

# Tax Havens Blacklists and similar regimes in Iberoamerica

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# Blacklisting

- **Aim**
  - Protection of national tax base and tax revenue against Distortions by Tax Havens and Harmful Preferential Regimes
  - (Re-)Allocation of Taxing Rights: BEPS incl. Base Eroding Payments
- **Considerations**
  - Global Tax Landscape
    - Global Tax Standards: OECD/G20/G7 – EU | World Tax Order
  - Global Level Playing Field of Taxation
    - Economic Perspective | Public Policy Perspective | Business Perspective
  - Impact on Tax Systems, Revenue, International Tax Law and on International Tax Planning
  - Impact on Negotiations of DTC, no beggar-thy-neighbour policy
  - Impact on other regulatory aspects (USD-Clearing/AML/...)

# Questionnaire.

- IDENTIFICATION.
  - Object: Countries/Regimes.
  - Reasons for inclusion.
  - Incorporations and exits.
  - Undue maintenance/non incorporations.
  - Influence of OECD/EU materials
- DEFENSIVE MEASURES.
- INTERMEDIATE REGIMES.

# IDENTIFICATION (Object)

- Countries/Territories (TH)
  - Argentina, Brasil, Colombia, Ecuador, **Mexico**,  
**Peru**, **Spain**,
- Tax regimes (PTR)
  - Argentina?, Brasil, Colombia, Ecuador

# IDENTIFICATION

## (Reasons for inclusion)

- Argentina (White list based upon Abstract criteria + Abstract criterion).
- Brasil (blacklist based upon Abstract criteria).
- Colombia (blacklist based upon Abstract criteria).
- Ecuador (blacklist based upon unknown criteria).
- Peru (blacklist + Abstract criteria).
- Spain (blacklist based upon Abstract criteria).

# IDENTIFICATION

## (Reasons for inclusion)

- Abstract criteria.
  - Certainty regarding (relative) importance of the criteria
    - Yes: Argentina (two alternative criteria), Brazil (one criterion for TH two for PTR) one Colombia (one criterion for TH two for PTR), Peru (low taxation + one out of 4 criteria)
    - No: Ecuador, Spain.
  - CRITERIA: **Argentina** (TIEA or DTC for White list or low tax rate) **Brazil** (low tax rate [20%] or lack of information regarding shareholders or beneficial owners; more for PTR), **Colombia** (low tax rate, or lack of Exchange of information or lack of transparency, or lack of substance requirement or internationally accepted criteria), **Peru** (taxation lower than 50% of the corresponding Peruvian taxation + lack of information or tax benefits exclusive for residents or ring fencing or self promotion as TH) **Spain** (existence of DTC, TIEA or CMATM amended by Protocol in 2010 and/or? Effective exchange of information and/or Peer Reviews by the Global Forum)

# Special Tax Regime

- Extended residence for nationals or limits to change of residence (Brazil, Colombia, Spain).
- Taxation of items of income otherwise exempted for non-residents (some capital gains in Brazil)
- Limitations of deductibility (or non-deductibility) of payments (Brazil, Peru, Spain)
- Increased WTHs (Brazil, Colombia)
- Transfer pricing rules for transactions with independent parties (Brazil, Colombia, Peru, Spain)
- Indication for the application of GAARs (Colombia).
- Easier application of CFC rules (Colombia)
- Special formal obligations.

# Legal Problems (I)

- Undue inclusions / exclusions according to the abstract criteria
- Unjustified inclusions.
  - Peruvian list/Ecuadorian list/Spanish list until 2014/Current Spanish list (Liechtenstein or Monaco).
- Unproportional tax consequences
  - Inclusions possibly based merely upon low taxation.
    - Argentina, Brazil, Colombia.

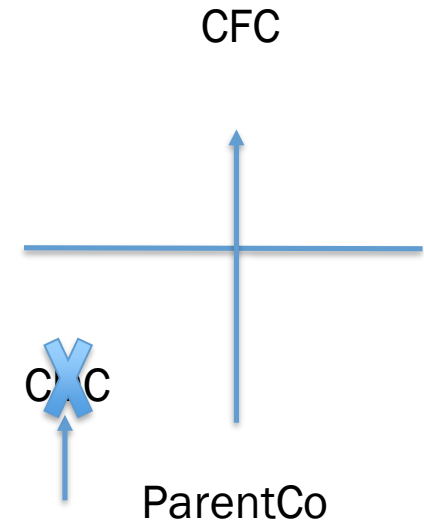
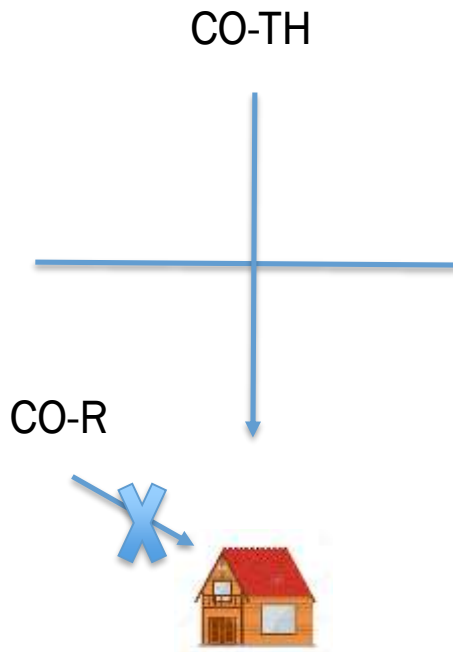


