Analysis

First step towards EU list of 'non-cooperative' jurisdictions

Speed read

On 15 September 2016, the European Commission released the results of the first step towards creating an EU list of 'non-cooperative' tax jurisdictions. This list includes 81 countries and measures them against three risk indicators. The next stage is for member states to agree by January which countries should face further scrutiny. A final list of countries is expected by the end of 2017.

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In June 2015, the European Commission published a list of 30 'non-cooperative tax jurisdictions'. It was met with widespread criticism. The OECD's Pascal Saint-Amans called it 'unhelpful'; some tax campaigners used words like 'subjective' and 'inconsistent'; and, of course, the countries on the list were unimpressed. It was constructed by aggregating EU member states' existing 'blacklists'. Clearly, this was flawed, as only some member states publish a list, and those that do use various different criteria. Therefore, the Commission began a process to create a new robust and definitive EU list.

The EU proposal on public country by country reporting (CBCR) also requires a defined list of havens, as it would require multinationals to publish CBCR data for all EU member states and havens, with only aggregated data for the rest of the world. Furthermore, the EU has suggested in the past that it may impose sanctions on companies 'using' countries on its haven list, and possibly also on the countries themselves.

Accepting that the EU needs a list of havens, the Commission developed a process to determine non-cooperative jurisdictions. In January 2016, as part of its external strategy for effective taxation (www.bit.ly/2darIpX), the Commission proposed a process, which was endorsed by EU finance ministers in May.

What is the process?

Finance ministers agreed three steps.

1. Scoreboard: The Commission will generate an objective list of non-EU countries, determining the potential risk level of each country's tax system in facilitating tax avoidance. This will be presented to member states.

Having preselected countries based on their economic links to the EU and the size and stability of their financial sector, three risk indicators will be applied: transparency and exchange of information for tax purposes; existence of preferential tax regimes; and no corporate income tax or a zero corporate tax rate.

2. Screening: Based on the scoreboard results, member states will then decide which countries should be formally 'screened' by the EU. The Commission and the Code of Conduct Group will carry out the screening. Member states will agree the exact criteria for this screening, but the Commission has suggested the following factors to be taken into account: tax transparency; fair tax competition; BEPS implementation; and the level of corporate taxation. This stage will include a dialogue process, with countries being allowed to respond to any concerns raised or discuss deeper cooperation with the EU on tax matters.

3. Listing: Once the screening process has been completed, countries that 'refused to cooperate or engage with the EU regarding tax good governance concerns' will be put on the EU list. The Commission has described this as the last resort, saying: 'It will be a tool to deal with third countries that refuse to respect tax good governance principles, when all other attempts to engage with these countries have failed.' It is not clear at this stage exactly what refusal looks like. It is possible that there may not be any countries on the final list, although this seems politically unlikely.

Where are we now?

The Commission has completed step 1, and released the scoreboard of 81 countries on 15 September (see www.bit.ly/2d5bHWr).

None of these countries showed all three risk indicators. Of those listed, 44 are identified as showing two out of the three risk indicators, which might be a pointer as to which countries will face further screening. However, the Commission has made it very clear that: 'The pre-assessment does not represent any judgment of third countries, nor is it a preliminary EU list. Countries can feature high in the scoreboard's indicators for a number of reasons, even when they pose no threat to member states' tax bases.'

Six listed countries appear to have been given a clean report, showing none of the risk indicators, including Australia, Canada, Japan and Norway. Interestingly Jersey, Guernsey, the Cayman Islands and the British Virgin Islands are among the 31 countries showing only one risk indicator, as they meet the rules on the automatic exchange of tax information.

The agreed list of countries for screening is expected by January 2017. These reviews will then take place throughout 2017, with a view to having a final list of non-cooperative tax jurisdictions by the end of the year.

What are the implications?

Firstly, countries themselves will be looking at the scoreboard, and whether they will be subject to screening. How they will respond is yet to be seen. Some jurisdictions may be sufficiently concerned about being on the final EU list that they make changes to their regime or relationship with the EU. Depending on the change, this may have implications for businesses operating there.

In addition, businesses with subsidiaries in countries on the final list may need to include these in any EU public CBCR report. There may also be more direct impacts if the EU imposes sanctions.

Agreeing the list of countries to be screened is bound to be politically sensitive. There will be pressure on member states to screen all countries in any way caught up in the tax avoidance debate. However, it will become increasingly difficult to say that being on the list for screening does not represent a pre-judgment of that country.

What we have seen so far is the first, and certainly the easiest, step in this process. ■