Euro Tax Flash from KPMG's EU Tax Centre

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February 2024 update of 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 20, 2024, the General Affairs 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 remove the Bahamas, and Turks and Caicos Islands from the list of non-cooperative jurisdictions (Annex I). In addition, Belize and the Seychelles were moved from Annex I to Annex II.

Following this latest revision, Annex I of the EU list of non-cooperative jurisdictions therefore includes the following twelve jurisdictions: American Samoa, Anguilla, Antigua and Barbuda, Fiji, Guam, Palau, Panama, the Russian Federation, Samoa, Trinidad and Tobago, the US Virgin Islands and Vanuatu.

In addition, the Council agreed to remove six jurisdictions from Annex II (the grey list), as they had fulfilled their previous commitments (Albania, Aruba, Botswana, Dominica, Israel, and Hong Kong (SAR), China).

The grey list now includes the following ten jurisdictions: Armenia, Belize, the British Virgin Islands, Costa Rica, Curaçao, Eswatini, Malaysia, the Seychelles, Türkiye 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" or Annex II. The lists are an on-going project and are updated and revised twice every year. Please refer to Euro Tax Flash Issue 526 for details of the state of play following the previous revision of the lists (October 17, 2023).

According to the CoCG work program for the first half of 2024 under the Belgian Presidency, as well as its report to the Council outlining the work performed during the Spanish Presidency (second half of 2023), focus areas of the CoCG in relation to the EU listing exercise included:

- *Automatic exchange of information (AEOI – criterion 1.1*[1]*) and exchange of information on request (EOIR – criterion 1.2*[2]*):* assessment of the progress made by jurisdictions in respect of the automatic exchange of information based on the results of the 2023 peer review by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum)[3].
- *Preferential tax regimes (criterion 2.1*[4]*):* review of the progress made by jurisdictions in relation to amending or abolishing preferential tax regimes – in particular, foreign source income exemption regimes (FSIE) and harmful tax regimes in the scope of the OECD Forum on Harmful Tax Practices (FHTP).
- *Tax regimes that facilitate offshore structures which attract profits without real economic activity (criterion 2.2*[5]*):* review of the effective implementation of the economic substance requirements following the FHTP annual monitoring for companies. The latest FHTP progress report was published in February 2024.

[1] Initially, this criterion was considered fulfilled when a jurisdiction had the arrangements in place to automatically exchange information on financial accounts with all EU Member States. This could be achieved either by signing up to the OECD Common Reporting Standard (CRS), or through bilateral arrangements. In addition, the CoCG decided to take into account the Global Forum's peer review assessments of jurisdictions' legal framework to implement the AEOI determinations in its listing process, asking jurisdictions to make a commitment to address these determinations when they were negative ('not in place'). Jurisdictions that do not make or do not fulfil the commitment are then proposed for inclusion on the list.

[2] If a report concludes that a jurisdiction is overall 'not compliant' or 'partially compliant' with the standard, that jurisdiction is then proposed to be included on the EU list of non-cooperative jurisdictions for tax purposes. If the Global Forum accepts a request for a supplementary review from a jurisdiction on the EU list, that jurisdiction can then be proposed to be removed from Annex I (and included in Annex II pending the outcome of that review).

[3] Please refer to E-News Issue 182 and Issue 187 for more information on the peer review outcomes.

[4] The screening of jurisdictions' preferential tax regimes is carried out in coordination with the OECD FHTP, which performs a very similar exercise. Unlike the FHTP, the CoCG also subjects regimes that cover manufacturing activities, regimes that exempt incomes from a foreign source from taxation and regimes that provide for notional interest deductions to a screening to determine whether these regimes have any harmful features. If either the CoCG or the FHTP finds a regime of a jurisdiction to be harmful, that jurisdiction is then asked to make a commitment to amend the regime's harmful aspects or to abolish the regime. Jurisdictions that do not make or do not fulfil the commitment are then proposed for inclusion on the EU list.

