

European pressure: the state aid dispute from 2005

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The first sustained external challenge came from the European Union. Switzerland is not a member of the Union and is not bound by its state aid rules in general. The Free Trade Agreement of 1972 between the European Economic Community and Switzerland, however, contains a provision declaring incompatible with the proper functioning of the agreement any public aid that distorts or threatens to distort competition by favouring certain undertakings, in so far as it may affect trade between the parties.¹ From about 2005 the European Commission took the view that the cantonal holding, domicile and mixed company regimes fell under this provision because they treated foreign-source income more favourably than domestic income.

On 13 February 2007 the Commission adopted a decision finding that the cantonal regimes constituted state aid incompatible with the Free Trade Agreement and authorising negotiations with Switzerland.² Switzerland rejected the legal analysis. The Federal Council maintained that the Free Trade Agreement concerned trade in goods, that it did not provide a basis for the review of tax measures, and that in any case no mechanism existed for the unilateral enforcement of the Commission's view. The dispute was nonetheless politically serious because it threatened to affect the broader bilateral relationship at a time when Switzerland depended on market access agreements and on cooperation in taxation of savings and in other fields.³

The dispute moved from confrontation to negotiation. From 2010, the European Union and Switzerland conducted a "dialogue" on company taxation in the context of the EU Code of Conduct for Business Taxation. The result was a joint statement signed on 14 October 2014, in which Switzerland declared its intention to abolish the cantonal regimes and the practices of principal companies and finance branches, while the member states of the Union undertook to lift existing countermeasures once the

regimes were abolished.⁴ The statement did not fix a deadline. It made clear, however, that the old regimes could no longer be defended in the medium term, and it committed Switzerland to replacement measures that would conform to internationally accepted standards.

For Basel, the European dispute had a particular edge because of the geography of the region. The pharmaceutical groups' operations extend into Germany and France, and both neighbours were sensitive to the attraction of mobile income to Switzerland. The defensive measures that some member states introduced, such as lists of low-tax jurisdictions and denials of deductions for payments to entities with low effective taxation, created practical difficulties for companies that held intellectual property or trading functions in privileged Swiss entities.⁵ Industry therefore had its own interest in a settlement, even if it feared the cost of the replacement measures.

1 Notes

1. Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 (SR 0.632.401), Art. 23 para. 1 (iii). To be verified. ↩
2. Commission Decision C(2007) 411 final of 13 February 2007 on the incompatibility with the 1972 Agreement of certain Swiss company tax regimes. To be verified. ↩
3. On the Swiss position, see the statements of the Federal Department of Finance in 2005–2007 and the literature on the EU–Swiss tax dispute, for example in the Archiv für Schweizerisches Abgaberecht and Steuer Revue. To be verified. ↩
4. Joint Statement between the Council of the European Union and the Government of the Swiss Confederation on company taxation issues, signed in Brussels on 14 October 2014. To be verified. ↩
5. On defensive measures by EU member states, including Italian and other "black lists" and controlled foreign company rules referring to Swiss status companies, see the explanatory report of the Federal Council on Corporate Tax Reform III and practitioner literature. To be verified. ↩

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