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Overview of defensive tax measures in EU Member States

PwC NL Tax Knowledge Centre

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Introduction

The EU list of non-cooperative jurisdictions (the EU list) is a tool of the European Union to promote fair tax competition and address harmful tax practices. The list consists of non-EU countries that were assessed against agreed criteria for tax good governance and is updated twice per year. According to the Council, the EU list "includes countries that either have not engaged in a constructive dialogue with the EU on tax governance or have failed to deliver on their commitments to implement the necessary reforms. Those reforms should aim to comply with a set of objective tax good governance criteria, which include tax transparency, fair taxation and implementation of international standards designed to prevent tax base erosion and profit shifting."¹

What are the EU listing criteria?

To be considered cooperative for tax purposes, jurisdictions are screened on the following criteria:

1. Tax transparency,²
2. Fair taxation,³ and
3. Implementation of Anti-BEPS measures^{4,5}.

Which jurisdictions are currently included in the EU list?

The EU list only includes jurisdictions that either have not engaged in a constructive dialogue with the EU on tax governance or have failed to deliver on their commitments to implement the necessary reforms.

Based on the latest version of the EU list (24 February 2022), the following jurisdictions are considered non-cooperative: American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu.

Which jurisdictions are currently included in the EU grey list?

Next to the EU list, Annex II of the Council Conclusions includes jurisdictions whose commitments to comply with EU standards are being monitored (the so-called "grey list"). There are currently no consequences with regard to transactions involving jurisdictions included in the EU grey list. However, a jurisdiction that has failed to meet its commitments can be moved to the EU list.

The following jurisdictions were included in the latest version of the EU grey list (24 February 2022): Anguilla, the Bahamas, Barbados, Belize, Bermuda, Botswana, the British Virgin Islands, Costa Rica, Dominica, Hong Kong, Israel, Jamaica, Jordan, Malaysia, Montserrat, North Macedonia, Qatar, Seychelles, Thailand, Tunisia, Turkey, Uruguay, Russian Federation, Turks and Caicos Islands and Vietnam.



- 1 Council of the EU, Taxation: Council reviews list of non-cooperative countries for tax purposes (24 February 2022) available [here](#).
- 2 Jurisdictions should i) exchange tax data with all EU Member States through automatic exchange of tax information (AEOI), either through the common reporting system (CRS) established by the OECD or through equivalent arrangements, ii) be able to exchange tax information on request (EOIR), iii) be party to the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters, or iv) have a network of exchange arrangements in place that covers all EU Member States.
- 3 Jurisdictions should not have harmful preferential tax measures and should not facilitate offshore structures or arrangements seeking to attract profits
- 4 Jurisdictions should commit to implementing the OECD anti-BEPS minimum standards, which concern harmful tax measures, treaty shopping, country-by-country reporting and dispute resolution and should receive positive peer-review assessments for the effective implementation of the anti-BEPS minimum standard on country-by-country reporting
- 5 See Council of the EU conclusions, Criteria and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes (8 November 2016) available [here](#).

For the purposes of this publication, the above four legislative measures will be called “defensive measures”.

If the domestic list of an EU Member State does not include all jurisdictions included in the EU list, a measure linked to that list was not considered defensive for the purposes of this publication.

How often is the EU list updated?

The first EU list was established in December 2019. Since that date, the EU list has been revised several times with the most substantial amendments taking place in March 2019 and February 2020. From 2020, the list has been updated twice a year.

The current version of the EU list is that of February 2022 and the next revision is scheduled for October 2022.

How is the EU list linked with EU Member States' tax measures?

According to the Council conclusions⁶ of 5 December 2017, “effective and proportionate defensive measures, in both non-tax and tax areas could be applied by the EU and Member States vis-à-vis the non-cooperative jurisdictions, as long as they are part of such list.” Regarding the tax measures, EU Member States agreed in December 2017 to apply at least one of the following administrative measures:

- reinforced monitoring of transactions
- increased risk audits for taxpayers who benefit from listed regimes
- increased risk audits for taxpayers who use tax schemes involving listed regimes

Nevertheless, the most important commitment of EU Member States took place on 5 December 2019 when the Council endorsed guidance for further coordination regarding defensive tax measures. In addition EU Member States committed,⁷ as of 1 January 2021, to use the EU list in the application of at least one of four specific legislative measures:

1. **non-deductibility of costs** incurred in a listed jurisdiction;
2. **controlled foreign company (CFC)** rules, to limit artificial deferral of tax to offshore, low-taxed entities;
3. **withholding tax measures**, to tackle improper exemptions or refunds, and
4. **limitation of the participation exemption** on shareholder dividends.

Is the EU list used for measures other than the defensive measures?

The EU list is also used for DAC6⁸ purposes. DAC6 applies to cross-border tax arrangements, which meet one or more specified characteristics (hallmarks), and which concern either more than one EU Member State or an EU Member State and a non-EU Member State. It mandates a reporting obligation for these tax arrangements if in scope no matter whether the arrangement is justified according to national law. One of the DAC6 hallmarks relates to deductible cross-border payments between two or more associated enterprises. If the recipient is a tax resident in a jurisdiction included in the EU list, the payment needs to be reported to the tax authorities (hallmark C1bii).

