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ECOFIN publishes updated list of non-cooperative jurisdictions for tax purposes, fails to gain agreement on digital services tax

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Executive summary

On 12 March 2019, the Council of the European Union (the Council or ECOFIN) held a meeting where they, among other things updated the European Union (EU) list (the EU List) of non-cooperative jurisdictions for tax purposes and discussed the proposal for a digital services tax (DST). They also agreed on implementing rules on the Value Added Tax (VAT) regime for e-commerce adopted in December 2017.

In regard to the EU List, the Council added 10 new jurisdictions which either did not commit to addressing the EU's concerns or did not deliver their commitments on time, bringing the total number of jurisdictions listed to 15. Also, the Council amended the list of countries included in Annex II of the Council conclusions of 5 December 2017 (jurisdictions with pending commitments) by moving 10 jurisdictions to the EU List, removing 21 and adding 2 new jurisdictions. The Annex II listing was reduced from 63 jurisdictions listed to 34.

Furthermore, the Council took stock of the progress achieved in the DST negotiations on the basis of a new compromise text setting out a scope limited to digital advertising services only. The discussion revealed that despite the broad support from a large number of Member States on the new compromise text, some delegations maintain reservations either on some specific aspects of the proposal or more fundamental objections.

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Detailed discussion

Listing of non-cooperative jurisdictions for tax purposes

The EU has been working on a list of non-cooperative jurisdictions for tax purposes since 2016. On 5 December 2017, the Council published a listing of "Non-cooperative jurisdictions for tax purposes," comprising 17 jurisdictions that were deemed to have failed to meet relevant criteria established by the European Commission.[1] Since the release of the list, there have been a number of changes to its content. The ECOFIN agreed that a de-listing is justified in the light of an expert assessment of the commitments made by the listed jurisdictions to address deficiencies identified by the EU. Over the course of 2018, most of the jurisdictions mentioned in the initial list engaged in a constructive dialogue with the EU and made commitments to comply with the EU's criteria. By the end of 2018, only five jurisdictions remained listed: American Samoa, Guam, Samoa, Trinidad and Tobago and the US Virgin Islands.

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.[2] The adopted Communication aims to ensure that EU external development and investment funds cannot be channeled or transited through entities in countries listed on the EU list.

On 12 March 2019, the Council adopted a revised EU List by adding 10 new jurisdictions which either did not commit to address the EU concerns or did not deliver their commitments on time. In addition to the five jurisdictions already listed, the revised EU List now also includes the following jurisdictions: Aruba, Barbados, Belize, Bermuda, Dominica, Fiji, Marshall Islands, Oman, United Arab Emirates, and Vanuatu.

Also, the Council amended the list of countries included in the Annex II list which covers jurisdictions that have undertaken sufficient commitments to reform their tax policies, but they remain subject to close monitoring. Accordingly, 21 jurisdictions[3] fulfilled their commitments and the Council removed them from the Annex II list, 10 jurisdictions[4] failed to address their commitments by the established timeframe and the Council moved the jurisdictions into the EU List and 2 new jurisdictions, namely Costa Rica and Eswartini, were added to the Annex II list and will be subject to close monitoring. Currently the Annex II list consists of 34 jurisdictions[5] which are officially committed to implement recommendations requested by the Council.

Additionally, among the conclusions of the meeting of 12 March, the Council considered that reasons put forward by some jurisdictions for not fully enacting all of the measures to which they had committed could, in some cases, be viewed as justified and agreed that the deadline for meeting such commitments should be extended as set out in Annex II.

Among others, the Cook Islands, Maldives and Switzerland have been granted extensions until the end of 2019 in order to amend or abolish their harmful tax regimes under criterion 2.1 (existence of harmful tax regimes) due to internal constitutional constraints. Also, the Council expressed its satisfaction that many jurisdictions under criterion 2.2 (existence of tax regimes that facilitate offshore structures which attract profits without real economic activity) enacted the required reforms in 2018 and were therefore removed from Annex II, but remain under monitoring on an annual basis. The Council further acknowledged that additional work will be needed to define acceptable economic substance requirements for collective investment funds under criterion 2.2. For this, the Council invited the Code of Conduct Group to continue the dialogue and provide further technical guidance to the jurisdictions concerned by mid-2019. Moreover, the Council confirmed the start of application of criterion 3.2 (implementation of the minimum standard on country-by-country reporting) and reiterated its invitation to the Code of Conduct Group to finalize discussions on further coordinated defensive measures.

