EU list of non-cooperative juridictions in tax matters – Defensive measures issued by the Luxembourg tax authorities

11 May 2018

In brief

On 5 December 2017, the ECOFIN Council published its conclusions on the EU common list of non-cooperative jurisdictions in tax matters, also referred to as the "blacklist". This initiative forms part of the EU's broader agenda on furthering tax transparency, fair taxation and the implementation of anti-BEPS measures with the dual aim of raising the level of good global governance and tackling tax fraud, evasion and avoidance. In this context, the Luxembourg tax authorities issued, on 7 May 2018, a circular in relation to defensive measures that will apply to transactions entered into by Luxembourg companies with associated entreprises located in such jurisdictions.

In detail

Background

In November 2016, the ECOFIN Council agreed on the process for the establishment of an EU list of non-cooperative jurisdictions in taxation matters, based on the following criteria:

- a jurisdiction should be considered compliant on tax transparency;
- a jurisdiction should be considered compliant on fair taxation;
- anti-BEPS measures should be implemented.

17 jurisdictions were initially included in the list approved on 5 December 2017. Several countries have been removed from or added to the list since then and the following nine jurisdictions are currently considered as non-cooperative jurisdictions for tax purposes (*http://www.consilium.europa.eu/fr/policies/eu-list-of-non-cooperative-jurisdictions/*): American Samoa, Bahamas, Guam, Namibia, Palau, Saint Kitts and Nevis, Samoa, Trinidad and Tobago, and the US Virgin Islands.

Finance Ministers have agreed that EU Member States may pursue defensive measures against listed jurisdictions in order to encourage these jurisdictions to comply with the three above-mentioned key criteria.

Such defensive measures may be in the non-tax area (e.g. in relation to the European Fund for Sustainable Development) but also in the tax area (e.g. increased audits, disallowance of deductibility of costs, withholding tax measures, application of CFC rules, reversal of the burden of proof, limitation of participation exemptions and switch-over clauses among others).

What about Luxembourg?

With the aim to notably prevent the erosion of tax bases and profit shifting, the Luxembourg tax authorities have indicated in the Circular L.G. –A n° 64 (hereafter "the Circular") that they will particularly scrutinise the transactions involving related companies (in the meaning of article 56 of the Luxembourg Income Tax Law) which are located in non-cooperative jurisdictions as per the EU list.

As from fiscal year 2018, the Luxembourg companies are required to indicate in their tax return whether they have performed any transaction with related parties located in the non-cooperative jurisdictions listed in the EU list. The list to take into account for such exercise will be the list updated as at the end of the financial year of the Luxembourg concerned entity. A consolidated version of the list further to any change adopted by the EU Council will be published on the Luxembourg tax authorities'website.

At their request, the details of said transactions would need to be provided to the Luxembourg tax authorities. The latter may notably require the total amount and statement of related income and expenses linked to those transactions as well as a recapitulative of all receivables and debts with such related parties.

Finally, the Luxembourg tax authorities will more strictly monitor transactions carried out by Luxembourg companies with countries mentioned in the list.

The Circular demonstrates the willingness of Luxembourg to enhance tax transparency and fair taxation.

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Let's talk

Sami Douenias	Partner	+352 49 48 48 3060	sami.douenias@lu.pwc.com
Fabien Hautier	Parnter	+352 49 48 48 3004	fabien.hautier@lu.pwc.com
Caroline Goemaere	Parnter	+352 49 48 48 3002	caroline.goemaere@lu.pwc.com