

European Commission adopts first counter-measures on listed non-cooperative tax jurisdictions

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Executive Summary

On 21 March 2018, the European Commission (the Commission) released a [Communication](#) on new requirements against tax avoidance in European Union (EU) legislation governing in particular financing and investment operations. 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's list of non-cooperative tax jurisdictions](#) (the EU list). In order to safeguard the EU's development policy, an exception is made for direct financing, where a project is physically implemented in a listed non-cooperative tax jurisdiction and is not linked to money-laundering, terrorism financing, tax fraud or tax evasion.

The Communication aims to facilitate the implementation of compliance requirements in order to ensure that EU funding is routed according to sound tax good governance standards. The released Communication does not create any new legal obligations. The Commission will provide updates on the information contained in the Communication as needed in order to adapt its content when and where appropriate taking into account the experience acquired in implementing it.

Detailed discussion

Background

Following the Commission's [Communication on an External Strategy for Effective Taxation](#) in January 2016, four legal acts concerning the use of EU funds by Implementing Partners currently contain, or will contain in the near future, the requirement that EU funds do not support projects contributing to tax avoidance. Implementing Partners, such as International Financial Institutions, development financial institutions, or other types of eligible counterparties involved in the indirect management of the EU budget, are required to comply with these requirements when using EU funds in their investment operations.

On 5 December 2017, the Council of the EU published a list of "uncooperative jurisdictions for tax purposes," comprising 17 jurisdictions which were deemed to have failed to meet relevant criteria established by the Commission.¹ On 23 January 2018, eight jurisdictions² were removed from the list during the Economic and Financial Affairs Council (ECOFIN) meeting in the light of an expert assessment of the commitments made by these jurisdictions to address deficiencies identified by the EU. On 13 March 2018, the Council delisted three more jurisdictions³ and added three more jurisdictions.⁴ Currently, nine jurisdictions in total remain on the EU list, namely American Samoa, Bahamas, Guam, Namibia, Palau, Saint Kitts and Nevis, Samoa, Trinidad and Tobago and the US Virgin Islands.

Member States were recommended to consider applying one or more defensive measures, including both taxation and non-taxation measures, aimed at preventing the erosion of their tax bases. The suggested defensive measures in tax are can be found in Annex III to the December 2017 Council conclusions.⁵ The conclusions also refer to counter-measures in the non-tax area, including the non-award of European Fund for Sustainable Development (EFSD) fund, EFSD Guarantee Funds of EFSD Guarantee. Alongside these specific measures, the conclusions also refer to the list becoming a component of other similar blacklists that may be developed in the future by other parts of the EU organization.

Communication overview

On 21 March 2018, the Commission released a Communication which aims to assist Implementing Partners in ensuring compliance with the new legal provisions while also providing broader recommendations on how to assess

tax avoidance issues in conjunction with existing prohibitions on the use of non-cooperative jurisdictions and the publication of the EU list.

The scope of the Communication is split into three parts: (i) Legal framework; (ii) Information for Implementing Partners of the new EU requirements on tax avoidance/EU list of non-cooperative jurisdictions for tax purposes; and (iii) Aligning Implementing Partners' internal policies to new EU tax requirements.

Firstly, the Communication sets out the legal framework and rules on tax avoidance and non-cooperative jurisdictions applicable to EU funds. As noted, four legal acts currently contain or will contain in the near future references to the tax good governance, namely Article 22 of Regulation (EU) 2017/1601 establishing the European Fund for Sustainable Development, Article 22 of Regulation (EU) 2015/1017 establishing the European Fund for Strategic Investments and Article 13 of Decision 466/2014/EU on the External Lending Mandate, Article 140(4) of Regulation (EU) 966/2012 on the financial rules applicable to the general budget of the Union, and Article 155 (2) of the revised Financial Regulation.

