

ATOZ ALERT

EU List of non-cooperative tax jurisdictions updated

05 October 2022

On 4 October 2022, the EU Finance Ministers decided to add Anguilla, The Bahamas and Turks and Caicos Islands to the EU list of non-cooperative jurisdictions for tax purposes. The update of the list 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, the requirement to disclose transactions with entities located in non-cooperative jurisdictions and the mandatory disclosure rules applicable to certain cross-border arrangements (DAC6).

The EU list of non-cooperative jurisdictions for tax purposes

The list of non-cooperative tax jurisdictions (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 4 October 2022, following the listing of Anguilla, The Bahamas and Turks and Caicos Islands, the Blacklist now includes the 12 following jurisdictions (the “**Blacklisted Jurisdictions**”): American Samoa, Anguilla, The Bahamas, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, Turks and Caicos Islands, 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 Article 168 n°5 of the Luxembourg Income Tax Law, since 1 March 2021, 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, additions of countries to the Blacklist have only an effect as from the next calendar year whereas a removal of a country out of the Blacklist may have an immediate effect under certain circumstances. The new Blacklist, including the 12 countries, will be the list to refer to for interest and royalties due as from 1 January 2023 (i.e. there will be no retroactive nor immediate effect but only an impact as from next year). It means that the deduction of interest and royalties due to the 3 newly added jurisdictions (Anguilla, The Bahamas and Turks and Caicos Islands) may only be denied based on Article 168-5 of the ITL as from 1 January 2023.

For a detailed explanation of the scope of the measure provided by Article 168-5 of the ITL, 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 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, when determining whether a specific transaction has to be reported in the 2022 corporate income tax return under Circular L.I.R. n° 168/2 of 31 May 2022, reference will have to be made to the newly released October 2022 list.

As far as the disclosure for the 2021 corporate income tax returns is concerned, reference should be made to the [EU list in force as of 12 October 2021](#) (date of publication in the Official Journal of the European Union of the October 2021 update).

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, 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.”

Therefore, reference should be made to the list in force at the time the arrangement was implemented and the listing or delisting of a jurisdiction after the arrangement has been implemented should not have any retroactive effect. In other words, reporting should 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, only those arrangements implemented with Anguilla, The Bahamas or Turks and Caicos Islands on or after the publication of the new Blacklist list (but only as long as these jurisdictions remain on the Blacklist) in the Official Journal of the European Union (publication to take place in the coming days), may 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 should also be closely monitored in order 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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