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EU list: An Overview of Defensive Tax Measures in the EU

EU Gateway – an initiative of PwC Netherlands – is dedicated to provide coordinated support for clients to navigate through the complex EU tax and legal landscape. Through our extensive network of tax and legal specialists we offer coordinated assistance, helping clients understand and comply with the complex tax and legal regulations in the EU.

The EU Gateway team takes a proactive role in informing clients on important tax, legal and transfer pricing developments in the EU and EU27 through the monthly and (free of charge) EU Gateway newsletter, implementation overviews, and Thought Leadership publications.

For questions regarding this publication, you can contact:

Dr. Vassilis Dafnomilis
Senior Manager ITS/
Knowledge Centre, EMEA
E: vassilis.dafnomilis@pwc.com

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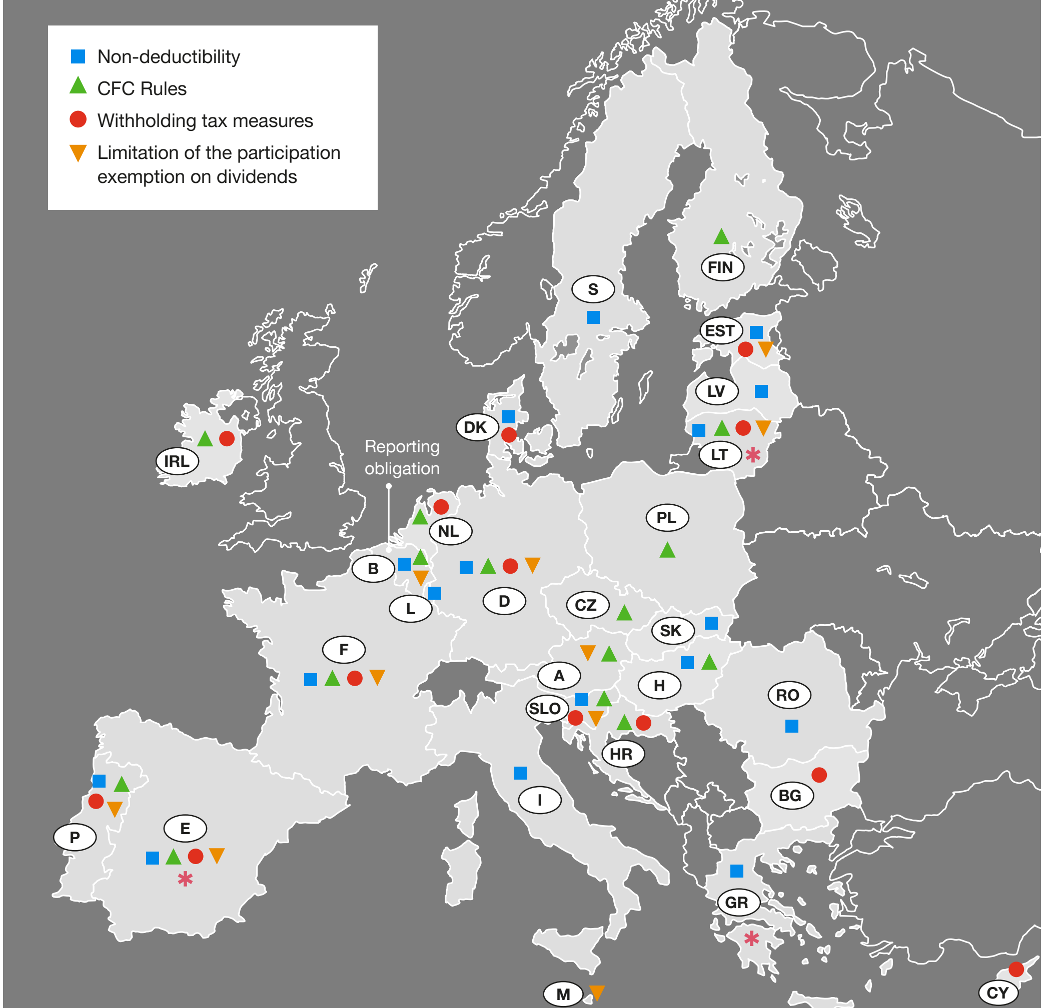
The EU list of non-cooperative jurisdictions (the EU list) is a tool of the European Union to promote fair tax competition and address harmful tax practices. The EU list includes non-EU jurisdictions that either have not engaged in a constructive dialogue with the EU on tax governance or have failed to deliver on their commitments to implement the necessary reforms. To be considered cooperative for tax purposes, jurisdictions are screened by the EU Code of Conduct Group (Business Taxation) on the following criteria: 1. tax transparency, 2. fair taxation, and 3. implementation of anti-BEPS measures.

Defensive tax measures tracker (July 2024)



* No entire alignment between EU list and national list of non-cooperative jurisdictions.

