7 October 2020

Global Tax Alert

ECOFIN publishes revised list of non-cooperative jurisdictions for tax purposes

EY Tax News Update: Global Edition

EY's Tax News Update: Global Edition is a free, personalized email subscription service that allows you to receive EY Global Tax Alerts, newsletters, events, and thought leadership published across all areas of tax. Access more information about the tool and registration here.

Also available is our EY Global Tax Alert Library on ey.com.

Executive summary

On 6 October 2020, the Council of the European Union (the Council or ECOFIN) updated the European Union (EU) list of non-cooperative jurisdictions for tax purposes (the EU List).

The Council decided, by written procedure, to remove the Cayman Islands and Oman and add Anguilla and Barbados 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.[1] As regards Annex II of the EU list (the so-called "Gray" list) and the state of play of pending commitments, the Council decided to extend several deadlines for these commitments due to the ongoing COVID-19 global pandemic. Also, the Council decided to remove two jurisdictions (Mongolia and Bosnia and Herzegovina) from Annex II which now contains 10 jurisdictions.[2]

The Council will continue to review and update the EU List biannually, with the next update due in February 2021.

Building a better working world

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.[3] 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.

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.[4] 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.[5]

Revised EU List

On 6 October 2020, ECOFIN held its monthly meeting through videoconferencing as the EU Finance Ministers could not meet in person in Brussels. Since the Council cannot adopt formal decisions at a remote meeting, EU ambassadors had agreed to update both Annex I and Annex II of the EU List under written procedure.

The Council adopted a revised Annex I of the EU List by adding Anguilla and Barbados and by removing the Cayman Islands and Oman, after having passed the necessary reforms to improve their tax policy framework. As noted above, the revised Annex I of the EU List now includes 12 jurisdictions (see endnote 1).

According to the Council press release on the revised EU List, Anguilla and Barbados were added to Annex I of the EU List following peer review reports published by the Global Forum on Transparency and Exchange of Information for Tax Purposes, which downgraded the ratings of Anguilla and Barbados, respectively, to "non-compliant" and "partially compliant" with the international standard on transparency and exchange of information on request (EOIR).

Cayman Islands was removed from the EU List after it adopted new reforms to its framework on Collective Investment Funds in September 2020. Oman was considered as compliant with all its commitments after it ratified the Organisation for Economic Co-operation and Development (OECD) Convention on Mutual Administrative Assistance in Tax Matters, enacted legislation to enable automatic exchange of information and took all the necessary steps to activate its exchange-of-information relationships with all the EU Member States.

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, the Council decided to remove Mongolia and Bosnia and Herzegovina from Annex II after those countries deposited the instruments of ratification of the OECD Convention on Mutual Administrative Assistance in Tax Matters, as amended. Due to the ongoing COVID-19 global pandemic, the Council also decided to extend several deadlines of pending commitments with regards to Annex II.

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 next revision to the EU List is expected in February 2021.

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.[6]

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, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands, and Vanuatu.
2. Australia, Botswana, Eswatini, Jordan, Maldives, Morocco, Namibia, Saint Lucia, Thailand and Turkey.
3. See EY Global Tax Alert, *Council of the European Union publishes list of uncooperative jurisdictions for tax purposes*, dated 6 December 2017.
4. See EY Global Tax Alert, *European Commission adopts first counter-measures on listed non-cooperative tax jurisdictions,* dated 22 March 2018.
5. See EY Global Tax alert, *EU Code of Conduct Group issues update report, including new guidance*, dated 12 December 2019.
6. See https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/ for information on available defensive measures.

For additional information with respect to this Alert, please contact the following:

Ernst & Young GmbH Wirtschaftsprüfungsgesellschaft, Munich

- Klaus von Brocke klaus.von.brocke@de.ey.com

Ernst & Young Belastingadviseurs LLP, Rotterdam

- Marlies de Ruiter marlies.de.ruiter@nl.ey.com
- Maikel Evers maikel.evers@nl.ey.com

Ernst & Young Belastingadviseurs LLP, Amsterdam

- Konstantina Tsilimigka konstantina.tsilimigka@nl.ey.com

Ernst & Young Société d'Avocats, Paris

- Jean-Pierre Lieb jean.pierre.lieb@ey-avocats.com

Ernst & Young LLP (United States), New York

- Jose A. (Jano) Bustos joseantonio.bustos@ey.com

EY | Assurance | Tax | Transactions | Advisory

About EY
EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

EYG no. 006843-20Gbl

1508-1600216 NY
ED None

ey.com