Furthermore, the EU list as well as the EU grey list are linked with the application of the public CBCR Directive, that has been adopted in the EU. The EU Directive will require multinational groups or standalone undertakings with a total consolidated revenue of at least €750m, over a period of two consecutive financial years, to publicly disclose the corporate income tax they pay in each EU Member State plus in each of the jurisdictions that are either on the EU's list or the EU grey list. The Directive needs to be implemented by 22 June 2023 by all EU Member States.

What changes are expected to the EU list?

The European Commission has stated¹⁰ that it will introduce Pillar Two in the criteria used for assessing third countries in the EU listing process. This is to incentivise these countries to join the international agreement on a two-pillar solution to address the tax challenges raised by the digitalisation of the economy of 1 July 2021. The European Commission considers such an approach to be in alignment with the existing approach to utilize the listing process to promote internationally agreed good practices.

⁶ See Council of the EU Conclusions on the EU list of non-cooperative jurisdictions for tax purposes (5 December 2017) available [here](#).

⁷ We understand that this is a politically binding commitment only and not a legally binding one.

⁸ Council Directive 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, available [here](#).

⁹ Council Directive 2021/2101 of 24 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, available [here](#).

¹⁰ European Commission, Communication on Business Taxation for the 21st Century, available [here](#).

This table shows the defensive measures applicable in an EU Member State.

It follows that more than half of the EU Member States apply more than one defensive measure.

For the purposes of this publication, a measure was considered defensive even if it is also linked to a domestic list (next to the EU list) of an EU Member State. The same is true if the measure is linked to a domestic list of an EU Member State that by coincidence includes all the jurisdictions included in the EU list.

Table 1: Overview of defensive tax measures in EU Member States

EU Member State	1. Non-deductibility of costs	2. CFC rules	3. Withholding Tax measures	4. Limitation of the participation exemption on dividends
Austria		X		X
Belgium	X (reporting obligation)	X		X
Bulgaria			X	
Croatia		X	X	
Cyprus			X	
Czech Republic		X		
Denmark	X		X	
Estonia			X	X
Finland		X		
France	X	X	X	X
Germany	X	X	X	X
Hungary		X		
Ireland		X	X (reporting obligation)	
Latvia	X	X	X	X
Luxembourg	X			
Netherlands		X	X	
Malta				X
Poland	X	X	X	
Portugal	X	X	X	X
Romania	X			
Slovakia	X		X	X
Slovenia	X		X	X
Sweden	X			

This table indicates whether an EU Member State follows the EU list dynamically or statically. It also shows the benchmark to determine which version of the EU list is used for the application of defensive measures.

EU Member States either follow the EU list dynamically or statically. Dynamic listing takes place when the listing or delisting of a jurisdiction takes effect to the application of a defensive measure automatically. This means that the EU Member State does not need to take any action to give effect to the most recent EU list. On the contrary, static listing takes place when an action

is required by the EU Member State (e.g. by updating the domestic list or specifying the listed jurisdictions by law). This means that an EU Member State that follows the EU list statically may not always use the most recent EU list when applying a defensive measure.

Table 2: EU list: dynamic or static listing

EU Member State	Dynamic or static listing	Benchmark
Austria	Dynamic	At the end of the tax year
Belgium	Dynamic	Date recording of expenses for non-deductibility, end of the taxable period for CFC rules and participation exemption
Bulgaria	Dynamic	Accrual date of taxable transaction
Croatia	Dynamic	
Cyprus	To be determined	To be determined
Czech Republic	Dynamic	End of taxpayer's tax period
Denmark	Static	Specified by law
Estonia	Dynamic	
Finland	Dynamic	End of taxpayer's current and previous fiscal year
France	Static	Specified by law on an annual basis
Germany	Static	Specified by law
Hungary	Dynamic	
Ireland	Static and Dynamic	Static (CFC) and Dynamic (WHT - reporting obligation)
Latvia	Static	Issuance of resolution
Luxembourg	Static	Specified by law on an annual basis
Netherlands	Static	Specified by law on an annual basis
Malta	Dynamic	Minimum period of 3 months during the year immediately preceding the year of assessment
Poland	Static	Specified by law
Portugal	Static	Specified in a decree
Romania	Dynamic	Date recording of expenses
Slovakia	Static	1 January of the calendar year
Slovenia	Static	Specified by law on an annual basis
Sweden	Dynamic	



