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Euro Tax Flash from KPMG's EU Tax Centre

ECOFIN discusses digital taxation agenda and removes Belize from the tax haven blacklist

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

In a meeting on November 8, 2019, the Economic and Financial Affairs Council of the EU (ECOFIN) exchanged views on the taxation of the digitalized economy following a proposal by the OECD in October 2019 to agree a "unified approach". The OECD proposal to introduce measures to ensure that multinationals pay a minimum level of tax was also discussed.

The ECOFIN also approved, without discussion, amendments to the EU blacklist of non-cooperative jurisdictions for tax purposes. Belize was removed from the blacklist, which now includes eight jurisdictions.

Taxation of the Digitalized Economy

As previously reported (see ETF 413), the taxation of enterprises that use digital technology has been high on the international political agenda and is a key topic of focus in the broader context of the fight against base erosion and profit shifting and the perceived mismatch between taxation and value creation.

Following an extensive consultation process and a meeting of the OECD Task Force on the Digital Economy (TFDE) on October 1, 2019, the OECD Secretariat published a policy paper on a "unified approach" to the nexus and profit allocation challenges arising from digitalization (the OECD Unified Approach Proposal).

Discussions on the OECD Unified Approach Proposal

Following the ECOFIN meeting on May 17, 2019, discussions have continued at a technical level with six meetings in total held with representatives from Member States discussing the taxation of the digital economy and, more recently, the OECD Unified Approach Proposal.

At the ECOFIN meeting on November 8, an economic impact assessment of the OECD Proposal prepared the EU Commission was presented to representatives of Member States. It is expected that the adoption of the OECD Proposal would result in an overall net gain for the EU as a whole with larger economies, such as France, expected to benefit and smaller open economies, such as Ireland, seeing a reduction in tax revenues.

In this regard, it is understood that, while all Member States are focused on the area of digital taxation and are supportive of work being undertaken at an OECD level, some Member States are wary of agreeing to an EU-wide position. Work is expected to continue at an EU technical group level to determine whether agreement amongst EU Member States on elements of the OECD Unified Approach Proposal can be reached.

Discussions on minimum tax OECD GloBE Proposal

The OECD global anti-base erosion proposal (the OECD GloBE Proposal) was also discussed at the ECOFIN meeting. As noted above, this proposal seeks to ensure that multinational companies pay a minimum level of tax through the introduction of income inclusion rules and restrictions on anti-base erosion payments. The OECD formally launched a consultation process on the GloBE Proposal on November8, 2019. For further information, please refer to the tax alert prepared by KPMG International.

The common areas of concern which were identified included the compatibility of the measures with the EU fundamental freedom of establishment. In particular, for a restriction on the freedom of establishment to be justified on grounds of the prevention of abusive practices, the Court of Justice of the European Union held in the *Cadbury Schweppes* case (C-196/04) that "*the specific objective of the restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality*".

Opposition to the idea of a minimum tax also remained strong among certain Member States due to perceived limitations on the sovereign right of a Member State to determine its taxation policy. It is understood that further work will be undertaken in to determine if a conflict with EU law exists in these areas before year-end.

EU Tax Centre Comment

It is unlikely that all Member States will be able to agree on a common EU position on the OECD Unified Approach and GloBE Proposals. While it is clear that the EU is committed to digital taxation, reaching agreement on concrete proposals will likely continue to prove difficult due to the divergent fiscal and economic views held by EU Member States. This is consistent with the difficulties encountered to date in reaching agreement on an EU digital services tax and is likely a prediction of future challenges that will be faced in reaching a consensus solution globally at the OECD level. Where agreement on the OECD Unified Approach Proposal cannot be reached, the EU has indicated that it will re-introduce proposals for an EU digital services tax in 2020. The direction of travel should become clearer in the months ahead.

EU Blacklist Update

During their meeting, the EU Finance ministers also approved, without discussion, amendments to the EU blacklist of uncooperative jurisdictions for tax purposes.

The EU blacklist is part of the EU's effort to clamp down on tax avoidance and harmful tax practices. Out of the ninety-two jurisdictions initially chosen for screening, seventeen jurisdictions were placed on the initial blacklist in December 2017. Throughout 2018, most of the countries and territories on the blacklist constructively engaged and made commitments to comply with the EU's criteria. As such, by the end of 2018, only five jurisdictions remained listed. On March 19, 2019, Aruba, Barbados, Belize, Bermuda, Dominica, Fiji, the Marshall Islands, Oman, the United Arab Emirates (UAE) and Vanuatu were added to the blacklist as the ten jurisdictions either failed to deliver on their commitments by the agreed deadline or made no commitment to address the EU's concerns. Since then, the list has been further modified to remove Aruba, Barbados, Bermuda, Dominica, the Marshall Islands and the UAE from the blacklist at ECOFIN meetings on May 17, 2019, June 14, 2019 and October 10, 2019.

For more information, please refer to ETF 400, ETF 404, ETF 406 and ETF 414.

A decision was taken on November 8, 2019 to remove Belize from the EU blacklist:

- Through the introduction of four legislative acts which were published on October 12, 2019, Belize adopted a reform of its International Business Companies – IBC Regime. The EU Code of Conduct Group had determined that the revised IBC Regime, if implemented, would no longer be considered to be harmful.
- Belize has also committed to amend or abolish the features that are considered harmful in its foreign source income exemption regime. Belize will remain on the EU "grey list" until the promised reforms have been implemented.

The blacklist now includes eight jurisdictions: American Samoa, Fiji, Guam, Oman, Samoa, Trinidad and Tobago, the US Virgin Islands, and Vanuatu.

In addition, a decision was made to remove the Republic of North Macedonia from the EU "grey list following the submission of instruments of ratification for the OECD Multilateral Convention on Mutual Administrative Assistance to the Council of Europe on September 30, 2019. With the inclusion of Belize and the removal of the Republic of North Macedonia, there are 32 jurisdictions remaining on the EU "grey list".

EU Tax Centre Comment

The work on the EU blacklist is a dynamic process that is regularly reviewed with the list being updated on four occasions in 2019. However, from 2020 onwards, updates to the blacklist will be made no more than twice a year to allow sufficient time for Member States to amend defensive measures against non-cooperative jurisdictions in their domestic law.

In terms of jurisdictions on the "grey list", a number of jurisdictions have committed to making amendments to their local law to counteract regimes which are perceived as being harmful by the EU before the end of 2019. With the deadline fast approaching, it remains to be seen whether futures additions to be blacklist will be made in early 2020.

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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