

ATOZ ALERT

EU list of non-cooperative tax jurisdictions updated: Implications for Luxembourg taxpayers

22 February 2021

Today, the EU Council updated the EU list of non-cooperative tax jurisdictions. The update is an important step as it directly impacts the scope of application of three different Luxembourg tax measures: the measure denying the corporate income tax deduction of interest and royalty expenses due to entities located in non-cooperative tax jurisdictions (which will enter into force on 1 March 2021), the requirement to disclose transactions with entities located in non-cooperative jurisdictions (Circular of the Luxembourg tax authorities of 7 May 2018) and the mandatory disclosure rules applicable to certain cross-border arrangements (DAC6). We will present the EU list now in force and analyse how it will impact the three Luxembourg tax measures.

Background

The list of non-cooperative tax jurisdictions 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 list 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 22 February 2021, following the listing of Dominica and the delisting of Barbados, the [EU list](#) now includes the 12 following jurisdictions: American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands and Vanuatu.

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 the Law of 10 February 2021, as from 1 March 2021, interest and royalties due to entities located in non-cooperative tax jurisdictions will no longer be tax-deductible for corporate income tax purposes under certain conditions. (For a presentation of the measure and its requirements, please read our [ATOZ Alert of 29 January 2021](#)).

The measure will apply to interest and royalties due as from 1 March 2021 to entities located in jurisdictions considered as non-cooperative tax jurisdictions based on the latest EU list available as of 1 March 2021. Since no further update of the list will occur prior to 1 March 2021, the measure will apply to interest and royalties due to entities located in American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands and Vanuatu. However, since the EU list is updated twice a year (generally in February and October), it means that the scope of application of the measure may evolve another time in the course of 2021 following the next update to take place this year (e.g. in October 2021).

What will be the effect of a country being added or removed from the EU list in the future?

- Countries added (e.g. following another update in October 2021) will be taken into account for interest and royalties due as from 1 January of the following year (i.e. 2022 if we assume that an update will take place in October 2021). Therefore, there will be no retroactive nor immediate effect but only an impact as from the following calendar year;
- Countries removed (e.g. following an update in October 2021) will no longer be taken into account for interest and royalties due as from the date of the publication of the relevant EU list in the Official Journal (that would be in October 2021 if we assume that an update will take place in October 2021), which means that the removal will have an immediate effect.

Impact on disclosure requirements based on Circular L.G. - A n° 64 of 7 May 2018

Based on Circular L.G. - A n° 64 of 7 May 2018, the Luxembourg tax authorities systematically review transactions entered into by Luxembourg corporate taxpayers with related parties (within the meaning of article 56 of the Income Tax Law) located in non-cooperative jurisdictions (as listed by the EU) 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 return.

The Circular states that the blacklisting as of the end of the year concerned is key for determining whether reporting is required or not. Therefore, since another update of the list is expected to happen prior to year-end, the scope of the disclosure requirements under Circular L.G. - A n° 64 of 7 May 2018 for the 2021 corporate tax return remains to be confirmed. As far as the disclosure for the 2020 corporate income tax returns is concerned, reference should be made to the [EU list in force as of 7 October 2020](#) (date of publication in the Official Journal of the European Union of the update preceding the update of today).

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 as regards 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 the list (in force as of which date?) to be taken into account to assess whether the recipient is resident in a non-cooperative jurisdiction. In this respect, in our view, reference should be made to the list in force at the time the transaction was implemented and the listing or delisting of a jurisdiction after the transaction has been implemented should not have any retroactive effect. In other words, reporting should only be required if the transaction with the entity located in the jurisdiction was implemented at the time when this jurisdiction was blacklisted.

Do you have further questions?



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