Euro Tax Flash from KPMG's EU Tax Centre

Discussions on the Digital Services Tax

EU Tax Centre comment

Fifth revision of the EU blacklist

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ECOFIN discusses the Digital Services Tax and makes further revisions to the EU Blacklist

ECOFIN – Digital Services Tax – Fair Taxation - Code of Conduct Group – EU Blacklist

On November 6, 2018, the ECOFIN Council discussed the Digital Services Tax (DST) and the progress achieved so far in the negotiations, in particular with respect to the introduction of a sunset clause and the limitation of the scope of the DST. The Council also decided to further amend the EU blacklist of non-cooperative jurisdictions by removing Namibia from the list.

Discussions on the Digital Services Tax

Taxation of enterprises that use digital technology remains high on the political agenda of international fora and should be seen in the broader context of the fight against base erosion and profit shifting (BEPS) and the perceived mismatch between taxation and value creation for digital activities.

While the OECD Interim Report on the "Tax Challenges Arising from Digitalisation", published on March 16, 2018, followed-up on the work delivered in 2015 under Action 1 of the BEPS Project, discussions on the taxation of the digital economy have intensified at the EU level since September 2017. On March 21, 2018, the European Commission issued several proposals on a Fair and Effective Tax System in the EU for the Digital Single Market, including a Directive proposal on a DST, a Directive proposal on the introduction of a digital permanent establishment concept, and Recommendations to Member States to implement this concept in their double tax treaties.

According to the European Commission's proposal (see ETF 360), the new DST would apply as of January 1, 2020, and would be levied on gross revenues at the single rate of 3%. The

DST would only apply to businesses that cumulatively meet certain thresholds (i.e. entities with a total annual worldwide revenue above EUR 750 million and a total annual revenue stemming from digital services in the EU above EUR 50 million), and to certain digital services, including the supply of advertising space, the making available of marketplaces, and the transmission of collected user data.

Following an informal ECOFIN meeting in September 2018 (see ETF 380) during which the EU Finance Ministers broadly agreed on the need to implement a DST, under the condition that it would be a temporary levy (sunset clause), the Austrian Presidency of the EU presented, on November 6, 2018, a state of play of the negotiations, identifying the following key points of discussion:

- The EU Finance Ministers discussed whether the sale of user data should be excluded from the scope of the DST, and if so whether technical solutions should be elaborated to prevent the circumvention of the taxation of online advertising. Most delegations expressed a preference for maintaining all three taxable services as proposed by the European Commission, while Finland, the United Kingdom, Germany, and Poland advocated for a revised scope.
- The EU Finance Ministers also debated whether the DST should have a fixed expiry date or whether the temporary application of the EU DST should be linked to developments at the G20/OECD level. While all Member States agreed that the DST should no longer be applicable once a comprehensive solution at the global level is in place, there were diverging views as to how to proceed. France suggested in that respect that once adopted, the implementation of the DST could be delayed to the end of 2020, unless a global solution is found in the meantime.

In addition, the Austrian Presidency acknowledged that the Member States had reached a general agreement on most of the definitions, including multi-sided digital interfaces and targeted advertising, and on the fact that, in principle, the collection of the DST should take place without the one-stop-shop mechanism, although non-EU resident taxable persons would have to nominate a tax representative to fulfil their DST obligations. However, a number of delegations mentioned that further work is needed at the technical level, for example regarding the compatibility of the DST with double tax treaties, the proposal's legal basis, or the cliff-edge effect of the minimum thresholds. Luxembourg in particular questioned whether financial services should be included in the scope of the tax. Of the sceptics, Sweden, Denmark and Ireland clearly expressed their opposition to the DST as it stands.

Nevertheless, the Austrian Presidency reiterated that the objective is to reach agreement on the implementation of a DST by the end of the year, with a political debate to be held during the next ECOFIN on December 4, 2018.

EU Tax Centre comment

It remains to be seen whether all Member States will be able to agree on the common features of a DST, whose implementation requires unanimity. Associated issues, including the compatibility of the new tax with the existing international tax framework, such as the World Trade Organization or double tax treaties, will also have to be addressed by the Council before any agreement is reached on the common features of the new tax.

Fifth revision of the EU blacklist

The EU blacklist of non-cooperative jurisdictions for tax purposes is part of the EU's effort to clamp down on tax avoidance and harmful tax practices and follows the European Commission's Anti-Tax Avoidance Package presented in January 2016.

The EU blacklist is based on a three-step process (see ETF 301) consisting of a pre-assessment, a screening phase and the listing. Thus, after pre-assessment of third country jurisdictions based on factual information and risk indicators listed in the Scoreboard, an extensive screening and dialog process with the identified jurisdictions took place, which resulted in the Council's conclusions on the first EU list of non-cooperative jurisdictions for tax purposes issued on December 5, 2017 (see ETF 345). Out of the ninety-two jurisdictions chosen for screening, seventeen jurisdictions were placed on the blacklist.

Since the first EU blacklist was published in December 2017, it has already been revised five times. On January 23, 2018, eight jurisdictions were removed from the blacklist. Later, on March 13, 2018, the Council removed three more countries and added the Bahamas, Saint Kitts and Nevis and the US Virgin Islands. On May 25, 2018, the ECOFIN agreed to remove the Bahamas and Saint Kitts and Nevis, followed by Palau on October 2, 2018.

On November 6, 2018, the ECOFIN further agreed to remove Namibia. This jurisdiction was moved to the grey list in Appendix II of the Conclusions. The decision was based on the Code of Conduct Group's assessment of the commitments made by this jurisdiction to reform its tax system in order to bring it in line with the EU screening criteria listed below.

- Tax transparency and exchange of information: 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 tax competition: the presence of harmful tax regimes, assessed based on reviews by the OECD Forum on Harmful Tax Practices.
- Anti-BEPS measures: Implementation of the BEPS minimum standards measured according to OECD BEPS Inclusive Framework reviews.

As of November 6, 2018, only the following five jurisdictions appear on the EU blacklist: American Samoa, Guam, Samoa, Trinidad and Tobago and the US Virgin Islands. 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.

EU Tax Centre comment

This fifth revision illustrates once again that the EU Blacklist is a living document and that commitments made by listed jurisdictions are taken into account. However, the screening and monitoring processes have recently attracted criticism from certain countries that may not be able to honor the commitments given by the end of 2018. They argue that this should not be to the detriment of their economies.

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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