Digital taxation

On 21 March 2018, the European Commission issued two proposals for new Directives that will deliver new ways to tax digitalized forms of business activity.[6] The Commission's proposals focus on a two-phased approach: an interim solution, referred to as the DST and a longer term *Council Directive laying down rules relating to the corporate taxation of a significant digital presence* (SDP). The DST proposal is for a gross revenues (i.e., turnover) tax, set at a uniform rate of 3% across all EU Member States and it is meant as an interim solution aimed at addressing the most urgent gaps in the taxation of digital activities, while ensuring a level playing field for all businesses.

On 12 March 2019, the Council took stock of the progress achieved in the negotiations on the DST, since the issue was last discussed at the ECOFIN meeting of 4 December 2018,[7] on the basis of a new compromise text setting out a scope limited only to digital advertising services. The discussion revealed that despite the broad support from a large number of Member States on this text, some delegations maintain reservations either on some specific aspects of the proposal or more fundamental objections.

In parallel, the Presidency will conduct work on the EU position in international discussions on digital tax, in particular in view of the Organisation for Economic Co-operation and Development (OECD)'s report on the issue, due in the course of 2020.[8]

VAT on e-commerce

During the meeting on 5 December 2017, the Council agreed on a series of new measures to support the digital economy in regard to VAT compliance.[9] The new rules are aimed at accelerating growth for online businesses, in particular start-ups and small and medium enterprises. The new rules will progressively come into force by 2021 and aim to ensure that VAT is paid in the Member State of the final consumer, leading to a fairer distribution of tax revenues among EU Member States.

On 12 March 2019, the Council agreed on implementing rules on the VAT regime for e-commerce adopted in December 2017.[10] Those new detailed measures will ensure a smooth transition to the new regime that comes into force in January 2021.

Implications

The work on the EU list of non-cooperative jurisdictions is a dynamic process. The Council will continue to regularly review and update the list at least once a year, 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 list. Companies with activities in listed jurisdictions are advised to understand the implications of a jurisdiction being listed as well as monitoring developments closely.

Additionally, as any concrete direction and plan for the adoption of an EU DST now seems to be suspended, taxpayers should remain especially aware of unilateral DST measures being proposed or enacted by EU Member States and other nations, as well as the OECD's ongoing discussions. As a result, they should evaluate the proposals at their earliest opportunity to gauge impacts on exiting or future business models and revenue streams.

Endnotes

1. See EY Global Tax Alert, *Council of the European Union publishes list of uncooperative jurisdictions for tax purposes*, dated 6 December 2017.
2. See EY Global Tax Alert, *European Commission adopts first counter-measures on listed non-cooperative tax jurisdictions*, dated 22 March 2018.
3. Bahrain, Faroe Islands, Greenland, Grenada, Guernsey, Hong Kong, Isle of Man, Jamaica, Jersey, Korea, Macao SAR, Malaysia, Montserrat, New Caledonia, Panama, Qatar, Saint Vincent and the Grenadines, Taiwan, Tunisia, Turks and Caicos, and Uruguay.
4. Aruba, Barbados, Belize, Bermuda, Dominica, Fiji, Marshall Islands, Oman, United Arab Emirates and Vannuatu.
5. Albania, Anguilla, Antigua and Barbuda, Armenia, Australia, Bahamas, Bosnia and Herzegovina, Botswana, British Virgin Islands, Cabo Verde, Costa Rica, Curacao, Cayman Islands, Cook Islands, Eswatini, Jordan, Maldives, Mauritius, Morocco, Mongolia, Montenegro, Namibia, North Macedonia, Nauru, Niue, Palau, Saint Kitts and Nevis, Saint Lucia, Serbia, Seychelles, Switzerland, Thailand, Turkey and Vietnam.
6. See EY Global Tax Alert, *European Commission issues proposals for taxation of digitalized activity*, dated 21 March 2018.
7. See EY Global Tax Alert, *ECOFIN agrees to extend discussions on Digital Services Tax, taking into account a new proposal from France and Germany*, dated 4 December 2018.
8. See EY Global Tax Alert, *OECD opens public consultation on addressing tax challenges arising from digitalization of the economy: time-sensitive issue impacting all multinational enterprises*, dated 14 February 2019.
9. See EY Global Tax Alert, *Council of the European Union publishes list of uncooperative jurisdictions for tax purposes*, dated 6 December 2017.
10. http://data.consilium.europa.eu/doc/document/ST-7245-2019-INIT/en/pdf.

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