

## ECOFIN publishes revised list of non-cooperative jurisdictions for tax purposes and adopts two reforms of existing VAT rules

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### Executive summary

On 18 February 2020, the Council of the European Union (the Council or ECOFIN) [held a meeting](#) where, among other things, it updated the European Union (EU) list of non-cooperative jurisdictions for tax purposes (the EU List), discussed preparations for the EU participation in G20 meetings on 20-23 February 2020 in Riyadh, Saudi Arabia and also adopted two reforms of existing value-added tax (VAT) rules.

During the meeting, the Council decided to add the Cayman Islands, Palau, Panama and Seychelles to Annex I (the so-called "Black" list) of the EU List as these jurisdictions did not implement the tax reforms to which they had committed by the agreed deadline. The total number of jurisdictions now included in Annex I of the EU List is 12.<sup>1</sup> In contrast, 16 jurisdictions<sup>2</sup> managed to implement all the necessary reforms to comply with EU tax good governance principles ahead of the agreed deadline and have therefore been removed from Annex II of the EU list (the so-called "Gray" list). Annex II now contains 13 jurisdictions.<sup>3</sup> Appendix I, included at the end of this Alert, sets out those jurisdictions currently listed on Annex I and II of the EU List.

The Council will continue to review and update the EU List biannually, with the next update due in October 2020.

## Detailed discussion

### Background

The EU has been working on a list of non-cooperative jurisdictions for tax purposes since 2016. On 5 December 2017, the Council published the first EU list of “non-cooperative jurisdictions for tax purposes,” comprised of two annexes. Annex I (the so-called “black” list) includes jurisdictions that fail to meet the EU’s criteria by the required deadline, and Annex II (the so-called “gray” list) includes jurisdictions that have undertaken sufficient commitments to reform their tax policies, but also remain subject to close monitoring. Once a jurisdiction meets all its commitments, it is removed from Annex II. The initial EU List included 17 jurisdictions that were deemed to have failed to meet relevant criteria established by the European Commission.<sup>4</sup> Since the release of the EU List, there have been multiple changes to its composition based on recommendations made by the Code of Conduct Group for Business Taxation. A de-listing might be justified in light of an expert assessment of the commitments made by the listed jurisdictions to address deficiencies identified by the EU. By the end of 2019, only eight jurisdictions remained listed: American Samoa, Fiji, Guam, Oman, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu.

The Council agreed in 2018 to extend the geographical scope of the EU listing exercise to Argentina, Mexico and Russia in 2019, as well as to Azerbaijan, Guyana, Kazakhstan, Kuwait, Lebanon, Moldova, New Zealand and Ukraine in 2020.

The European Commission has also adopted the first countermeasures on listed non-cooperative tax jurisdictions by the adoption of a Communication in March 2018 that sets new requirements against tax avoidance in EU legislation governing, in particular, financing and investment operations.<sup>5</sup> The said Communication aims to ensure that EU external development and investment funds cannot be channeled or transited through entities in jurisdictions listed on the EU List. Moreover, the Council has released additional guidance on notional interest deduction regimes, treatment of partnerships under criterion 2.2 (existence of tax regimes that facilitate offshore structures which attract profits without real economic activity) for screening jurisdictions, and on defensive measures towards non-cooperative jurisdictions.<sup>6</sup>

### Revised EU List

On 18 February 2020, the Council adopted a revised EU List by adding four new jurisdictions that did not implement the tax reforms to which they had committed by the agreed deadline. In addition to the eight jurisdictions already listed, the revised EU List now also includes the Cayman Islands, Palau, Panama, and Seychelles.

According to the Council conclusions (the Conclusions) on the revised EU List,<sup>7</sup> Cayman Islands was added to the list as it does not have appropriate measures in place relating to economic substance in the area of collective investment vehicles.

Palau was listed as it does not apply any automatic exchange of financial information and it has not signed and ratified the OECD<sup>8</sup> Multilateral Convention on Mutual Administrative Assistance as amended; Panama does not have a rating of at least “Largely Compliant” from the Global Forum on Transparency and Exchange of Information for Tax Purposes for Exchange of Information on Request; and Seychelles has harmful preferential tax regimes, though the Conclusions provide no further details on the form of such regimes.

The Council also amended the list of jurisdictions included on Annex II of the EU List which covers jurisdictions that have undertaken sufficient commitments to reform their tax policies, but also remain subject to close monitoring. Accordingly, 16 jurisdictions (Antigua and Barbuda, Armenia, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cabo Verde, Cook Islands, Curaçao, Marshall Islands, Montenegro, Nauru, Niue, Saint Kitts and Nevis, Vietnam) managed to implement all necessary reforms to comply with EU tax good governance principles ahead of the agreed deadline and have therefore been removed from Annex II.

