EU list of non-cooperative jurisdictions for tax purposes: Anguilla and Barbados added, Cayman Islands and Oman removed


Mr. Eric Fort
Partner
eric.fort@arendt.com


Mr. Alain Goebel
Partner
alain.goebel@arendt.com


Mr. Thierry Lesage
Partner
thierry.lesage@arendt.com


Mr. Vincent Mahler
Partner
vincent.mahler@arendt.com

In a press release issued on 6 October 2020, the Council of the EU announced its decision to make changes to the EU list of non-cooperative jurisdictions for tax purposes (the “EU blacklist”).

In particular, the Cayman Islands and Oman were removed from the EU blacklist. Anguilla and Barbados were added to the list, which comprises 12 jurisdictions following the update: American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, the US Virgin Islands and Vanuatu.

There are 3 potential items of attention that need to be considered by Luxembourg investment structures in respect of the EU blacklist:

a) Although Luxembourg law does not – for the time being - contain any specific withholding tax provision for payments made to entities set up or resident in non-cooperative jurisdictions, a bill of law (N° 7547) in this sense has been filed by the Luxembourg government on 30 March 2020. The bill provides for a non-tax deductibility of interest and royalty payments made to entities located in jurisdictions appearing on the EU blacklist.

This new measure would apply to accruals and payments made to related parties as of 1 January 2021, based on a list of jurisdictions to be proposed by the Luxembourg government during the second half of 2020. This list, which the government has yet to issue, would be based on the version of the EU blacklist in force at that time, and would thus take any interim amendments to the EU list into account (provided they had been published in the Official Journal of the European Union prior to its release). On this basis, only accruals and payments made as of 1 January 2021 to entities located in the jurisdictions appearing on the new EU blacklist would be concerned by the proposed measures.

Please refer to our newsflash for more details on bill of law N° 7547.

b) A circular letter1 dated 7 May 2018 had been issued by the Luxembourg tax authorities, regarding the measures to be taken by the tax authorities where a Luxembourg company has transactions with non-cooperative jurisdictions on the EU blacklist. According to the circular letter, Luxembourg companies must disclose any intragroup transactions made with entities set up or resident in non-cooperative jurisdictions on their annual tax returns.

The presence of a country on the EU blacklist does not lead to adverse tax consequences in Luxembourg per se, provided that transactions between Luxembourg entities and entities located in such jurisdictions are in line with the domestic provisions regarding the arm's length principle. According to the circular letter, the Luxembourg tax authorities will increase their scrutiny in reviewing the arm's length character of such transactions.

Please refer to our newsflash for more details on the circular.

c) Finally, the EU blacklist may be relevant for the application of the Luxembourg provisions 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 (the "DAC 6 Law").

The DAC 6 Law requires the disclosure by intermediaries or taxpayers of 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 specific characteristics ("Hallmarks"). Hallmarks are features which are considered indicative of potentially aggressive tax planning. One such Hallmark relates to deductible cross-border payments made between associated enterprises where the recipient is resident in a jurisdiction included on a blacklist, such as the EU blacklist.

The DAC 6 reporting process will start as of 1 January 2021. It will concern reportable cross-border arrangements made available for implementation, ready for implementation, or implemented as of 1 July 2020, as well as reportable arrangements whose first step was implemented between 25 June 2018 and 30 June 2020 ("Triggering Events").

As the EU blacklist is always changing (for instance, the Cayman Islands was added to the list in February 2020 but is now being removed), the question is when the list should be taken into account to determine whether the aforementioned Hallmark is met. Whilst this is not specifically detailed in the DAC 6 Law, a reasonable approach would be to use the EU blacklist in force at the time the relevant Triggering Event occurred. As such, an arrangement involving deductible cross-border payments to an associated enterprise located in the Cayman Islands implemented in January 2020 should not fall within the scope of the above Hallmark.

However, such structures should be carefully monitored to ensure that they do not fall within the scope of another Hallmark, such as the one related to deductible cross-border payments made between associated enterprises where the recipient is resident in a jurisdiction which does not impose corporate tax, or which imposes corporate tax at a rate of zero or almost zero.

Please refer to our newsflash for more details on DAC 6 and the reporting process.

Concluding remarks

Taxpayers undertaking transactions with related entities located in jurisdictions included on the EU blacklist will need to carefully assess the impact of the new list on their operations, bearing in mind that the list may be updated in the future.

1 Circular of the head of the tax authorities, L.G. – A N°64 of 7 May 2018.