Secondly, it provides elements to ensure: (i) compliance with tax avoidance requirements, and (ii) compliance with EU policy on non-cooperative jurisdictions. According to the Communication, Implementing Partners shall not support projects that are structured to contribute to tax avoidance by reference to EU and international tax standards. In order for the Implementing Partners to perform an assessment of whether a project or an action may contribute to tax avoidance, the Communication provides the following guidance:

- (i) The criteria used by Implementing Partners and other relevant financial intermediaries to assess projects covered by the relevant legal acts should clearly refer to EU and international tax standards against tax avoidance.
- (ii) A risk-based approach based on key risk indicators (the Communication mentions scope, effective taxation, artificial structuring, and committed jurisdictions) may be considered where appropriate in order for any tax avoidance risks in the use of EU funds to be identified as early as practically possible and adequately mitigated.
- (iii) The information relevant to assess tax avoidance risks should be retrieved and held by the Implementing Partners in accordance with their rules and procedure.

The Communication highlights that Implementing Partners managing EU financial instruments or budgetary guarantees shall not enter into new or renewed operations with entities established or incorporated in jurisdictions currently listed as non-cooperative by the EU. Implementing Partners may derogate the above-mentioned prohibition on non-cooperative jurisdictions, provided that both of the following conditions are met:

- (a) The project is physically implemented in a non-cooperative jurisdiction
- (b) The operation does not present any indication that it contributes to money laundering, terrorism financing, tax avoidance, tax fraud or tax evasion

It is acknowledged that the content of the EU list is being amended over time. In the case of a jurisdiction newly listed under Annex I, any new or renewed operation with entities established or incorporated in such jurisdiction will be immediately prohibited. In the case of a jurisdiction being de-listed, it will immediately be taken off the EU list and operations involving entities located in such a jurisdiction may be approved by Implementing Partners from the date of the Council conclusions indicating de-listing of such jurisdiction.

Finally, the Communication serves to facilitate alignment of the Implementing Partners' internal policies with the new EU requirements in terms of tax good governance. To that end, the Communication points out that as most Implementing Partners, including international financial

institutions, have in place an internal policy related to the treatment of non-cooperative jurisdictions, it would seem useful that they ensure coherence in their approach to tax governance matters by recognizing the EU list as one of the key international list of jurisdictions and apply it to all their operations, involving EU funds or not.

Even though the EU list applies to new and renewed operations only, the Communication urges the Implementing Partners to take the opportunity of the revision of their non-cooperative jurisdictions policies to reflect on potential enhanced monitoring of tax avoidance issues on their existing portfolios.

This Communication document will be updated by the Commission over time.

Implications

The adopted Communication marks the first step in stopping the transit of EU funds through non-cooperative tax jurisdictions. The Commission will support Member States' work to develop a more binding and definitive approach to sanctions for the EU list in 2018.

Implementing Partners should understand the implications of the Communication to align with the stated European Commission policies. Businesses, particularly those with operations or activities in listed countries, should closely monitor future developments in this area, especially as additional countermeasures may be set forth.

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. Barbados, Grenada, the Republic of Korea, Macao SAR, Mongolia, Panama, Tunisia and the United Arab Emirates.
3. Bahrain, the Marshall Islands and Saint Lucia.
4. Bahamas, Saint Kitts and Nevis and the US Virgin Islands.
5. For more information regarding defensive measures, see EY Global Tax Alert, [Council of the European Union publishes list of uncooperative jurisdictions for tax purposes](#), dated 6 December 2017.

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 LLP (United Kingdom), London

- ▶ Chris Sanger csanger@uk.ey.com

Ernst & Young Belastingadviseurs LLP, Amsterdam

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

Ernst & Young LLP, Global Tax Desk Network, New York

- ▶ Jose A. (Jano) Bustos joseantonio.bustos@ey.com
- ▶ David Corredor-Velásquez david.corredorvelasquez@ey.com

Ernst & Young LLP, Washington, DC

- ▶ Rob Thomas rob.l.thomas1@ey.com

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