Euro Tax Flash from KPMG's EU Tax Centre

ECOFIN agrees on an EU list of non-cooperative jurisdictions for tax purposes and issues conclusions on the taxation of profits in the digital economy

ECOFIN – Code of Conduct Group – EU Blacklist – Tax Transparency – Digital Economy – Virtual Permanent Establishment – Equalization levy

On December 5, 2017 the Economic and Financial Affairs Council of the EU (ECOFIN) reached agreement on the 2017 EU list of non-cooperative jurisdictions for tax purposes and confirmed that tax jurisdictions will remain on this list until they meet the required criteria. Seventeen countries have been placed on a blacklist, forty-seven committed countries on a grey list and eight 'hurricane countries' (i.e. countries recently affected by tropical storms) have been given additional time to comply. During the meeting, the ECOFIN also adopted conclusions on the taxation of profits of the digital economy, with the objective to outline a common EU position in discussions at the international level.

Background

Both initiatives should be seen as part of the EU's efforts to clamp down on tax avoidance and harmful tax practices, as well as in the broader context of the European Commission's Action Plan for Fair and Efficient Corporate Taxation, launched in June 2015 (see ETF 253), and the final recommendations issued by the OECD in October 2015 on their 15 BEPS Action Points.

2017 EU Blacklist of non-cooperative tax jurisdictions

In January 2016, the EU Commission presented its Anti-Tax Avoidance Package (see ETF 273). Among the raft of measures proposed was a common approach to third country jurisdictions on tax good governance matters. The aim was to replace the current patchwork of national lists with a single EU listing system which would provide “clear, coherent and objective criteria”. The listing process, which was endorsed by the Member States on May 25, 2016 (see ETF 283), followed a three step approach comprising a pre-assessment of countries, an extensive screening phase and, finally, the listing of non-cooperative jurisdictions.

After pre-assessment of third country jurisdictions based on factual information and risk indicators such as economic ties, financial activity and stability factors (Scoreboard, see ETF 301), an extensive screening and dialog process with the identified jurisdictions took place, with the criteria being assessed based on the following:

- tax transparency – consisting of three criteria: compliance with international standards on the automatic exchange of information (Common Reporting Standard) and on the exchange of information on request, ratification of the OECD Multilateral Convention or bilateral agreements with all Member States, and the facilitation of the exchange of information. Compliance was assessed based on peer reviews in the OECD Global Forum on Transparency;
- fair taxation – the presence of harmful tax regimes, assessed based on reviews by the OECD Forum on Harmful Tax Practices; and
- implementation of the BEPS minimum standards measured according to OECD BEPS Inclusive Framework reviews.

As a result of the screening process, the Council placed seventeen countries on the EU list of non-cooperative jurisdictions out of the ninety-two chosen for screening and recommended that the list be revised at least once a year. Listed jurisdictions are encouraged to make the required changes and to engage in discussions with the Code of Conduct Group that will be monitoring the criteria and commitments made.

Twenty jurisdictions were given the all-clear, while forty-seven jurisdictions were identified as cooperative, subject to successful delivery on their commitments to comply with the EU screening criteria. In this respect, commitments taken by the grey-listed jurisdictions will be monitored and should be implemented by the end of 2018 for most countries, with a possible extension to 2019 for developing countries. Some countries were also granted, under certain conditions, an extension of the deadline to respond to the EU investigations. Eight countries recently affected by tropical storms – the ‘hurricane countries’ (including the Bahamas and the British Virgin Islands) will thus have until February 2018 to comment.

In response to the publication of the blacklist, Member States are expected to apply at least one of the following administrative measures: stricter monitoring of certain transactions, increased audit risks for taxpayers benefiting from the disputed regimes, or increased audit risks for taxpayers using structures or arrangements involving blacklisted jurisdictions. The Council recommended that Member States take certain tax defensive measures in accordance with their national legislation and with EU and international law, such as the non-deductibility of costs, withholding tax provisions, controlled foreign company rules and the limitation of the participation exemption, etc. At an EU level, the EU Commission stated that existing defensive measures will be applied, such as limiting access to EU funding, or stricter reporting requirements for multinationals that have a presence in blacklisted jurisdictions, but encouraged Member States to implement effective sanctions.

