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EU “Black Lists” Bahrain and UAE as Non-Cooperative Jurisdiction for Tax Purposes

On 5 December 2017, the Economic and Financial Affairs Council (ECOFIN) determined a list of 17 non-cooperative jurisdictions, which included Bahrain and the United Arab Emirates (UAE). This list was established based on three (screening) criteria: tax transparency, fair taxation (no harmful tax regimes) and implementation of BEPS minimum standards.

The other jurisdictions on the EU “black list” are: American Samoa, Barbados, Grenada, Guam, Korea (Republic of), Macao SAR, Marshall Islands, Mongolia, Namibia, Palau, Panama, Saint Lucia, Samoa, Trinidad Tobago and Tunisia. Inclusion on the listing could have implications for the jurisdictions named. For instance, ECOFIN recommends, but does not oblige, the Member States to also apply tax sanctions towards the listed jurisdictions. The EU may apply non-tax sanctions.

The screening process for certain other jurisdictions (Anguilla, Antigua and Barbuda, Bahamas, British Virgin Islands, Dominica, Saint Kitts and Nevis, Turks and Caicos Islands and US Virgin Islands) was put on hold; it is expected the process will be completed by the end of 2018.

Sanctions

The black listed jurisdictions may face sanctions imposed by the Member States in the form of tax measures and by the EU in the form of ‘non-tax’ measures.

The ‘non-tax’ measures are linked to EU funding in the context of the European Fund for Sustainable Development, the European Fund for Strategic Investment and the External Lending Mandate. Such EU funding may not be channelled through entities in the black listed jurisdictions.

The ECOFIN recommends, but does not oblige, that Member States take tax sanctions against the listed jurisdictions including: non-deductibility of costs, CFC rules, withholding taxes, limitation on participation exemption, switch-over rules and reversal of burden of proof.

It also recommends that Member States take administrative tax measures against the EU black listed jurisdictions, such as increased audit risks for

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taxpayers benefiting from certain regimes or using structures involving these jurisdictions. No guidance is provided as to when the Member States should take the recommended sanctions.

The ECOFIN intends to monitor and update the EU black list at least once a year. The blacklist is already linked with other EU legislative proposals, such as stricter reporting requirements for multinationals with activities in listed jurisdictions. In the proposed Directive of mandatory disclosure rules for intermediaries, a tax scheme routed through an EU black listed jurisdiction will be automatically reportable to tax authorities.

Finally, further provisions may be introduced which would result in structures with entities based in EU black listed jurisdictions being regarded as “artificial structures” by Member States with the consequence that taxation for these entities would be based purely on commercial considerations.

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