European Union - Cooperation with Non-Cooperative Jurisdictions

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Cooperation with Non-Cooperative Jurisdictions

As of December 2017, the European Union has a common list of non-cooperative jurisdictions for tax purposes (the "EU List"). The EU List functions as a tool to improve tax good governance globally and to promote the EU standards and values vis-à-vis third countries. This article examines the development of the EU List and the role it plays in the various Member States in terms of their (future) national legislation, including national legislative defensive tax measures taken by the Member States in respect of the listed non-cooperative jurisdictions.

1. Introduction

For years, Member States have been using lists of non-cooperative jurisdictions for tax purposes at a national level in order to combat abusive tax practices. There has been increasing awareness, however, in the European Union that improving tax good governance globally and battling tax avoidance are matters that can be more efficiently and, therefore, more successfully dealt with at a central EU level.[1] Initially, this resulted in an EU List that merely consolidated most of the jurisdictions that had been listed by the individual Member States.[2] As the national lists were all based on varying, national screening criteria, there was no transparency or clarity concerning the jurisdictions that were placed on the list and for what reason. Therefore, the EU-wide accumulation of national lists only functioned as a temporary solution. The objective of the European Union was, all along, to develop its own framework for assessing, screening and listing third countries that were deemed non-cooperative for tax purposes, leading to an independent, uniform list.[3] After establishing such a common EU listing approach in 2016, the first official uniform EU List saw the light of day on 5 December 2017.[4]

In this article, the authors explain how the listing process works at the EU level (section 2.) and how it evolved into the current list (section 3.). The European Council has agreed to strive for more and better use of the EU List in applying the tax legislation of the individual Member States. To that end, the nature of the EU List (section 4.) and the increasing influence of the EU List (section 5.) are described, followed by an overview of actual action taken by the EU Member States to incorporate the EU List into their domestic tax legislation (section 6.). Finally, the article ends with some conclusions (section 7.).

2. Listing Process

The initial EU listing process involved three steps.[5] First, the European Commission identified a set of third countries that were prioritized for screening, which excluded all of the EU Member States and the territories considered to be part of a Member State. The Commission did so by means of a self-created scoreboard of indicators, which determined whether a jurisdiction had a potential impact on the tax bases of the Member States.[6] Over 100 indicators were used to analyse 160 jurisdictions in terms of their economic ties with the European Union, their stability and their financial activities.[7] Based on the findings in the first step, the Member States decided to screen 92 jurisdictions in a second phase.

Currently, that first identification phase is no longer applied in the listing process. The current screening process is based on two steps, which are similar to the last two steps of the initial process. These two steps relate to (i) screening and (ii) the actual listing. Under the screening process, which is carried out by the Code of Conduct Group, the compliance of jurisdictions in terms of tax transparency, fair taxation and the implementation of

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1. *See*, for example, Commission Recommendation of 6 December 2012 regarding Measures Intended to Encourage Third Countries to Apply Minimum Standards of Good Governance in Tax Matters, C(2012) 8805 final; Commission Recommendation of 6 December 2012 on Aggressive Tax Planning, C(2012) 8806 final; Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation, COM(2016) 24 final, Primary Sources IBFD. For an extensive elaboration on the initiative of European institutions to promote tax good governance globally in order to combat harmful tax practices *see* V. Kalloe, *EU Tax Haven Blacklist – Is the European Union Policing the Whole World?*, 58 Eur. Taxn. 2/3 (2018), Journal Articles & Opinion Pieces IBFD.
2. European Commission, *A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*, COM(2015) 302 final (2015), Primary Sources IBFD.
3. COM(2016) 24 final, *supra* n. 1, at pp. 2 and 10.
4. Council of the European Union, The EU list of non-cooperative jurisdictions for tax purposes – Council conclusions FISC 345 ECOFIN 1088, 15429/17 (5 Dec. 2017), available at http://www.consilium.europa.eu/media/31945/st15429en17.pdf.
5. For a detailed description of the three steps in the initial listing process *see* A. Koutsouva, *The European Union's List of Non-Cooperative Jurisdictions for Tax Purposes*, 29 EC Tax Rev. 4, sec. 4.1. (2020).
6. COM(2016) 24 final, *supra* n. 1, at p. 11.
7. European Commission Press Release IP/16/2996, *First step towards a new EU list of third country jurisdictions: Scoreboard*, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2996.

BEPS measures is assessed.[8] As such, the question is whether or not a country complies with the OECD standards of automatic exchange of information and whether it has at least a "largely compliant" rating with respect to the OECD's "exchange of information on request" standard. A third transparency criterion assesses whether a jurisdiction has ratified the Multilateral Convention on Mutual Administrative Assistance[9] or has a broad network of bilateral agreements that includes all Member States, guaranteeing both automatic and on request exchange of information. Initially, the European Union only required compliance in respect of two out of these three transparency criteria but, since June 2019, countries have to meet all three in order to avoid being listed.