[5] This criterion concerns jurisdictions that have no or very low corporate income tax. The FHTP and the CoCG screen these jurisdictions' relevant legislation and the enforcement of requirements relating to economic substance – such as a minimum number of employees and other real economic ties (operating expenditures, premises, etc.) to the jurisdiction in question – and exchange of information. If significant deficiencies are identified in the legislation or the implementation framework and these are not addressed, the jurisdictions concerned are proposed for inclusion on the EU list.

Update to Annex I

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

- **The Bahamas** and **Turks and Caicos Islands** were removed from Annex I in respect of criterion 2.2 following the FHTP's decisions to convert the hard recommendation to implement certain economic substance requirements (exchanges of information with respect to all relevant entities under the standard for no or only nominal corporate income tax jurisdictions) into a soft recommendation.
- **Belize** was moved from Annex I to Annex II in respect of criterion 1.2 after the Global Forum's decision to grant Belize a supplementary review (following its "partially compliant" rating in the 2023 second round EOIR peer review). In addition, the Council agreed to remove the reference to criterion 1.1 after the country received a rating of "in place" in the AEOI peer review published by the Global Forum on November 29, 2023.
- **The Russian Federation** remains on Annex I in respect of criterion 2.1 (harmful preferential tax regime (International Holding Companies) that has not been resolved).
- **The Seychelles** were moved from Annex I to Annex II in respect of criterion 1.2 after the Global Forum's decision to grant the Seychelles a supplementary review (following its "partially compliant" rating in the second EOIR peer review process in 2023).

Update to Annex II

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

- **Albania** was removed from section 2.1 of Annex II (and therefore removed completely from the grey list) after the country abolished a reduced corporate income tax rate of 5 percent for income from software production, which had previously been deemed a 'harmful regime' by the FHTP and CoCG.
- **Aruba** and **Israel** were removed from section 1.1 of Annex II (and therefore removed completely from the grey list) after the countries received a rating of "in place, but needs improvement" in the recent AEOI peer review published by the Global Forum.
- **Botswana** and **Dominica** were removed from section 1.2 of Annex II (and therefore removed completely from the grey list) after the countries received a rating of "largely compliant" in the recent supplementary EOIR review published by the Global Forum.
- **Hong Kong (SAR), China** was removed from section 2.1 of Annex II (and therefore removed completely from the grey list) following amendments to its FSIE legislation concerning the treatment of capital gains.
- **Malaysia** remains in section 2.1 of Annex II with respect to commitments to amend its FSIE legislation concerning the treatment of capital gains.
- **Türkiye** remains in section 1.1 of Annex II. The Council conclusions note that the progress made by Türkiye is still not fully in line with the commitments required in connection with the exchange of information with all Member States (Türkiye does not currently exchange data with Cyprus).

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 2024.

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. Taxpayers should be mindful that EU countries may refer to different (local) lists and apply different defensive measures, based on different application timelines and have other varying requirements in this context. The CoCG has previously indicated its commitment to performing 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 has a direct impact on EU Public Country-by-Country Reporting obligations that generally apply in relation to financial years starting on or after June 22, 2024 (exceptions apply). 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 as well as for each jurisdiction listed on Annex I of the EU list of non-cooperative jurisdictions and 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.

The EU list further produces effects outside the tax area, such as in respect of EU Regulation 2021/557, which provides that securitisation special purpose entities (SSPEs) should only be established in third countries that are not listed in Annex I of the EU list, or in the list of high-risk third countries which have strategic deficiencies in their regimes on anti-money laundering and counter terrorist financing.

Lastly, according to the CoCG work program under the Belgian Presidency (dated February 13, 2024) as well as recent statements by its Chair, the CoCG will continue reflections on a possible further strengthening of the EU listing process, including:

- design of the additional criterion 1.4 on the exchange of beneficial ownership information (whilst the scope and application of this criterion have not yet been agreed at EU level, the EC is considering a reference to the Anti-Money Laundering (AML) listings, and ratings by the Global Forum on Tax Transparency and Exchange of Information for Tax Purposes);
- potential link to the Inclusive Framework's Pillar Two peer-review results once the GloBE rules have been implemented locally;
- review of the effective implementation of defensive measures applied by EU Member States against non-cooperative jurisdictions;
- extension of the geographical scope of the EU listing exercise by including Brunei Darussalam, Kuwait and New Zealand as agreed in 2023.

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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