Moreover, the Council decided to provide Turkey with additional time to solve all open issues related to the effective implementation of the automatic exchange of information with all EU Member States. Turkey has internal legislation in place enabling the automatic exchange of information with all EU Member States but Cyprus. The Conclusions note that if Turkey does not put arrangements in place for the effective implementation of the automatic exchange of information with all EU Member States, it should be included in Annex I in the subsequent update to the EU List.

## VAT simplified rules and exchange of VAT payment data

During the ECOFIN meeting, the Council also adopted simplified VAT rules for small businesses. The purpose of the new rules is to reduce the administrative burden and compliance costs for small enterprises and create a fiscal environment which will help small enterprises grow and trade across borders more efficiently. Small enterprises will be eligible for simplified VAT compliance rules in cases where their annual turnover remains below a threshold set by a Member State concerned, which cannot be higher than €85,000. However, under certain conditions, small enterprises from other Member States which do not exceed this threshold will also be able to benefit from the simplified scheme, so long as their total annual turnover across the whole EU does not exceed €100,000. These new rules will apply as of 1 January 2025.

Furthermore, the Council adopted a set of rules to facilitate the detection of tax fraud in cross-border e-commerce transactions. To this end, the Council adopted amendments to the VAT Directive, putting in place requirements on payment service providers to keep records of cross-border payments related to e-commerce, and amendments to a regulation on administrative cooperation in the area of VAT. The new measures will apply as of 1 January 2024.

## Next steps

The Council will continue to periodically review and update the EU List, taking into consideration the evolving deadlines for jurisdictions to deliver on their commitments and the evolution of the listing criteria that the EU uses to establish the EU List. Up until 2019, the EU List was regularly updated without a set schedule, to reflect the reforms undertaken by third countries. However, from 2020, Member States have agreed that the EU List will be updated no more than twice a year, to ensure a more stable listing process, business certainty and so that Member States can effectively apply

defensive measures against listed jurisdictions. The Council conclusions invite the Code of Conduct Group to continue the screening of jurisdictions that have foreign source income exemption regimes in place,<sup>9</sup> the monitoring of the implementation of the country-by-country reporting minimum standard (criterion 3.2), and the screening of the three jurisdictions added to the geographical scope of the EU listing exercise in 2019 (i.e., Argentina, Mexico and Russia), with a view to reaching a decision on the occasion of the next update of Annexes I and II. The next revision to the EU List is due in October 2020.

## Implications

Companies with activities in jurisdictions listed as non-cooperative are advised to understand the implications of a jurisdiction being included on the EU List, including:

- ▶ Reporting obligations which arise from the mandatory disclosure rules contained in Directive 2011/16/EU as amended by Council Directive (EU) 2018/822 (MDR Directive or DAC6), which inter alia require the disclosure of cross-border arrangements that involve deductible cross-border payments when the recipient of the payment is tax resident in a jurisdiction included on the EU List of non-cooperative jurisdictions.
- ▶ Member States may consider applying one or more defensive measures, including both taxation measures and measures outside the field of taxation, aimed at preventing the erosion of their tax bases. These may include measures such as non-deductibility of costs, enhanced Controlled Foreign Company rules or withholding tax measures, among others.<sup>10</sup>

As the work on the EU List is a dynamic process, companies should continue to monitor developments closely, including the introduction of defensive measures towards non-cooperative jurisdictions by other Member States.

## Endnotes

1. American Samoa, Cayman Islands, Fiji, Guam, Oman, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands and Vanuatu.
2. Antigua and Barbuda, Armenia, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cabo Verde, Cook Islands, Curaçao, Marshall Islands, Montenegro, Nauru, Niue, Saint Kitts and Nevis, Vietnam.
3. Anguilla, Australia, Bosnia and Herzegovina, Botswana, Eswatini, Jordan, Maldives, Morocco, Mongolia, Namibia, Saint Lucia, Thailand and Turkey.
4. See EY Global Tax Alert, [Council of the European Union publishes list of uncooperative jurisdictions for tax purposes](#), dated 6 December 2017.
5. See EY Global Tax Alert, [European Commission adopts first counter-measures on listed non-cooperative tax jurisdictions](#), dated 22 March 2018.
6. See EY Global Tax alert, [EU Code of Conduct Group issues update report, including new guidance](#), dated 12 December 2019.
7. Council of the European Union, [Document 6129/20 on the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes](#), dated 18 February 2020.
8. Organisation for Economic Co-operation and Development.
9. See EY Global Tax Alert, [EU Code of Conduct Group publishes six-month Work Programme under EU's Croatian Presidency](#), dated 11 February 2020.
10. See <https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/> for information on available defensive measures.

## Appendix I: Jurisdictions listed in Annex I and Annex II of the EU List

Annex I	Annex II
American Samoa	Anguilla
Cayman Islands	Australia
Fiji	Bosnia and Herzegovina
Guam	Botswana
Oman	Eswatini
Palau	Jordan
Panama	Maldives
Samoa	Mongolia
Seychelles	Morocco
Trinidad and Tobago	Namibia
US Virgin Islands	Saint Lucia
Vanuatu	Thailand
	Turkey

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