

ATOZ ALERT

The Bahamas, Belize, the Seychelles & the Turks and Caicos Islands removed from the EU list of non-cooperative tax jurisdictions

27 February 2024

Background

On 26 February 2024, the new list of non-cooperative jurisdictions for tax purposes (the “**Blacklist**”) was published in the Official Journal of the European Union. The Blacklist was updated on 20 February 2024 by the EU Council which removed four jurisdictions from the previous list: the Bahamas, Belize, the Seychelles and the Turks and Caicos Islands. The new Blacklist came into force as at the date of its publication in the Official Journal.

The update of the Blacklist is an important step as it directly impacts the scope of application of three different Luxembourg tax measures: 1) the measure denying the corporate income tax deduction of interest and royalty expenses due to entities located in non-cooperative tax jurisdictions, 2) the requirement to disclose transactions with entities located in non-cooperative jurisdictions in tax returns and 3) the mandatory disclosure rules applicable to certain cross-border arrangements.

The EU list of non-cooperative jurisdictions for tax purposes

The Blacklist is determined at EU level. It is a result of a thorough screening and dialogue process with non-EU countries to assess them against agreed criteria for good governance relating to tax transparency, fair taxation, the implementation of OECD BEPS measures and substance requirements for zero-tax countries.

The Blacklist is updated twice a year, taking into consideration the evolving deadlines for jurisdictions to deliver on their commitments and the evolution of the listing criteria that the EU uses to establish the list. Given these regular updates, the scope of application of all Luxembourg measures which refer to those jurisdictions will constantly evolve over time.

As of 26 February 2024 (date of [publication of the Blacklist in the Official Journal of the European Union, see Annex I](#)), following the delisting of the Bahamas, Belize, Seychelles and Turks and Caicos Islands, the Blacklist now includes the following twelve jurisdictions (the “**Blacklisted Jurisdictions**”):

1. American Samoa
2. Anguilla
3. Antigua and Barbuda
4. Fiji
5. Guam
6. Palau
7. Panama
8. Russian Federation
9. Samoa
10. Trinidad and Tobago
11. US Virgin Islands
12. Vanuatu

In addition to the Blacklist, a list of jurisdictions with pending commitments to implement tax good governance principles (the “**Greylist**”) is determined at EU level and is also updated twice a year at the same time as the Blacklist. The evolution of the Greylist should be followed closely since Greylisted tax jurisdictions may become Blacklisted tax jurisdictions if they do not fulfil the commitments they made within the agreed time line. Contrary to the Bahamas and Turks and Caicos Islands which have been totally delisted, Belize and Seychelles have been removed from the Blacklist but have been included in the Greylist. Following changes to the applicable rules in these jurisdictions, the Global Forum has granted them both a supplementary review, which will be undertaken in the near future and, pending the outcome of this review, they are being kept on this listing.

As of 26 February 2024 (date of [publication of the Greylist in the Official Journal of the European Union, see Annex II](#)), the Greylist includes the following ten jurisdictions:

1. Armenia
2. Belize
3. British Virgin Islands
4. Costa Rica
5. Curaçao
6. Eswatini
7. Malaysia
8. Seychelles
9. Turkey
10. Vietnam

We can note that two jurisdictions (Qatar and Hong Kong) fulfilled their commitments and have been removed from the state of play document.

Impact on the measure denying the corporate income tax deduction of interest and royalty expenses due to entities located in non-cooperative tax jurisdictions

Based on Article 168-5 of the Luxembourg Income Tax Law (“LITL”), under certain conditions, interest and royalties due to entities located in Blacklisted Jurisdictions are not deductible for corporate income tax purposes. As a matter of principle, the measure denying the deduction of interest and royalties applies based on the latest version of the Blacklist available as of 1 January.

However, when it comes to the removal of a jurisdiction from the Blacklist, as is the case here, the rules are as follows:

- If a country is removed from the Blacklist in the February update but is added back in the October update, since the latest list available as from 1 January is always the list to refer to when applying the measure, the fact that the country was removed from the list in February will have no effect and the measure will apply with respect to interest and royalties paid to this country for the entire year as well as for the subsequent year.
- If a country is removed from the Blacklist in the February update and is not added back to the Blacklist prior to 1 January of the subsequent year, this country will no longer be taken into account for interest and royalties due as from the date of publication of the relevant Blacklist in the OJ of the EU (i.e. the removal will have an immediate effect as from February).
- If a country is removed from the Blacklist in the October update, this country will no longer be taken into account for interest and royalties due as from the date of publication of the relevant Blacklist in the OJ of the EU (i.e. the removal will have an immediate effect as from October).