In this context, the Council’s conclusions on the EU list of non-cooperative jurisdictions for tax purposes issued on December 5, 2017, include the list of non-cooperative jurisdictions, a state of play on the cooperation of certain jurisdictions with the EU with respect to commitments taken to implement tax good governance principles, a list of suggested defensive measures, additional guidelines on the EU blacklist, as well as a detailed explanation on the criteria on tax transparency, fair taxation and implementation of anti-BEPS measures that EU Member States undertake to promote.

EU Tax Centre comment

The EU Commission has, on several occasions, highlighted that the EU blacklist constitutes an initiative lead by the Member States and expressed its preference for the implementation of stronger defensive measures against the listed jurisdictions. While the Council's conclusions underline the dissuasive effects of the listing, it remains to be seen how the listed jurisdictions will react and whether the Member States will agree to implement sanctions at the EU level.

Conclusions on the taxation of profits in the digital economy

Initial discussions on the challenges raised by the digital economy took place in September 2017 during an informal ECOFIN meeting in Tallinn (see ETF 335). Although an 'equalization tax', as proposed by France, Germany, Italy and Spain, was accepted as a potential solution by some Member States, consensus was not reached, as a number of other Member States favored a long-term solution building on traditional international tax rules. Following the meeting, the European Commission issued a Communication on a fair and efficient tax system in the European Union for the digital single market (see ETF 338), which presented the critical challenges in taxing businesses that provide services digitally and proposed both long-term – a fundamental reform of the international corporate tax framework – and short-term solutions, such as the introduction of an equalization tax on turnover, a withholding tax on digital transactions or a levy on revenues generated from the provision of digital services or advertising activity.

The Council's (draft) conclusions on "Responding to the challenges of taxation of profits of the digital economy" adopted by the ECOFIN during its meeting of December 5, build on those discussions and are aimed at defining a common EU approach to the issue, in view of subsequent discussions at the international level. In this respect, the Council particularly highlights the urgency of agreeing on a policy response at a global level, and stresses the importance of reaching consensus internationally.

In addressing the challenges posed by the digital economy, the Council suggests that the concept of a 'virtual permanent establishment' be explored, based on elements specified by the OECD such as revenue-based, user-based and digital factors. It further underlines the importance of data for value creation and the need to assess it in the context of transfer pricing and profit attribution rules. With regard to the specifics of the sharing economy, the Council takes the view that this should be covered by general options and encourages data reporting by the digital platforms to the relevant tax authorities, as well as the subsequent exchange of such data between jurisdictions. Finally, the Council's conclusions take note of the proposal for an equalization tax favoured by certain Member States, considering that such a tax could also be assessed by the European Commission, but would remain outside the scope of bilateral tax treaties concluded by Member States.

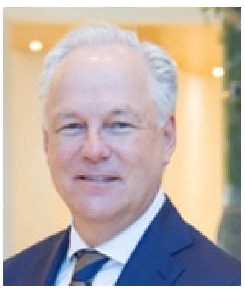
Calling for action at the global and possibly the EU level, the Council also urged the OECD to find appropriate solutions for upgrading the global network of bilateral tax treaties, the OECD

Model Tax Convention and accompanying commentaries, as well as the various OECD guidelines on transfer pricing. It also invited the European Commission to put forward proposals by early 2018, after having assessed the economic impact of the envisaged responses.

EU Tax Centre comment

There is significant momentum for updating both international and EU rules to allow for the taxation of the digital economy. While some Member States strongly advocate the implementation, at the EU level, of an equalization tax targeting digital businesses, it seems that the recent stance taken by the Council will focus on reaching a wider consensus through an update of the international tax framework, including the introduction of the concept of a 'digital presence' in the definition of a permanent establishment.

Should you have any queries, please do not hesitate to contact KPMG's EU Tax Centre, or, as appropriate, your local KPMG tax advisor.



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