



Luxembourg Newsflash - 6 October 2022

Updated EU list of non-cooperative jurisdictions for tax purposes: Three jurisdictions added

ON 4 OCTOBER 2022, THE COUNCIL REVISED THE EU LIST OF NON-COOPERATIVE JURISDICTIONS FOR TAX PURPOSES (THE “EU BLACKLIST”) AND ADDED THE BAHAMAS, ANGUILLA AND TURKS AND CAICOS IN THEIR CONCLUSIONS.

Following this [update](#)_, the EU blacklist includes 12 jurisdictions:

- American Samoa
- Anguilla
- The Bahamas
- Fiji
- Guam
- Palau
- Panama
- Samoa
- Trinidad and Tobago
- Turks and Caicos
- US Virgin Islands
- Vanuatu

The three new jurisdictions were added to the grey list in February 2022 (i.e. cooperative jurisdictions with commitments to implement tax good governance principles). This is the first time that Turks and Caicos have been put on the EU blacklist. The Bahamas has been added once before, in March 2018 (removed in May 2018). Anguilla was added in October 2020 and remained on the list published in February 2021 (removed in October 2021).

The Council notes that these jurisdictions’ zero or nominal rate of corporate income tax facilitates offshore structures and arrangements aimed at attracting profits without real economic substance. It also notes a lack of transparency (Anguilla) and a failure to prevent tax base erosion and profit shifting (The Bahamas).

The revised list becomes official upon publication in the Official Journal of the European Union. The next revision is due to be performed in February 2023.

Defensive measures against blacklisted jurisdictions in Luxembourg

Note that Luxembourg law does not provide for a specific withholding tax provision for (deductible) payments made to entities set up or resident in non-cooperative jurisdictions. However, this new

development could still trigger various consequences impacting Luxembourg investment structures:

1. **Non-tax deductibility of interest and royalties due to a related party established in a country or territory on the EU blacklist (under certain conditions), unless the taxpayer provides evidence that a transaction was made for valid business reasons that reflect the economic reality.**

For the newly added jurisdictions, this non-deductibility rule should be applicable as from 1 January 2023.

However, if any of these jurisdictions are removed from the EU blacklist in February 2023 and remain off the final EU blacklist published in 2023, the non-deductibility rule will cease to apply to them from the date of publication of the February 2023 EU blacklist in the Official Journal.

See our [newsflash_](#) for more details on the Luxembourg law on payments to EU blacklist countries.

2. **Disclosure to the Luxembourg tax authorities of intra-group transactions with non-cooperative jurisdictions on the EU blacklist.**

The Luxembourg tax authorities issued a [circular_](#) on 31 May 2022 (LG – A n°64 LIR n°168/2) stating the measures they will take where a Luxembourg company has transactions with non-cooperative jurisdictions on the EU blacklist.

In particular, Luxembourg companies must disclose any intragroup transactions made with entities located in a non-cooperative jurisdiction on the EU blacklist on their annual tax returns. While it is possible that the tax authorities will closely review the details of such transactions during tax assessment, they are likely to focus on whether the transactions were done at arm's length (i.e. transfer pricing angle).

3. **DAC 6 – Hallmark C1 related to “cross-border transactions”**

DAC 6 as implemented in Luxembourg obliges intermediaries or taxpayers to disclose information relating to certain cross-border arrangements to the Luxembourg tax authorities. A cross-border arrangement may need to be reported where it contains one or more “hallmarks”, i.e. specific features considered indicative of potentially aggressive tax planning.

One such hallmark, C1(b)(ii), exists where deductible cross-border payments are made to an associated enterprise resident in a jurisdiction on the EU blacklist. This is a standalone hallmark, meaning that a cross-border arrangement with this feature is reportable (irrespective of the main benefit test).

Such arrangements should also be carefully monitored to ensure that they do not fall within the scope of another hallmark, C1(b)(i) – where deductible cross-border payments are made to an associated enterprise resident in a jurisdiction that does not impose corporate tax, or that imposes corporate tax at a rate of zero or almost zero.

See our [DAC 6 webpage_](#) for more details on DAC 6 and the cross-border arrangement reporting process.

Concluding remarks

EU taxpayers performing transactions with related entities located in jurisdictions on the EU blacklist should assess the impact of the revised list on their operations, bearing in mind that this list is updated regularly and must be closely monitored.

How can we help?

The Tax Law partners and your usual contacts at Arendt & Medernach are at your disposal to further assess and advise on the impact of this new measure on your investments.

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