Four jurisdictions added to Annex I and other changes to the EU list of non-cooperative jurisdictions

Council of the EU – Code of Conduct Group – Non-cooperative jurisdictions – Tax transparency – Automatic Exchange of Information – Exchange of Information on Request – Forum on Harmful Tax Practices – Harmful tax regimes – Substance requirements – Country-by-Country Reporting

On February 14, 2023, the ECOFIN Council adopted conclusions on the EU list of non-cooperative jurisdictions (Annex I) and the state of play with respect to commitments taken by cooperative jurisdictions to implement tax good governance principles (Annex II – so called "grey list").

The Council agreed to add the Marshall Islands to the list of non-cooperative jurisdictions (Annex I) and to move three jurisdictions from Annex II to Annex I: British Virgin Islands, Costa Rica and the Russian Federation.

Following this latest revision, the EU list of non-cooperative jurisdictions therefore includes the following sixteen jurisdictions: American Samoa, Anguilla, the Bahamas, British Virgin Islands, Costa Rica, Fiji, Guam, Marshall Islands, Palau, Panama, Russian Federation, Samoa, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands, Vanuatu.

In addition, Albania, Aruba and Curaçao were added to the grey list while four jurisdictions were removed from the grey list as they had fulfilled their previous commitments (Barbados, Jamaica, North Macedonia and Uruguay).

As a result, the grey list now includes the following eighteen jurisdictions: Albania, Armenia, Aruba, Belize, Botswana, Curaçao, Dominica, Eswatini, Hong Kong, Israel, Jordan, Malaysia, Montserrat, Qatar, Seychelles, Thailand, Turkey and Vietnam.

Background

The EU list of non-cooperative jurisdictions, first adopted in the Council conclusions of December 5, 2017, is part of the EU's efforts to curb tax avoidance and harmful tax practices. The list is the result of an in-depth screening of non-EU countries that are assessed against agreed criteria for tax good governance by the Code of Conduct Group ('CoCG' or 'Group'), which is composed of high-level representatives of the Member States and the European Commission.

The current screening criteria are founded upon tax transparency, fair taxation, and the implementation of OECD anti-BEPS measures. Jurisdictions that do not comply with all criteria, but that have committed to reform are included in a state of play document – the so-called "grey list" (Annex II). The lists are an on-going project and are updated and revised twice every year. Please refer to Euro Tax Flash Issue 487 for details of the state of play following the previous revision of the lists (October 4, 2022).

Since the last update of the lists, the CoCG report on the work during the Czech Presidency (i.e. second half of 2022) listed the following key developments:

- Automatic exchange of information (AEOI – **criterion 1.1**) and exchange of information on request (EOIR – **criterion 1.2**): on November 9, 2022, the Global Forum published new AEOI and EOIR peer review reports (for more information, please refer to KPMG's Tax News Flash). Based on the Global Forum's findings, the CoCG sent letters to jurisdictions asking for commitments to address the deficiencies and to ensure a sufficient level of compliance with those standards.
- Existence of harmful tax regimes (**criterion 2.1**): the Group asked jurisdictions with ongoing reforms of their foreign source income exemption (FSIE) regimes to complete the reforms by the end of 2022, with the effect on January 1, 2023 and their reforms on the treatment of capital gains by the end of 2023, with effect from January 1, 2024. During the technical examinations of FSIE reforms, the CoCG identified a need to update the guidance on FSIE regimes to provide for further. Where the additional screening of FSIE regimes results in non-compliance with the revised FSIE guidance, the Group agreed to ask for commitments to amend such regimes by June 30, 2024, with effect from July 1, 2024.
- Tax regimes that facilitate offshore structures which attract profits without real economic activity (**criterion 2.2**): the Group discussed the main findings in the context of the 2022 monitoring of the implementation of substance requirements under the OECD Forum on Harmful Tax Practices (FHTP) global standard on substantial activities for no/nominal tax jurisdictions (for more information, please refer to Euro Tax Flash Issue 487).
- Implementation of CbCR minimum standard (**criterion 3.2**): on October 4, 2022, the OECD issued the fifth annual peer review report for the BEPS Action 13 minimum standard (for more information, please refer to E-News Issue 163). The Group discussed actions based on the peer review results and decided to extend the scope of criterion 3.2 to those jurisdictions that joined the Inclusive Framework on BEPS after January 1, 2018 and are developed countries or developing countries without a financial centre.

Update to Annex I

According to the Council release, the EU Member States adopted the following conclusions with respect to Annex I:

- The **British Virgin Islands** were moved from Annex II to Annex I in respect of criterion 1.2 after being downgraded to "Partially Compliant" in Round 2 of the Global Forum's EOIR peer review process.

