EU BLACK LIST, A NEW PERSPECTIVE ON TAX HAVENS

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IIntroductory Remarks

The European Union recently took one more step in the worldwide fight against tax avoidance and evasion with the release of the common EU list of non-cooperative tax jurisdictions. The EU black list – the first such list at EU level - includes seventeen offshore countries: American Samoa, Bahrain, Barbados, Grenada, Guam, South Korea, Macao SAR, Marshall Islands, Mongolia, Namibia, Palau, Panama, Saint Lucia, Samoa, Trinidad and Tobago, Tunisia and United Arab Emirates.

The black list is intended primarily as driver for non EU countries to improve their tax systems and fully align them with international standards. Thus, the EU actively pursues the ambitious objective to streamline the international tax framework on the basis of a (wishful race-to-the-top) convergence. At EU level, the list seeks to coordinate Member States' policies vis-à-vis non-cooperative tax jurisdictions. Hence it addresses an important impediment to cross-border investment in the EU, since divergent national rules imply heavier administrative burdens for business in an otherwise Single Market.

In an ever-evolving international framework demanding further evidence of multinationals' tax compliance, it is crucial especially for tax risk management purposes, that the latter be fully aware of any and all relevant measures. Specifically, the herein examined black list is considered as a factor triggering increased reporting obligations in the context of public Country-by-Country reporting – if and when adopted. Equally the black list seems to be connected with additional obligations in respect of mandatory reporting of tax schemes by professional intermediaries, currently under discussion at European Parliament level and expected to come into force in 2019. In view of the above, the present article shall give an overview of the listing criteria and process as well as of the core features of the EU list and its implications.

Compilation of the Black List: Procedure

In view of the relevant backdrop, the compilation of a common list of non-cooperative tax jurisdictions was provided in the External EU Strategy for Effective Taxation and was formally approved by the Council in the aftermath of the Panama Papers' leaks, in May 2016. The Code of Conduct Group for Business Taxation, comprised of Member States' tax experts, undertook the compilation mission in cooperation with the European Commission and in continuous contact with the OECD.

The process started with a pre-selection, i.e., review of all non-EU tax jurisdictions by the European Commission with regard to the risk for their legal framework to favor tax avoidance. Outcome of the review was a scoreboard of such jurisdictions based on (i) their economic relations with the EU, (ii) their financial activity, (iii) the level of stability of their legal and institutional framework and (iv) the applicable tax governance principles.

The scoreboard served for Member States to select the jurisdictions to be further reviewed (screening) on the basis of pre-agreed criteria by Member States. This second-stage review involved formal communications and meetings with representatives of ninety two selected jurisdictions, ensuring that the latter were given a real opportunity to present their case. The outcome of the screening was notified to each jurisdiction screened. The tax framework of seventy two of the jurisdictions was found not to be compliant with international standards. These jurisdictions were then invited to remedy such non-compliance or to commit to do so in the near future.

At a third stage (listing) the black list was drawn, including the seventeen jurisdictions that did not respond positively to the above invitation, i.e., that did not commit to take action to remedy identified deficiencies in their tax framework. For eight jurisdictions, under conditions of emergency, finalization of the process has been postponed to early 2018.

Black List Criteria

The aforementioned screening of jurisdictions was effected on criteria agreed by Member States in light of the international standards to which the latter abide. Such criteria are divided into three categories related to (i) transparency, (ii) fair tax competition, and (iii) so-called BEPS compliance.

In terms of transparency, the jurisdictions included in the black list were found:

(i) not to implement any information exchange, automatically and on request, with EU Member States; and/or

(ii) not to be parties to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters; and/or

(iii) not to be members of the Global Forum on Transparency and Exchange of Information for Tax Purposes or to have been assessed as being "non-compliant" thereby.

From the perspective of fair tax competition, jurisdictions were black listed where:
(a) their legislation favored offshore structures without economic substance; and/or

(b) they had in place harmful tax regimes, i.e., rules to attract foreign investment on purely tax-related considerations.

In relation to compliance with the OECD's Base Erosion and Profit Shifting (BEPS) Project, jurisdictions were assessed against implementation of the four BEPS minimum standards, regarding harmful tax practices, legislation to curb tax treaty abuse, introduction of country-by-country reporting and the framework of tax dispute resolution.

Gray List

A major part of the screened jurisdictions (forty seven) were not included in the black list but in a so-called gray list. Although deficiencies were identified in their tax systems under the above criteria, the distinguishing factor is that they committed to cooperate with EU Member States within strict timeframes. In other words, they undertook to eliminate such deficiencies by the end of 2018 (or 2019 in case of developing countries). The prompt fulfillment of such obligation shall be verified in due course and their exclusion from the black list shall be affirmed along with it.

Implications of Black Listing

The impact of the EU black list depends largely on the extent and the way it will be used by Member States, and the legislative measures they will adopt by reference to the list. Nevertheless, certain consequences are also provided at EU level.

Most importantly at the current stage, the EU black list is connected to EU funding, originating from EFSD (European Fund for Sustainable Development), EFSI (European Fund for Strategic Investment) and ELM (External Lending Mandate). Thus the EU aims to ensure that no such funding shall end up in non-cooperative jurisdictions. Furthermore, the list is envisaged to be used in future EU legislation as threshold of enhanced tax reporting obligations, in particular from multinationals and tax intermediaries.

At national level, Member States have been strongly encouraged by the EU Council to adopt legislation by reference to the list in order to protect their tax bases. From the perspective of EU business taxpayers, such national measures may define significant implications. Specifically, potential measures encompass inter alia (i) enhanced controls over transactions involving black-listed jurisdictions and/or (ii) assessment of increased tax risk for taxpayers using or benefiting from harmful tax regimes of such jurisdictions.

In any case, it is important to note that Member States may always adopt other measures at domestic level to defend their taxable bases. Such measures may be different, or additional to the ones suggested above. Hence, national black lists cannot be excluded, provided their scope be broader than that of the EU black list.

Tax havens' de-listing

The black list shall be subject to regular revision and update by the Council of the EU, following respective report by the Code of Conduct Group. This implies that black-listed jurisdictions may be removed from the list, once found compliant with the aforementioned criteria and any future international standards of tax good governance. Equally, jurisdictions currently excluded from the list (or even from the screening process, e.g., due to lack of financial activity) may be included therein, for example, if they adopt practices abstaining from such standards. However, black listed jurisdictions shall always be promptly notified as to the reasons for listing as well as any expected actions for their removal therefrom.

Conclusions

The release of the EU black list is a remarkable step against tax avoidance as well as a strong signal of the potential of Member States' coordination. For the business world, it implies a clear need to keep an eye on structures and transactions involving black-listed jurisdictions and to ensure that all necessary tools are in place to manage related tax risk. Simultaneously, any and all legislative developments, at national, EU and international level should be closely followed, especially in view of the regular updates envisaged. The transformation of the international tax arena seems to have still a long way to go. The business world cannot but be fully alert thereto.