Some remarks on the practical implications of the EU black list

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The first common EU list of non cooperative tax jurisdictions – commonly referred as the EU black list – was released on 05 December 2017. It included seventeen offshore countries: American Samoa, Bahrain, Barbados, Grenada, Guam, South Korea, Macao SAR, Marshall Islands, Mongolia, Namibia, Palau, Panama, Saint Lucia, Samoa, Trinidad and Tobago, Tunisia and United Arab Emirates. A number of updates followed to almost halve the number of the countries included with the current version – updated until 13 March 2018 – counting just nine countries: American Samoa, Bahamas, Guam, Namibia, Palau, Samoa, Saint Kitts and Nevis, Trinidad and Tobago and US Virgin Islands.
The EU black list seems to entail important implications for enterprises with activities in the EU. By way of an example, in the context of public country-by-country reporting black listing shall trigger additional reporting tasks. Similarly, in the context of mandatory disclosure by tax intermediaries, specific hallmark provides for obligations where listed countries are involved in a cross-border arrangement.

To better understand the function and implications of the EU black list it is important to capture the purposes it seeks to serve.

The idea was conceived in the 2016 External Strategy for Effective Taxation and was connected with three purposes: *"...[(i)] boost Member States' collective success in tackling tax avoidance, [(ii)] ensure effective taxation and [(iii)] create a clear and stable environment for businesses in the Single Market.*" In a nutshell, it

was aimed to promote adoption of international tax standards worldwide by harmonizing the Member States' approaches. Such harmonization would benefit the function of the Single Market as a whole by enhancing certainty. But did it really reach such purpose?

The impact of the EU black list can vary depending on how Member States opt to use it. However there are also some implications defined at EU level.

At the current stage, the EU black list is connected to EU funding, originating from EFSD (European Fund for Sustainable Development), EFSI (European Fund for Strategic Investment) and ELM (External Lending Mandate). Thus, the EU aims to ensure that no such funding shall end up in non-cooperative jurisdictions. Furthermore, the list is envisaged to be used in future EU legislation as threshold of enhanced tax reporting obligations, in particular from multinationals and tax intermediaries.

At national level, Member States have been strongly encouraged by the Council of the EU to adopt legislation by reference to the list in order to protect their tax bases. From the perspective of EU business taxpayers, such national measures may define significant implications. Specifically, potential measures encompass *inter alia* (i) enhanced controls over transactions involving black-listed jurisdictions and/or (ii) assessment of increased tax risk for taxpayers using or benefiting from harmful tax regimes of such jurisdictions.

In any case, it is remarkable that Member States may always adopt other measures at domestic level to defend their taxable bases. Such measures may be different or additional to the above suggested. Hence, national black lists cannot be excluded as long as their scope is broader than that of the EU black list.

From the above, it follows that the common EU list, at its current status, does not guarantee certainty within the Single Market as regards Member States' policies towards non-cooperative jurisdictions. Although the list does signify an important step towards coordination of Member States' policies, it leaves a large margin for national policies to differ. Consequently, enterprises with activities in the Single Market should, on the one hand, keep an eye on the developments with respect to the EU list while, on the other, ensure that they are fully aware of national legislations.

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