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Based on the latest version of the EU list (20 February 2024), the following jurisdictions are considered non-cooperative: American Samoa, Anguilla, Antigua and Barbuda, Fiji, Guam, Palau, Panama, Russia, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu. The list is updated twice per yearly.

Why monitoring EU list developments is important?

The presence of an entity in an EU-listed jurisdiction, or the execution of any inbound or outbound transaction involving such jurisdictions, may trigger the application of defensive tax measures in most EU Member States. Companies planning to set up within the EU or engaging in commerce among EU Member States must recognize the potential risks when dealing with entities or transactions associated with EU-listed jurisdictions.

Moreover, considering the EU list is revised biannually, the inclusion of a jurisdiction can have direct implications for specific EU Member States in relation to their defensive tax measures. Monitoring these measures, whether already in effect or forthcoming, in each EU Member State, as well as keeping up with policy developments concerning the EU list, is essential. PwC's expansive network across Europe makes it possible for the EU gateway team to provide you valuable assistance in these areas.

Application of tax defensive measures – national law

EU Member States apply administrative measures such as reinforced monitoring of certain transactions and audits when a transaction involves an EU listed jurisdiction. At the same time, they apply one (or, sometimes, more than one) of the following 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.

These measures are part of national legislation, and it is up to the individual EU Member States to implement them in a specific manner.

EU legislation and the EU list

Next to the defensive measures, the EU list is used in EU legislation, i.e. legislation that has been adopted by the EU institutions. EU Member States have already implemented or will implement this legislation into their national laws.

- **Mandatory Disclosure / DAC6:** The EU list is used for Mandatory Disclosure purposes in the EU. DAC6 relates to cross-border tax arrangements meeting specific characteristics (hallmarks). These tax arrangements must be reported if within scope, regardless of national law justification. One hallmark (C1bii) requires reporting of deductible cross-border payments between associated enterprises if the recipient is resident for tax purposes in a jurisdiction on the EU list.

- **Public Country-by-Country Reporting:** The EU list is also linked to the public Country-by-Country Reporting (CBCR) Directive. This Directive requires multinational groups or standalone entities with consolidated revenue of at least €750m over two years to publicly disclose, amongst others, corporate income tax paid in each EU Member State and jurisdictions on the EU list or grey list. Grey list includes cooperative jurisdictions subject to the successful delivery of their commitments.

- **Faster and Safer Relief of Excess Withholding Taxes (FASTER) Directive:** The list is used for the registration procedure in the FASTER Directive. The Directive aims to make withholding tax procedures efficient and secure in the EU. Certain financial intermediaries must register in a national financial intermediaries register, but those in non-cooperative jurisdictions on the EU list are ineligible for registration.

Temporal effects of listing and delisting

EU Member States follow the EU list either dynamically or statically:

- Dynamic listing: Jurisdiction listings or delistings automatically affect the application of defensive measures. The EU Member State does not need to take any action to apply the most recent EU list.
- Static listing: Action is required by the EU Member State, such as updating the domestic list or specifying listed jurisdictions by law. This means the most recent EU list may not always be used when applying a defensive measure.

Highlighted national developments

Expenses borne for transactions with entities resident or established in a jurisdiction included in the EU list are deductible for Italian CIT purposes within the limit of their fair market value, unless actual evidence of their economic soundness and effective execution is provided to the tax authorities. Notwithstanding all the above, a proper disclosure of such transactions is to be provided in the tax return. Penalties for omitted disclosure apply. Corporations applying the cooperative compliance regime can define in advance with tax authorities the fair market value for the transactions at hand.

The Netherlands applies a conditional withholding tax (WHT) on interest and royalty payments (since 2021) and on dividends (since 2024). This tax is only levied on these payments to affiliated companies in designated low-tax jurisdictions (i.e. jurisdictions with a statutory CIT rate of less than 9%) or on the EU list for non-cooperative jurisdictions and in certain (tax abuse) situations. In principle, the tax is withheld from the company that makes the payment, but levied from the recipient. The October version of the EU list is always taken into account for the application of defensive tax measures in the Netherlands (the conditional WHT and the CFC measures).

Finance (No.2) Act 2023 included new measures on the tax treatment of distributions (including dividends), royalties, and interest payments to recipients in no-tax and zero tax jurisdictions, as well as those included on the EU list of non-cooperative jurisdictions: the new measures propose that withholding tax should be applied on applicable payments by Irish companies to associated entities that are resident in no-tax, zero-tax or non-cooperative jurisdictions.

Furthermore, Ireland has consulted on legislation that would provide a 100% corporation tax relief on qualifying dividends received from entities in the EU/EEA and jurisdictions with a double taxation agreement with Ireland, excluding dividends from jurisdictions on the EU list of non-cooperative jurisdictions. To qualify, companies must have a minimum 5% control over a foreign subsidiary's ordinary share capital for at least twelve months.