- **Costa Rica** was moved from Annex II to Annex I because it has not fulfilled its commitment to abolish or amend the harmful aspects of its FSIE regime. In addition, the country committed to address the recommendations received in the Global Forum's AEOI peer review report in due time (criterion 1.1).
- The **Russian Federation** was moved from Annex II to Annex I in respect of criterion 2.1. According to the Group's report to the Council, Member States agreed that the substance requirements relating to the Russian IP regime are not in line with the OECD modified nexus approach. In addition, the Russian Federation was found to have not properly implemented grandfathering rules in relation to the international holding company regime that was deemed harmful by the CoCG.
- The **Marshall Islands** were added to Annex I in respect of criterion 2.2 after the country was deemed non-compliant with the standard for no or only nominal corporate tax jurisdictions, in particular with respect to their compliance framework, the provision of statistical data, and the exchange of information.

In addition, the Council agreed to remove the entry for the Bahamas in relation to criterion 3.2 in light of the most recent BEPS Inclusive Framework peer review report on CbCR and to update the entry of Trinidad and Tobago in relation to criterion 1.1 to reflect its commitment to implement the AEOI standard.

Update to Annex II ("grey list")

The ECOFIN Council adopted the following conclusions with respect to Annex II:

- **Albania** was added to section 2.1 of Annex II following its commitment to amend or abolish its industries incentives (software production / development) regime by December 31, 2023, after the FHTP deemed the regime potentially harmful.
- **Aruba, Belize, Curaçao** and **Israel** were added to section 1.1. of Annex II following their commitment to comply with the Global Forum requirements by 2024, after the countries failed to achieve a minimum rating of "in place, but needs improvement" in the AEOI peer review. In addition, the Council agreed that Belize and Israel should stay in section 3.2 of Annex II given their commitments in relation to the implementation of the CbCR minimum standard.
- **Barbados** was removed from section 1.2, 2.2 and 3.2 of Annex II. The Group noted the improved rating of "Largely Compliant" in the Global Forum's EOIR peer review report (section 1.2), an updated assessment by the FHTP of the substantial activities requirements in no or nominal tax jurisdictions (section 2.2) and the removal of the country-specific recommendation in the recent CbCR peer review report by the Inclusive Framework on BEPS (section 3.2).
- **Jamaica** and **North Macedonia** were removed from section 2.1 of Annex II following the FHTP's assessment that Jamaica's special economic zones regime and North Macedonia's technological industrial development zone regime are not harmful in light of the amendments in accordance with the FHTP's recommendations.
- **Hong Kong** and **Malaysia** remain in section 2.1 in light of the CoCG's revised guidance on FSIE regimes (December 2022) and the CoCG's decision to grant the countries additional time to amend their legislation concerning the treatment of capital gains.
- **Qatar** remains listed in section 2.1 of Annex II following the jurisdiction's commitment on February 2, 2023 to complete the FSIE reform by specifying the economic substance requirements and anti-abuse rules, with effect from January 1, 2023 and the CoCG's decision to grant Qatar additional time, i.e. until March 31, 2023, to complete the reform.
- **Turkey** was removed from section 1.2 of Annex II following an improved rating of "Largely Compliant" in the Global Forum's EOIR peer review report. However, Turkey remains in section 1.1 of Annex II. The Group noted that the progress made by Turkey is still not fully in line with the commitments

required in connection with the exchange of information with all Member States (Turkey does not currently exchange data with Cyprus).

- **Uruguay** was removed from section 2.1 following the reform of its FSIE regime before the end of 2022.

Next steps

The revision will take effect from the day of publication in the Official Journal of the European Union of the revised Annexes I and II. The next update of the EU list of non-cooperative jurisdictions is expected to take place in October 2023.

ETC comment

It is important for taxpayers to monitor the evolution of the list in light of defensive measures that are being applied by EU Member States against listed jurisdictions in form of e.g. non-deductibility of costs, CFC rules, increased WHT or limitation of participation exemption. The CoCG has previously indicated its commitment to perform an analysis on how defensive measures have been effectively applied by Member States to enable discussion on whether and how coordination of the measures could be enhanced. For more details, please refer to KPMG's summary of defensive measures against non-cooperative jurisdictions for tax purposes.

The EU list of non-cooperative jurisdictions is also relevant for the purposes of the EU mandatory disclosure rules under DAC6, where recipients of cross-border payments are resident for tax purposes in a jurisdiction that is included in Annex I. Under Hallmark C1b(ii)) of DAC6, such payments may trigger a reporting obligation irrespective of whether the transaction is aimed at generating a tax benefit (i.e. the main benefit test does not apply). Note that consensus has not formed among Member States on the point in time at which the list should be tested (e.g. the triggering date, or the reporting date). For more information on DAC6 reporting requirements, please click here.

In addition, the EU list of non-cooperative jurisdictions has a direct impact on EU public CbCR obligations that generally apply in relation to financial years starting on or after June 22, 2024. Based on the EU Public Country-by-Country Reporting Directive, relevant data points should be made publicly available on a country-by-country basis for each EU Member State. Furthermore, country-by-country information must be separately reported for each jurisdiction listed on Annex I of the EU list of non-cooperative jurisdictions or for each jurisdiction that has been on the grey list (Annex II) for a minimum of two years (i.e. as opposed to disclosure of aggregated amounts, which is the requirement for the rest of non-EU jurisdictions). For more information on EU public CbCR, please click here.

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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