With regard to fair taxation, a country should not have harmful preferential tax measures or a regime that encourages artificial offshore structures without real economic activity. No or zero-rate corporate taxation is an important indicator that a regime might be harmful and, therefore, needs to be assessed. In assessing such regimes, elements that, amongst other things, should be taken into account are whether advantages are only granted to (transactions carried out with) non-residents, whether advantages are ring-fenced from the domestic market such that they are prevented from affecting the national tax base and whether advantages are granted despite the lack of real economic activity/economic presence within the relevant Member State.[10]

Lastly, a country must have made a commitment to implementing the OECD's BEPS minimum standards and must have received a positive assessment regarding effective implementation of these anti-BEPS minimum standards based on criteria established by the Inclusive Framework. In this regard, as of 2019, jurisdictions are being monitored in terms of implementation of these minimum standards, starting with country-by-country reporting. The compliance of jurisdictions in terms of tax transparency, fair taxation and implementation of the BEPS measures criteria will be assessed cumulatively.[11] This means that as soon as one of the three criteria are not (or no longer) met, this is sufficient reason to be included on the EU List, despite possible compliance with the other two criteria. Once the screening process has resulted in a provisional list recommended by the Commission, in the third and final step it has always been up to the Member States to make the final decision on which countries actually should be included in the formal EU List.

3. Evolution of the EU List

Since publication of the first EU List, a process of dynamic monitoring of third countries and their tax policy and implemented measures has resulted in several updates to the EU List.[12] In this context, it is relevant to note that the continuous updating process is, to date, based on the abovementioned screening criteria. This entails that countries are, on a regular basis, screened against the original EU assessment criteria and are then added to or removed from the list accordingly. The authors consider it a serious shortcoming that the listing process is not subject to regular updates, as this raises the question of how representative the List still is today. This is all the more problematic in light of the speed at which new challenges in the field of battling tax avoidance are emerging. Such new developments do not necessarily impact the listing process.

Several of the original 17 listed countries have, by now, been removed, whilst others have been added. As of 22 February 2021, the EU List includes the following 12 jurisdictions: American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, the US Virgin Islands and Vanuatu.[13] As from 2020, the list will be updated twice per year; the next revision is due in October 2021.[14] Jurisdictions that do not yet comply, but have made a commitment to improve and implement tax good governance principles, are included in the state-of-play document included in Annex II of the Council conclusions. They are removed from this preliminary nomination list only if they take effective action to address the European Union's concerns. If they do not manage to comply within a set deadline, which is often one year after being included in the preliminary nomination list, they will be included on the EU List.[15]

4. Towards a Less Voluntary and Stronger EU List?

4.1. Introduction

The European Union seems to be in the process of transforming the EU List from the soft law and not legally binding instrument it currently is, towards a more binding and stronger tool in the battle against tax avoidance and in the promotion of global tax good governance

8. Council of the European Union, *Conclusions of 8 November 2016 on the criteria and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes* (Annex I), available at https://www.consilium.europa.eu/media/24230/08-ecofin-non-coop-juris-st14166en16.pdf. For a more detailed explanation of the current screening criteria *see* Kalloe, *supra* n. 1, at sec. 4.2.
9. *Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters* (25 Jan. 1988) (amended by the 2010 Protocol), Treaties & Models IBFD.
10. *Supra* n. 8 and Code of Conduct: Annex I, *Resolution of the Council and the Representatives of the Governments of the Member States, Meeting Within the Council of 1 December 1997 on a Code of Conduct for Business Taxation to the Council conclusions of 1 December 1997 concerning Taxation Policy (98/C 2/01)*, OJ C98 (6 Jan. 1998).
11. *Supra* n. 8.
12. In Koutsouva, *supra* n. 5, the author extensively examines the evolution of the EU List and the rationale behind the (de)listing of individual jurisdictions.
13. Council of the European Union, Council Conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes, FISC 33 ECOFIN 153 (22 Feb. 2021), Annex I, available at https://data.consilium.europa.eu/doc/document/ST-6329-2021-INIT/en/pdf.
14. Code of Conduct Group, Report to the Council of 15.02.2021 outlining information about updates of Annexes regarding specific jurisdictions, both listing and delisting FISC 31 ECOFIN 145 (15 Feb. 2021), p. 7, available at https://data.consilium.europa.eu/doc/document/ST-6223-2021-INIT/en/pdf; *supra* n. 13, at p. 3.
15. At this moment Australia, Barbados, Botswana, Eswatini, Jamaica, Jordan, Maldives, Thailand and Turkey belong to the jurisdictions in the state-of-play document: *see supra* n. 13, at Annex II.

