Overview of defensive tax measures in EU Member States

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Introduction

On 22 February 2021, the Council of the European Union (the Council) published the updated EU list of non-cooperative jurisdictions (the EU list). According to the Council, the list includes jurisdictions worldwide 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 reforms necessary to comply with a set of objective tax good governance criteria. These criteria relate to tax transparency, fair taxation and implementation of international standards designed to prevent tax base erosion and profit shifting."[1]

The first EU list was established in December 2017. Since that date, the EU list has been revised several times with the most substantial amendments taken place in March 2019 and February 2020. From 2020, the list is updated twice a year.

> As of 22 February 2021, the EU list is composed of the following jurisdictions: American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, the US Virgin Islands and Vanuatu.[2]

Giving effect to the EU list in tax area and non-tax area defensive measures

According to the Council conclusions of 5 December 2017[3], "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.[4] In addition EU Member States committed,[5] 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.**[6]

For the purposes of this publication, the above four legislative measures will be called "defensive measures".[7]

1 Council's Press release of 22 February 2021: Taxation: Council adds Dominica to the EU list of non-cooperative jurisdictions and removes Barbados (available *here*)
2 Compared to the October 2020 version of the EU list, Dominica has been added to the EU list while Barbados was removed.
3 Council Conclusions (December 2017), available *here*.
4 Council, Guidance on defensive measures in the tax area towards non-cooperative jurisdictions (available *here*)
5 We understand that this is a politically binding committement only and not a legally binding one.
6 It should be mentioned that the EU list is also important for DAC6 purposes. For instance, there could be a reportable cross-border arrangement if the recipient is resident for tax purposes in a jurisdiction included in the EU list.
7 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). However, if the domestic list does not include all jurisdictions included in the EU list or refers to another list or international criteria (e.g. at the OECD level), such a measure was not considered defensive.

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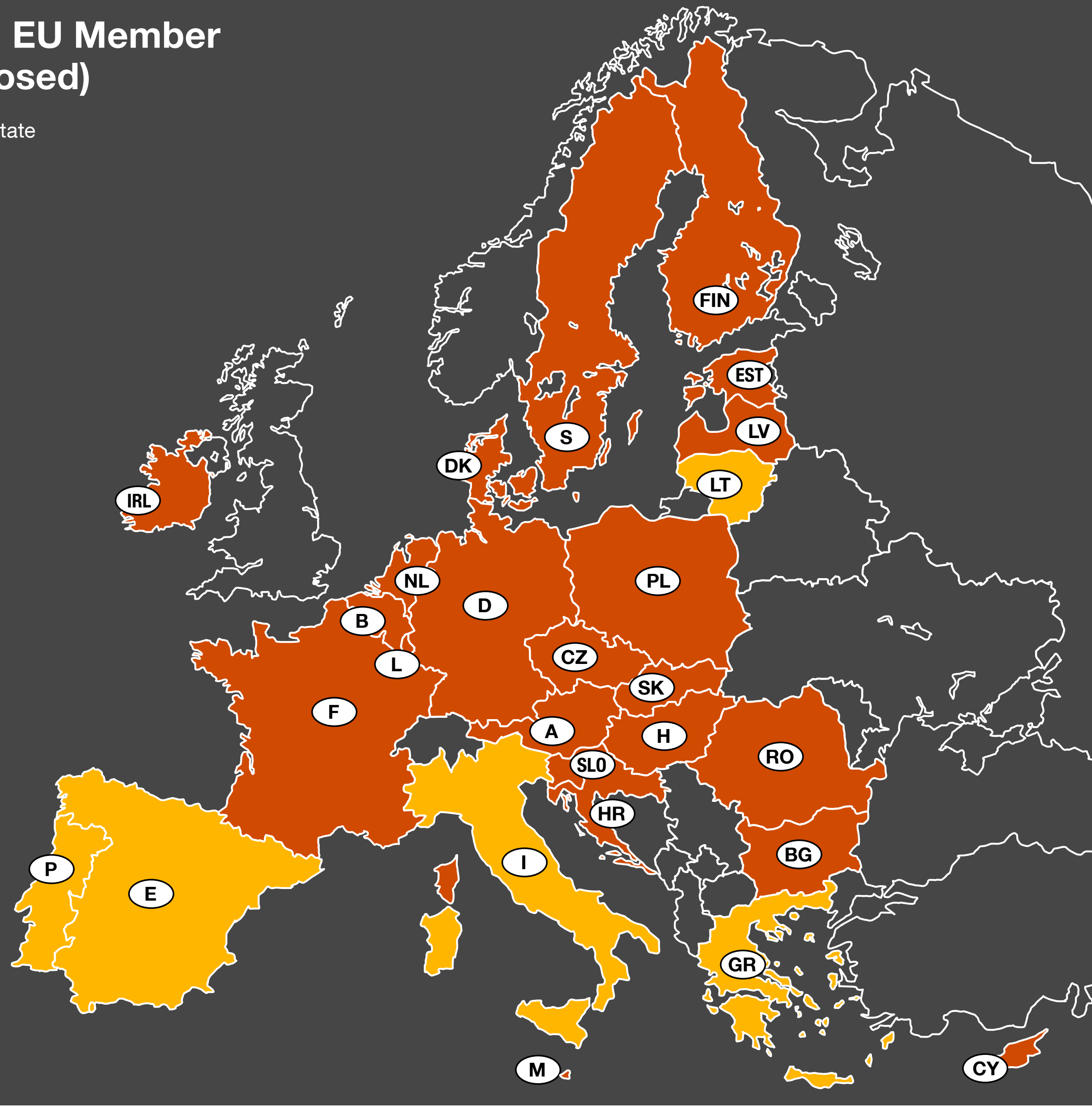
Defensive tax measures in EU Member States (applicable or proposed)

This infographic shows whether an EU Member State applies or has proposed a defensive measure.

