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Tax Lawyers

ECOFIN agrees on an EU list of non-cooperative jurisdictions for tax purposes

On December 5, 2017 the Economic and Financial Affairs Council of the EU (ECOFIN) reached agreement on the 2017 EU list of non-cooperative jurisdictions for tax purposes and confirmed that tax jurisdictions will remain on this list until they meet the required criteria. Seventeen countries have been placed on a blacklist, 47 committed countries on a grey list and 8 'hurricane countries' (i.e. countries recently affected by tropical storms) have been given additional time to comply. During the meeting, the ECOFIN also adopted conclusions on the taxation of profits of the digital economy, with the objective to outline a common EU position in discussions at the international level.

Background

Both initiatives should be seen as part of the EU's efforts to clamp down on tax avoidance and harmful tax practices, as well as in the broader context of the European Commission's Action Plan for Fair and Efficient Corporate Taxation, launched in June 2015 (see our memorandum of June 18, 2015), and the final recommendations issued by the OECD in October 2015 on their 15 BEPS Action Points (see our memorandum of October 5, 2015).

2017 EU Blacklist of non-cooperative tax jurisdictions

In January 2016, the EU Commission presented its Anti-Tax Avoidance Package (see our memorandum of January 28, 2016). Among the raft of measures proposed was a common approach to third country jurisdictions on tax good governance matters. The aim was to replace the current patchwork of national lists with a single EU listing system which would provide "clear, coherent and objective criteria". The listing process, which was endorsed by the Member States on May 25, 2016, followed a three step approach comprising a pre-assessment of countries, an extensive screening phase and, finally, the listing of non-cooperative jurisdictions.

After pre-assessment of third country jurisdictions based on factual information and risk indicators such as economic ties, financial activity and stability factors, an extensive screening and dialog process with the identified jurisdictions took place, with the criteria being assessed based on the following:

- tax transparency – consisting of three criteria: compliance with international standards on the automatic exchange of information (Common Reporting Standard) and on the exchange of information on request, ratification of the OECD Multilateral Convention or bilateral agreements with all Member States, and the facilitation of the exchange of information. Compliance was assessed based on peer reviews in the OECD Global Forum on Transparency;
- fair Taxation – the presence of harmful tax regimes, assessed based on reviews by the OECD Forum on Harmful Tax Practices; and
- implementation of the BEPS minimum standards measured according to OECD BEPS Inclusive Framework reviews.

As a result of the screening process, the Council placed seventeen countries on the EU list of non-cooperative jurisdictions (see annex) out of the ninety-two chosen for screening and recommended that the list be revised at least once a year. Listed jurisdictions are encouraged to make the required changes and to engage in discussions with the Code of Conduct Group that will be monitoring the criteria and commitments made.

Twenty jurisdictions were given the all-clear, while forty-seven jurisdictions were identified as cooperative, subject to successful delivery on their commitments to comply with the EU screening criteria. In this respect, commitments taken by the grey-listed jurisdictions will be monitored and should be implemented by the end of 2018 for most countries, with a possible extension to 2019 for developing countries. Some countries were also granted, under certain conditions, an extension of the deadline to respond to the EU investigations. Eight countries recently affected by tropical storms – the 'hurricane countries' (including the Bahamas and the British Virgin Islands) will thus have until February 2018 to comment.

In response to the publication of the blacklist, Member States are expected to apply at least one of the following administrative measures: stricter monitoring of certain transactions, increased audit risks for taxpayers benefiting from the disputed regimes, or increased audit risks for taxpayers using structures or arrangements involving blacklisted jurisdictions. The Council recommended that Member States take certain tax defensive measures in accordance with their national legislation and with EU and international law, such as the non-deductibility of costs, withholding tax provisions, controlled foreign company rules and the limitation of the participation exemption, etc. At an EU level, the EU Commission stated that existing defensive measures will be applied, such as limiting access to EU funding, or stricter reporting requirements for multinationals that have a presence in blacklisted jurisdictions, but encouraged Member States to implement effective sanctions.

In this context, the Council's conclusions on the EU list of non-cooperative jurisdictions for tax purposes issued on December 5, 2017, include the list of non-cooperative jurisdictions, a state of play on the cooperation of certain jurisdictions with the EU with respect to commitments taken to implement tax good governance principles, a list of suggested defensive measures, additional guidelines on the EU blacklist, as well as a detailed explanation on the criteria on tax transparency, fair taxation and implementation of anti-BEPS measures that EU Member States undertake to promote.

Our comments

The EU Commission has, on several occasions, highlighted that the EU blacklist constitutes an initiative lead by the Member States and expressed its preference for the implementation of stronger defensive measures against the listed jurisdictions. While the Council's conclusions underline the dissuasive effects of the listing, it remains to be seen how the listed jurisdictions will react and whether the Member States will agree to implement sanctions at the EU level.

The Netherlands has not taken specific new measures yet. Nevertheless, the Netherlands Government has announced that it will introduce a new withholding tax on interest and royalties paid to low tax jurisdictions and that it will maintain a dividend withholding tax as far as dividends are paid to shareholders resident in low tax jurisdictions (see our memorandum of October 10, 2017). It is not clear yet whether or not these jurisdictions will be same as blacklisted by the EU. Furthermore, the Netherlands will introduce anti-CFC rules further to ATAD1 in the course of 2018 which will apply as from January 1, 2019.

As far as the Kingdom of the Netherlands is concerned there are no jurisdictions listed on the blacklist. However, two of the Caribbean parts of the Kingdom were grey-listed being Aruba and Curacao. These jurisdictions have committed to comply by 2018 with the criteria as follows:

1. Transparency: Curacao is committed to implement automatic exchange of information as well as to become member of the Global Forum and/or have a sufficient rating for exchange of information (at least largely compliant);
2. Fair Taxation: Aruba and Curacao are committed to amend or abolish the identified harmful tax regimes;
3. Anti-BEPS Measures: Aruba is committed to become member of the Inclusive Framework or implement BEPS minimum standard (Curacao is a member as of June 2016).

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The information contained in this memorandum is of a general nature and does not address the specific circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

Annex

Jurisdictions included on the EU blacklist (status December 5, 2017)

American Samoa
Bahrain
Barbados
Grenada
Guam
Korea (Republic of)
Macao (SAR)
Marshall islands
Mongolia
Namibia
Palau
Panama
Saint Lucia
Samoa
Trinidad and Tobago
Tunisia
United Arab Emirates