As a result, for 2024 and regarding the consequences of the removal of the Bahamas, Belize, Seychelles and Turks and Caicos Islands from the Blacklist, it will be necessary to look at the update of the list taking place in October 2024 to see whether interest and royalties due to entities located in the Bahamas, Belize, Seychelles and Turks and Caicos Islands will be deductible based on Article 168-5 of the LITL. Should these jurisdictions be added back on the list after the October 2024 update, their removal from the list in February **will have no effect and the measure will apply with respect to interest and royalties paid to these countries for the entire year of 2024 as well as for the subsequent year**. On the contrary, provided that the other conditions of Article 168-5 of the LITL are met, should one of these jurisdictions not be added back on the Blacklist at the occasion of the October 2024 update, interest and royalties due to entities located in that jurisdiction will no longer be targeted by the deduction limitation rule of Article 168-5 of the LITL **as from the date of publication of the February Blacklist in the OJ of the EU (the removal will have an immediate effect as from February 2024)**.

For a detailed explanation of the scope of the measure provided by Article 168-5 of the LITL, its conditions and its timing aspects, please read our article “*New guidelines on Luxembourg defensive measures against non-cooperative jurisdictions for tax purposes*” in our [July 2022 ATOZ Insights](#).

Impact on disclosure requirements based on Circular L.I.R. n° 168/2 of 31 May 2022

Based on Section 4 of Circular L.I.R. n° 168/2 of 31 May 2022, the Luxembourg tax authorities systematically review transactions entered into by Luxembourg corporate taxpayers with related parties (within the meaning of article 56 of the LITL) located in Blacklisted Jurisdictions in order to assess whether the terms and conditions of the transactions reflect the arm's length principle. Detailed information on these transactions has to be reported by Luxembourg corporate taxpayers in their corporate tax returns.

The Circular states that the latest Blacklist available as of the end of the accounting year concerned is key for determining whether reporting is required or not. Therefore, since most companies have an accounting year corresponding to the calendar year, reference generally has to be made to the list reflecting the October update of the year concerned. However, one should keep in mind that for companies with an accounting year which differs from the calendar year (e.g. for companies with an accounting year starting on 1 March), reference may have to be made to the list reflecting the February update. Thus, for these companies, the new list in force as of 26 February 2024 may be relevant. In such case, transactions with entities located in the Bahamas, Belize, Seychelles and Turks and Caicos will no longer have to be disclosed in the 2024 corporate tax returns.

Impact on disclosure requirements under DAC6

The listing of a jurisdiction as non-cooperative may also have an impact on the reporting obligations applicable according to the Luxembourg Law of 25 March 2020 implementing Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU regarding the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (“**DAC6**”).

Hallmark C.1.b) ii) of the Annex to the Law of 25 March 2020 implementing DAC6 covers deductible cross-border payments made between two or more associated enterprises where the recipient is resident for tax purposes in a jurisdiction which has been assessed as being non-cooperative. This hallmark is not subject to the main benefit test.

The question arises as to which list should be taken into account to assess whether the recipient is resident in a non-cooperative jurisdiction. In this respect, the FAQ released by the Luxembourg tax authorities on DAC6 provides that “non-cooperative jurisdictions within the meaning of Hallmark C.1. are those which appear on the list (as published in the Official Journal of the European Union) on the date of the triggering event of the reporting obligation.” Here, in our view, reference should be made to the list in force at the time the arrangement was implemented so the listing or delisting of a jurisdiction after the arrangement was implemented should not have any retroactive effect. Should this approach be followed, reporting would only be required if the arrangement with the entity located in the jurisdiction was implemented at the time when this jurisdiction was on the Blacklist.

As a consequence, arrangements implemented with the Bahamas, Belize, Seychelles and Turks and Caicos on or after 26 February 2024 (and at least until the October 2024 list) would no longer have to be reported under Hallmark C.1.b) ii).

Implications

Luxembourg taxpayers with investments into and from non-cooperative jurisdictions should seek advice from their tax advisers in order to analyse the potential tax impact of the update of the EU list of non-cooperative jurisdictions on their investments and the potential reporting requirements. The evolution of the legislation of jurisdictions under the radar of the EU Council (both those on the Blacklist and those on the Greylist) should also be closely monitored to anticipate an addition to or a removal from the EU list of non-cooperative tax jurisdictions in the future and thus a change in the scope of application of the Luxembourg measures.

Do you have further questions?



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