PwC NL Tax
Knowledge Centre

Overview of tax area defensive measures in EU Member States

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The results of this factsheet are based on the input that was provided by the members of PwC's EU Direct Tax Group ("EUDTG") from 25 countries (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the UK).

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On 5 December 2017, the Council of the European Union (the Council) adopted the first EU list of non-cooperative jurisdictions (the EU list). The EU list consists of non-EU countries that encourage abusive tax practices, which erode EU Member States' corporate tax revenues. According to the Council, the EU list "is a tool to tackle: a) tax fraud or evasion, b) tax avoidance and c) money laundering." Since December 2019, 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 6 October 2020, the EU list is composed of the following jurisdictions: American Samoa, Anguilla, Barbados, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, the US Virgin Islands and Vanuatu.

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

According to the Council, "it is important that EU Member States put in place efficient defensive measures in non-tax and tax areas. Defensive measures help to protect their tax revenues, and fight against tax fraud, evasion and abuse."

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 tax area defensive measures. In addition EU Member States committed, 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.

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

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. Council conclusions, 5 December 2017

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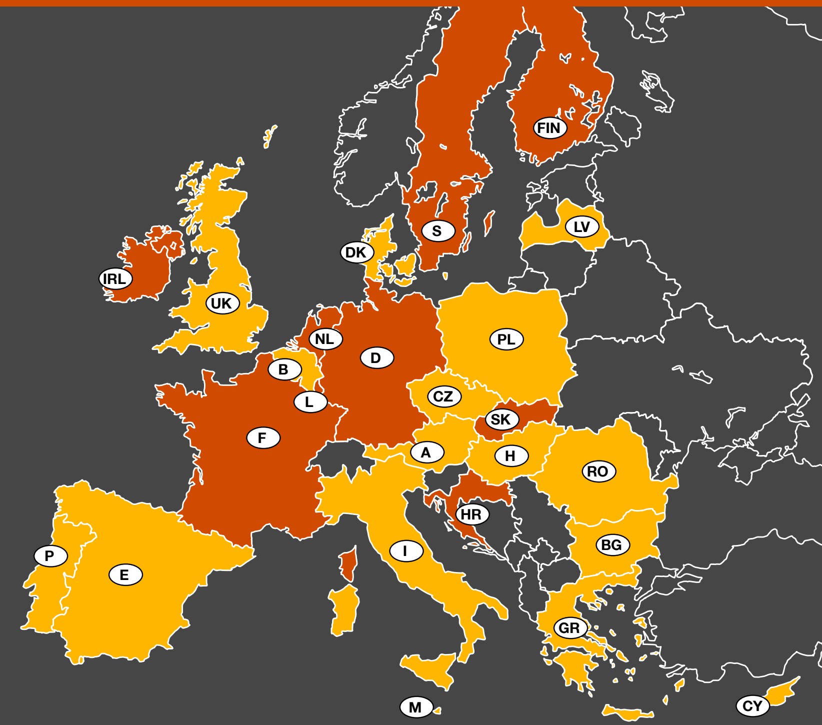
Defensive measures in EU Member States (applicable or proposed)

This infographic shows whether an EU Member State applies or has proposed a particular tax area defensive measure

9 Some measures based on EU list (applicable or proposed)
Croatia, Finland, France, Germany, Ireland, Luxembourg, Netherlands, Slovakia, Sweden

16 No measures based on EU list
Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Greece, Hungary, Italy, Latvia, Malta, Poland, Portugal, Romania, Spain, United Kingdom

"It follows from this infographic that most EU Member States have not introduced a defensive measure (status July 2020)."



Type of applicable or proposed defensive measures

The below table focuses on the types of defensive tax area measures that EU Member States apply or have proposed.

EU Member State	Measures for non-deductibility of certain costs	CFC rules	Withholding Tax measures	Limitation of the participation exemption on dividends
Croatia		X	X	
Finland		X		
France	X		X	X
Germany	X		X	X
Ireland		X (draft)		
Luxembourg	X (draft)			
Netherlands		X		
Slovakia	X		X	X
Sweden	X (draft)	X (draft)		

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

Overview of tax area defensive measures in EU Member States

Interesting observations

- Certain EU Member States apply the EU list, in parallel with a domestic list, for the purposes of the application of a defensive measure. This is the case, for instance, in **the Netherlands** and **France**.

- There are some EU Member States that apply a defensive measure that uses a domestic list of non-cooperative jurisdictions/jurisdictions with a preferential tax regime. This is the case, for instance, in **Belgium**, **Greece**, **Poland**, **Portugal** and **Spain.** This domestic list may include certain jurisdictions that are already included in the EU list. For the purposes of this publication, these measures were not considered "defensive" since their application was not linked with the EU list.

- Although there may be no defensive measures in an EU Member State, there may be a reporting obligation in the tax return when a non-cooperative jurisdiction is involved in a particular transaction. This is the case in **Malta**. In addition, the local tax authorities in Luxembourg have indicated that they will particularly scrutinize the transactions involving related companies (in the meaning of article 56 of the Luxembourg Income Tax Law) which are located in non-cooperative jurisdictions.

- In **Italy**, 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.* 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.

- **Germany** has already enacted legislation introducing measures for non-deductibility of certain costs, withholding tax measures and measures limiting the participation exemption (German Act to Counter Tax Evasion, the Act). Under this Act, it is essentially possible for the Federal Ministry of Finance (FMOF) to publish a list of countries that do not exchange information at all. As of now, this list is still empty but can be added with such states via a circular of the FMOF.

- In **Sweden**, new rules will ensure the application of the CFC rule to Trinidad and Tobago (which at the time of the proposal, and currently, is listed on the EU list). The reason for this is that Sweden has a double tax treaty with Trinidad and Tobago which can affect the application of the proposed rule for non-deductibility for interest costs (another defensive measure) in relation to this jurisdiction. The amendment means that Trinidad and Tobago are removed from the list of approved countries (white list).

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

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