quantity of economic activity you bring in (number of employees, offices, capital etc.).

In case of an assessment against the Code criteria, the regime would probably fall foul of criteria 1 and 2 (limited to foreign source profits), criterion 4 (profit determination departs from internationally accepted rules) and criterion 5 (negotiable tax rates lack transparency).

#### d. Assessment by the COCG

Switzerland has committed to abolish this regime under the EU-Swiss 2014 Joint Statement.

In the FHTP the status of this regime (referred to as “Commissionaire ruling regime”) is “in the process of being eliminated”.