# Legal problems (II)

- Discrimination according to Constitutional/EU/EEA Law
  - Different treatment.
  - **Of comparable situations.**
  - Not justified.
  - Justified but not proportional

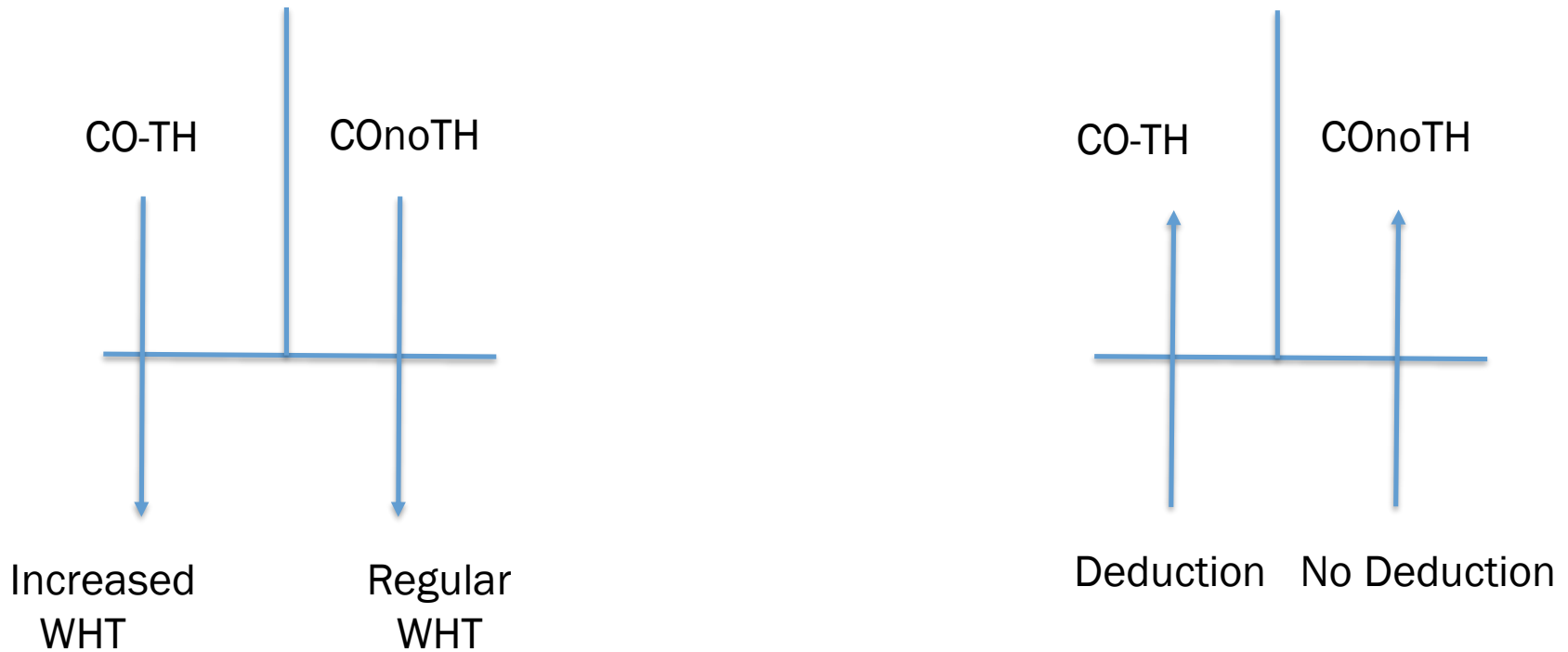
# Legal Problems (II)

## Vertical Comparability



# Legal Problems (II)

## Horizontal Comparability



# Legal problems (III)

- Justification.
  - Totally unjustified lists?...reconstruction?
  - Justification on lack of information.
    - Based on DTCs or TIEAs...what if signatory to the Convention on Mutual Assistance?
  - Justification on low taxation: prevention of tax avoidance.

# Legal problems (IV)

- Proportionality.
  - Can we assume that a transaction performed by a non resident (resident in a low tax jurisdiction) or by a resident (in a low tax jurisdiction) is *per se* abusive?

# Is this just academic?

- *“The European Union embodies ideas protecting the freedom of movement and non-discrimination. Accordingly, taxpayers who live in one country in the European Union and hold accounts in another EU country may challenge anti-tax haven provisions in court on this basis. In addition, taxpayers may challenge anti-tax haven provisions on constitutional grounds or on the basis of bilateral tax treaties”.*

Della Bauserman; Maggie Stehn; Kathy L. Lovett. *Report of the Proceedings of the Fifth Assembly of the International Association of Tax Judges (23-24 October 2014).* /In/ Bulletin for International Taxation, 2015, p. 423.