5 No measures based on EU list
Greece, Italy, Lithuania, Portugal, Spain

22 Some measures based on EU list
Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Latvia, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Slovenia, Sweden

It follows from this infographic that most EU Member States have introduced or proposed a defensive tax measure (status January 2021).



Overview of defensive tax measures in EU Member States

Most EU Member States have implemented or proposed at least a defensive tax measure (status January 2021).

It follows that some EU Member States apply more than one defensive measure.

Type of applicable or proposed defensive measures

The table below focuses on the EU Member States that have implemented or already apply a defensive measure. The table shows the type of defensive measure or measures applicable in an EU Member State. It also indicates whether the EU Member State at hand follows the EU list dynamically (e.g. at the time that a transaction takes place or at the end of the tax period) or statically (e.g. through an annual update or determination of the jurisdictions in the relevant provision).

EU Member State	1. Measures for non-deductibility of certain costs	2. CFC rules	3. Withholding tax measures	4. Limitation of participation exemption on dividends	Dynamic or static listing
Austria		**X**		**X**	Dynamic (end of the tax year of the foreign company)
Belgium	**X** (reporting obligation)	**X**		**X**	Dynamic (date recording of expenses for 1, list available at the end of the taxable period for 2 and 4)
Bulgaria			**X**		Dynamic (accrual date of the transaction)
Croatia		**X**	**X**		Dynamic
Cyprus			**X** (draft)		TBD
Czech Republic		**X**			Dynamic (list available at the end of the tax period)
Denmark	**X**		**X**		Static (specified in law)
Finland		**X**			Dynamic
France	**X**	**X**	**X**	**X**	Static (specified by law on an annual basis)
Estonia			**X** (2022)	**X** (2022)	Static (update twice per year)
Germany	**X** (draft, 2022)	**X** (draft, 2022)	**X** (draft, 2022)	**X** (draft, 2022)	Static (specified by law)
Hungary		**X**			Static (specified by law)
Ireland		**X**	**X** (reporting obligation)		Dynamic (moment of filing of the tax return)
Latvia	**X**	**X**	**X**	**X**	Static (new resolution required)
Luxembourg	**X**				Static (specified by law on an annual basis)
Netherlands		**X**	**X**		Static (specified by law on an annual basis)
Malta				**X** (draft)	Dynamic but minimum period of 3 months during the year immediately preceding the year of assessment (draft)
Poland	**X**	**X**	**X**		Static (specified by law)
Romania	**X**				Dynamic (date recording of expenses)
Slovakia	**X**		**X**	**X**	Static (specified by law on an annual basis)
Slovenia			**X** (draft)	**X** (draft)	Static (specified by law)
Sweden	**X**	**X**			Dynamic (for 1) Static (for 2 - with regard to Trinidad)

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Interesting observations

- Certain EU Member States apply a defensive measure linked to the EU list and a domestic list. This is the case, for instance, in **Belgium**, **Bulgaria**, **France**, **Hungary**, the **Netherlands** and **Poland**.

- There are some EU Member States that apply a measure that is only linked to a **domestic list** of non-cooperative jurisdictions/jurisdictions with a preferential tax regime. For the purposes of this publication, these measures were not considered defensive. This is the case, for instance, in **Greece**, **Lithuania**, **Portugal** and **Spain**. This domestic list may include certain jurisdictions that are already included in the EU list. For instance, the domestic list of **Lithuania** includes all countries included in the EU list except for Guam and Panama. In **Italy**, the withholding tax exemption on certain interest payments applies only if the recipient is resident in a country included in the domestic white list provided by the Italian Ministry of Economy and Finance. Notably, the list contains certain jurisdictions that are included in the EU list.

- 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 jurisdiction included in the EU list which does not meet the criteria 2.2 of the list[8]. 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). A similar approach has been taken in relation to the French tax measures for the non-deductibility of certain costs.

- In certain EU Member States, there may be a reporting obligation if a transaction involves a jurisdiction included in the EU list. 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. For this measure "tax haven" is defined based on (i) a Belgian list of tax havens, (ii) the OECD blacklist and (iii) (as from 1 January 2021) the EU list that was applicable at the moment that the payment took place. In **Luxembourg**, 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 a jurisdiction included in the EU list.

- Most defensive measures introduced by EU Member States apply as per 1 January 2021. In **Luxembourg**, the non-deduction measure is applicable only for expenses accruing as due as of 1 March 2021 (thus not as of 1 January 2021). In **Germany**, the proposed rules apply as per 1 January 2022 (or as of 1 January 2023 with respect to jurisdictions that were not yet included in the EU list as of 1 January 2021). In **Estonia** the national blacklist will be aligned with the EU list as per 1 January 2022 and will be updated twice per year.

- In January 2021, the Department of Finance published a corporation tax roadmap update, which provides an indication of the actions that **Ireland** will take to ensure that the Irish corporation tax system remains competitive, fair and sustainable into the future. In this context, the roadmap suggests that additional additional defensive measures in respect of EU list countries, such as denial of tax deductions, will be considered in 2021.

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