PwC observations

- Not all EU Member States managed to meet the political commitment to introduce a defensive measure as of 1 January 2021:
 - **Bulgaria** extended the definition of the jurisdictions to which their withholding tax measures apply to include jurisdictions on the EU list, with effect from 17 February 2021.
 - In **Luxembourg**, the non-deduction measure is applicable only regarding expenses accruing as of 1 March 2021.
 - In **Malta**, the participation exemption is limited on dividends paid as of 16 April 2021.
 - In **Denmark**, the defensive measures are effective as of 1 July 2021.
 - In **Germany, Estonia** and **Slovenia** defensive measures apply as of 1 January 2022.
 - Finally, **Cyprus** will apply a withholding tax regarding certain payments to EU listed jurisdictions as of 31 December 2022.
- Certain EU Member States apply a defensive measure linked to both the EU list and a domestic list. This is the case, for instance, in **Belgium, Bulgaria, France, Hungary, the Netherlands, Poland** and **Slovakia**.
- Although **Portugal** does not refer to the EU list for the application of tax measures, the [Portuguese list of countries](#), territories and regions that provide a more favorable tax regime includes all jurisdictions that are currently included in the EU list. Interestingly enough, all jurisdictions currently included in the EU list have been included in the Portuguese list since its initial publication in 2004.
- Although **Italy** has not linked the application of the withholding tax exemption/reduction on interest payments to the EU list (as Samoa, Trinidad and Tobago, US Virgin Island are still in the Italian “whitelist”), the Italian tax authorities may still object to the application of the exemption/reduction from withholding tax under the Italian GAAR leveraging on the fact that, among other factors, the receiving company is a resident in a listed jurisdiction.
- EU Member States that do not link the EU list to the application of at least one defensive tax measure may use the EU list for other measures: for instance, the EU list has been used for DAC6 purposes.
- There is some degree of variation when states apply a defensive measure. For instance, in **Belgium**, there is a reporting obligation for payments made to tax havens provided that the total of the payments exceeds EUR 100,000 in the taxable period. Not reported payments or reported payments which cannot be justified based on specific grounds are not deductible.

A reporting obligation also exists in **Ireland**. Companies that entered into transactions, involving interest, royalties or dividends, with persons in certain jurisdictions are required to disclose the fact that the transaction occurred where the jurisdiction is on the list at the time of filing the annual Form CT1. The specific question on Form CT1 tax return is ‘During the accounting period, did the company enter into a transaction of paying royalty, interest or dividend to a person in any jurisdiction which is currently considered by the EU Member States collectively as a non-cooperative jurisdiction for tax purposes?’

- There is some degree of variation in the types of costs incurred in listed jurisdictions that are deemed non-deductible by EU Member States. In some EU Member States, such as **France** and **Luxembourg**, both interest and royalties do not qualify as deductible costs if they are paid to a company in a listed jurisdiction. Whereas in other EU Member States, such as **Sweden** and **Slovenia**, only interest is deemed as a non-deductible cost. In the same vein, there is a degree of variation in the types of payments to which withholding tax measures apply: for example, in **Bulgaria** a withholding tax applies to penalties or damages payments (except for insurance compensations) accrued to entities in EU listed jurisdictions, while in **the Netherlands** a withholding tax applies to interest and royalty payments.
- From the above it follows that EU Member States that apply both non-deductibility as well as withholding tax measures, never apply both measures to the same type of costs/payments. This is to avoid double taxation. **Poland**, for example, applies non-deductibility measures to costs related to advisory services, licenses and intellectual property, and applies withholding tax measures to payments related to the acquisition of shares and receivables.
- In **France**, some defensive measures apply with a so-called “safeguard clause”. For example, the French participation exemption regime is not applicable to dividends received from a company established in a jurisdiction included in the EU list which does not meet the criteria 2.2 of the list¹¹. However, the participation exemption regime would be applicable if the parent company establishes that the transactions of the company established outside France in which the shareholding is acquired, relate to actual transactions which have neither the purpose nor the result of enabling profits to be located in an EU non-cooperative jurisdiction for the purpose of tax fraud (safeguard clause).

¹¹ The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.

A similar approach has been taken in relation to the French tax measures for the non-deductibility of certain costs. This is also the case in **Romania**: the deduction of costs is limited if the relevant transactions do not have an economic scope (i.e. in the initial form the non-deductibility was applicable even if the transaction had economic scope).

- **France, Germany, Latvia and Portugal** apply all four defensive measures.
- Most EU Member States have decided to link the CFC measure and the withholding tax measure with the EU list. The limitation of the participation exemption is the least popular defensive measure amongst EU Member States.
- **The Netherlands** will introduce a conditional withholding tax on dividends paid to low tax jurisdictions as of 1 January 2024. The withholding tax will apply to payments of dividends to related companies established in (i) jurisdictions that have a statutory tax on profits at rate of less than 9%; or (ii) jurisdictions that are on the EU list. See here for more information: [Netherlands Proposes Conditional Withholding Tax on Dividends from 2024](#).
- In **Malta**, the limitation of the participation exemption will only apply to dividend income derived from a participating holding in a body of persons resident for tax purposes in a jurisdiction that is included in the EU list for a minimum period of 3 months during the year immediately preceding the year of assessment.
- In **Romania**, the non-deductibility of the expenses is applicable only for transactions with jurisdictions mentioned in the Annex I of the EU list. In the initial bill proposal, also jurisdictions mentioned in the EU grey list.



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