

ATOZ ALERT

EU list of non-cooperative jurisdictions for tax purposes updated by the EU Council

8 October 2024

During today's ECOFIN meeting, the EU Council [approved the updated EU list of non-cooperative jurisdictions for tax purposes](#) ("Blacklist"). The Blacklist is updated twice a year (in February and October) by the EU Council based on criteria relating to tax transparency, fair taxation and measures against base erosion and profit shifting ('anti-BEPS measures'). By reference to this list, Member States can put in place defensive measures to help protect their tax revenues and fight against tax fraud, evasion and abuse.

The update of the Blacklist is an important step as it directly impacts the scope of application of three different Luxembourg tax measures: 1) the measure denying the corporate income tax deduction of interest and royalty expenses due to entities located in non-cooperative tax jurisdictions, 2) the requirement to disclose transactions with entities located in non-cooperative jurisdictions and 3) the mandatory disclosure rules applicable to certain cross-border arrangements under DAC6.

We will analyse the Blacklist update and its implications for Luxembourg below.

Update of the EU list of non-cooperative jurisdictions for tax purposes

Today, the EU Finance Ministers decided to remove **Antigua and Barbuda** from the Blacklist following changes to the applicable rules in this jurisdiction, which was included in the Blacklist in October 2023.

As of 8 October 2024, following the delisting of Antigua and Barbuda, the Blacklist now includes the 11 following jurisdictions (the "**Blacklisted Jurisdictions**"): American Samoa; Anguilla; Fiji; Guam; Palau; Panama; Russia;

Samoa; Trinidad and Tobago; US Virgin Islands and Vanuatu. The list will become official upon publication in the Official Journal (“OJ”) to take place in the coming days.

Impact on the measure denying the corporate income tax deduction of interest and royalty expenses due to entities located in non-cooperative tax jurisdictions

Based on Article 168-5 of the Luxembourg Income Tax Law (“LITL”), under certain conditions, interest and royalties due to entities located in Blacklisted Jurisdictions are not deductible for corporate income tax purposes. As a matter of principle, the measure denying the deduction of interest and royalties applies based on the latest version of the Blacklist available as of 1 January of the relevant fiscal year. The Blacklist approved by the Council on 8 October 2024 will be the latest version of the Blacklist available as of 1 January 2025.

However, when it comes to the removal of a jurisdiction from the Blacklist, as is the case here, the rules are as follows:

- If a country is removed from the Blacklist in the February update but is added back in the October update, since the latest list available as from 1 January is always the list to refer to when applying the measure, the fact that the country was removed from the list in February will have no effect and the measure will apply with respect to interest and royalties paid to this country for the entire year as well as for the subsequent year.
- If a country is removed from the Blacklist in the February update and is not added back to the Blacklist prior to 1 January of the subsequent year, this country will no longer be taken into account for interest and royalties due as from the date of publication of the relevant Blacklist in the OJ of the EU (i.e. the removal will have an immediate effect as from February).
- If a country is removed from the Blacklist in the October update, this country will no longer be taken into account for interest and royalties due as from the date of publication of the relevant Blacklist in the OJ of the EU (i.e. the removal will have an immediate effect as from October).

As a result, for 2024, regarding the consequences of the removal of Antigua and Barbuda from the Blacklist in the October 2024 update, this country will no longer be taken into account for the deduction limitation rule of Article 168-5 of the LITL in respect to interest and royalties due as from the date of publication of the relevant Blacklist in the OJ of the EU (i.e. the removal will have an immediate effect as from October).

In addition, for 2024, regarding the consequences of the removal of the Bahamas, Belize, Seychelles and Turks and Caicos Islands from the Blacklist in February 2024, interest and royalties due to entities located in those jurisdictions will no longer be targeted by the deduction limitation rule of Article 168-5 of the LITL as from 26 February 2024, the date of publication of the February Blacklist in the OJ of the EU (the removal will have an immediate effect as from February 2024) because they were not added back on the Blacklist at the occasion of the October 2024 update.

For a detailed explanation of the scope of the measure provided by Article 168-5 of the LITL, its conditions and its timing aspects, please read our article ‘New guidelines on Luxembourg defensive measures against non-cooperative jurisdictions for tax purposes’ in our [July 2022 ATOZ Insights](#).

Impact on disclosure requirements based on Circular L.I.R. n° 168/2 of 31 May 2022

Based on Section 4 of Circular L.I.R. n° 168/2 of 31 May 2022, the Luxembourg tax authorities systematically review transactions entered into by Luxembourg corporate taxpayers with related parties (within the meaning of article 56 of the ITL) located in non-cooperative jurisdictions (as listed by the EU) in order to assess whether the terms and conditions of the transactions reflect the arm's length principle. Detailed information on these transactions has to be reported by Luxembourg corporate taxpayers in their corporate tax returns.

The Circular states that the blacklisting as of the end of the accounting year concerned is key for determining whether reporting is required or not. Therefore, since most companies have an accounting year corresponding to the calendar year, reference generally has to be made to the list reflecting the October update of the year concerned. When determining whether a specific transaction of a company with an accounting year corresponding to the calendar year has to be reported in the 2024 corporate income tax return under Circular L.I.R. n° 168/2 of 31 May 2022, reference will have to be made to the newly released October 2024 Blacklist.

However, one should keep in mind that for companies with an accounting year which differs from the calendar year (e.g. for companies with an accounting year starting on 1 March), reference may have to be made to the list reflecting the February update. Thus, for these companies, the list in force as of February 2024 might be relevant. In such case, transactions with entities located in Antigua and Barbuda would have to be disclosed in the 2024 corporate tax returns.

Impact on disclosure requirements under DAC6

The listing of a jurisdiction as non-cooperative may also have an impact on the reporting obligations applicable according to the Luxembourg Law of 25 March 2020 implementing DAC6. Indeed, Hallmark C.1.b) ii) of the Annex to the Law of 25 March 2020 implementing DAC6 covers deductible cross-border payments made between two or more associated enterprises where the recipient is resident for tax purposes in a jurisdiction which has been assessed as being non-cooperative. This hallmark is not subject to the main benefit test.

Therefore, reference should be made to the Blacklist in force at the time the arrangement was implemented and the listing or delisting of a jurisdiction after the arrangement has been implemented should not have any retroactive effect. In other words, reporting should only be required if the arrangement with the entity located in the jurisdiction was implemented at the time when this jurisdiction was on the Blacklist.

As a consequence, arrangements implemented with Antigua and Barbuda on or after the publication of the new Blacklist in the OJ of the EU (publication to take place in the coming days) are no longer to be reported under Hallmark C.1.b) ii). Only arrangements implemented with Antigua and Barbuda on or after the publication of the October 2023 Blacklist and before the October 2024 Blacklist in the OJ of the EU (publication of the October 2024 Blacklist to take place in the coming days) may not have to be reported under Hallmark C.1.b) ii). However, one should keep in mind that as soon as article 168-5 of the LITL applies (provided all its conditions are met), payments to these Blacklisted Jurisdictions are not tax deductible so they no longer fall within the scope of Hallmark C.1.b) ii).

Implications

Luxembourg taxpayers with investments into and from non-cooperative jurisdictions should seek advice from their tax advisers in order to analyse the potential tax impact of the update of the Blacklist on their investments and the potential reporting requirements. The evolution of the legislation of jurisdictions under the radar of the EU Council should also be closely monitored in order to anticipate an addition to or a removal from the Blacklist in the future and thus a change in the scope of application of the Luxembourg measures.

The next revision of the Blacklist is scheduled for February 2025.

Do you have further questions?



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