The ECOFIN approved (i) the EU list of non-cooperative jurisdictions in taxation matters and (ii) the conclusions on the taxation of profits in the digital economy

The EU list of non-cooperative jurisdictions

During today meeting the ECOFIN approved the conclusions on the EU list of non-cooperative jurisdictions in taxation matters. The publication of such list was envisaged by the Council in May 2016 as part of its external tax strategy and plan for measures against tax treaty abuse.

The approved final list includes the following 17 jurisdictions: American Samoa, Bahrain, Barbados, Grenada, Guam, Republic of Korea, Macao SAR, Marshall Islands, Mongolia, Namibia, Palau, Panama, Saint Lucia, Samoa, Trinidad and Tobago, Tunisia, United Arab Emirates.

The inclusion in the list is based on the assessment of three cumulative sets of criteria, approved by the Council in November 2016:

- Criteria that a jurisdiction should fulfil for being compliant on tax transparency;
- Criteria that a jurisdiction should fulfil for being compliant on fair taxation;
- Implementation of anti-BEPS measures.

According to the Council's conclusions, the inclusion in the list should trigger the application of defensive measures both of tax and non-tax nature. With reference to tax measures:

- the Council recommends Member States to apply at least one of the followings:
  - Reinforced monitoring of certain transactions;
  - Increased audit risks for taxpayers benefiting from the regimes at stake;
  - Increased audit risks for taxpayers using structures or arrangements involving these jurisdictions;
- Member States could apply additional domestic anti-avoidance measures such as: non-deductibility of costs; CFC rules; withholding tax measures; limitation of participation exemption; switch-over rule; reversal of the burden of proof; special documentation

requirements; mandatory disclosure by tax intermediaries of specific tax schemes with respect to cross-border arrangements;

- Member States could use the list as a tool to facilitate the operation of the relevant anti-abuse provisions introduced upon the implementation of the ATAD (Council Directive (EU) 2016/1164 of 12 July 2016, laying down rules against tax avoidance practices that directly affect the functioning of the internal market).

The list is intended to be regularly reviewed and updated at least once per calendar year as the situation will be continuously monitored.

The conclusions also include a second list of 47 jurisdictions (including Hong Kong, Oman, Qatar, Switzerland, Jersey, Turkey, Liechtenstein, and San Marino) that agreed to amend their legislations in order to comply with EU screening criteria by the end of 2018 (or, in some cases, 2019). The Code of Conduct Group on Business Taxation will monitor the implementation of such political commitments.

Finally, the screening process for jurisdictions of the Caribbean area (Anguilla, Antigua and Barbuda, Bahamas, British Virgin Islands, Dominica, Saint Kitts and Nevis, Turks and Caicos Islands, US Virgin Islands) has been put on hold due to the natural disaster that affected the region in September 2017. The Council is committed to complete it by the end of 2018.

Conclusions on the taxation of profits in the digital economy

In the same meeting the ECOFIN adopted the conclusions on the taxation of profits in the digital economy. In such conclusions, the ECOFIN observes that the traditional concept of permanent establishment relies on physical presence and therefore is not adequate to address the challenges raised by the digital economy. As far as profits are derived from digital activities, the Council takes the view that the absence of physical presence should not per se prevent a State from taxing those profits to the extent that an appropriate nexus reflecting value creation is used to source such profits in that State.

In this respect, the Council calls for a revision of international tax rules that could have a twofold effect. First the Council envisages the possible introduction of the "virtual permanent establishment" concept, which could take into account the elements referred to in the OECD BEPS report on Action 1 (revenue-based, user-based and digital factors) and would attribute importance to user data. Second, the Council also envisages the amendments of existing rules on transfer pricing and profit attribution to permanent establishments, which would become necessary as a consequence of the introduction of the "virtual permanent establishment" concept.

Accordingly the ECOFIN calls for global action and encourages close cooperation between the EU, the OECD, and other international partners for revising the current legal framework in order to respond to the challenges of the digital economy. Meanwhile, the ECOFIN also invites the European Commission to assess temporary solutions, such as an equalization levy charged on the revenues from digital activities, given the interest of many Member States to introduce similar levies not covered by double tax conventions. The Commission proposals are expected by early 2018.

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