standards. Thus, the EU List seems to be gaining importance. This is reflected in the November 2019 conclusions of the Council, which called on all Member States to take action and implement national tax legislation pursuant to which the denial of certain advantages or the triggering of certain disadvantages is linked to the EU List.[16] In recent months, there seems to have been a rapid evolution of the intentions behind the EU List. On 21 January 2021, the European Parliament (EP) adopted a resolution to reform the EU List of non-cooperative jurisdictions or, as framed by the EP, the "EU list of tax havens". In this resolution, the EP acknowledges the positive impact of the EU List but notes that the List "does not live up to its full potential",[17] as some of the largest tax havens are not amongst the listed jurisdictions[18] and the jurisdictions that are listed cover no more than 2% of the overall worldwide tax revenue losses.[19]

The solutions put forward by the EU institutions to increase the efficiency of the EU List can broadly be divided into two categories: adjusting the listing process and strengthening the defensive legislative measures. These are explained in sub sections 4.2. and 4.3. below.

4.2. A formalized and stricter listing process

The EP criticizes the fact that the listing process has never been updated since the creation of the initial EU List. According to Dourado (2021), the listing process should be more dynamic and criteria should be revised from time to time.[20] For the EP, a major thorn in the side in this regard is that the current process leads to certain jurisdictions without corporate income tax being delisted or not getting listed at all due to the fair taxation criterion, which only takes into account *preferential* tax rates. Furthermore, due to a lack of transparency, the EP considers the listing process to be influenced by political considerations rather than objective conditions and criteria that are applied in the same way to all third countries.[21] Lastly, another sensitive aspect of the listing process is, in their view, that it automatically excludes Member States even though aggressive tax planning "appears to be taking place on a large scale within the EU borders".[22] For these reasons, the EP considers the current process of establishing the EU List to be confusing and ineffective.[23]

In its resolution, the EP does not simply note the problems but also suggests directions for solutions. The most far-reaching suggestion is the formalization of the process of revising and amending the EU List through a legally binding instrument by the end of 2021.[24] Irrespective of the instrument to be used, however, transparency in relation to the listing process and its criteria could be improved by at least publishing the objective criteria that should be used. The authors would favour such an objective approach. The EP has suggested updating the listing criteria such that they are both broader and stricter. This would mean, among other things, that more factors, such as tax exemptions and transfer pricing mismatches, would need to be taken into account under the fair taxation criterion and that an independent criterion would need to be introduced based on which jurisdictions with a 0% corporate tax rate or no taxation of company profits would be automatically listed.[25] The authors, on the one hand, do not consider all of these proposed material amendments to be "fair", as countries should not necessarily be blamed for qualification mismatches that could be caused by disparities between the tax systems of individual countries. On the other hand, the authors consider it rather strange that, currently, only countries with "preferential regimes" would be listed, i.e. that non-taxing jurisdictions are excluded automatically from the scope of the List because non-taxation is the norm under their general system. This can, probably, be explained by the fact that the EU List relates to non-cooperative jurisdictions. Whether or not a country is non-cooperative is a different question than whether it actually taxes profits. The EP appears to have broadened the scope of the EU List to include non-taxing jurisdictions. At this juncture, with both the OECD and the United States appearing to be in favour of a global minimum tax, the EP should take the opportunity to amend the scope of the EU List as well. In order to prevent symbolic amendments to a jurisdiction's tax system from influencing the listing process, the EP calls for an overall strengthening of the listing criteria, including introducing broader substance requirements.[26] Other elements that could be taken into account in the

16. Council of the European Union, Council meeting of 5 Dec.2019, p. 11, available at https://www.consilium.europa.eu/media/41655/st14851-en19-docx.pdf.
17. European Parliament Resolution of 21 January 2021 on reforming the EU list of tax havens, para. 1, available at https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2020/2863(RSP.
18. European Parliament Press Release 20201119IPR92018, *EP tax matters subcommittee chair reacts to the Tax Justice Network report on tax evasion in the world* (20 Nov. 2020), available at https://www.europarl.europa.eu/news/en/press-room/20201119IPR92018/ep-taxation-subcommittee-chair-on-tax-justice-network-report-on-tax-evasion.
19. *Supra* n. 17, at para. 1.
20. Prof. Ana Paula Dourado in The Public Hearing on "The reform of the Code of Conduct Group criteria and process" of 19 April 2021 held by the European Parliament Subcommittee on Tax Matters, available at https://multimedia.europarl.europa.eu/en/subcommittee-on-tax-matters_20210419-1345-COMMITTEE-FISC_vd.
21. With regard to the opinion that the listing process is a political process, *see also* Koutsouva, *supra* n. 5, at sec. 6.2.1.
22. *Supra* n. 18.
23. European Parliament Press Release 20210216IPR97916, *EU list of tax havens prevented from living up to its potential says tax subcommittee Chair* (17 Feb. 2021), available at https://www.europarl.europa.eu/news/en/press-room/20210216IPR97916/eu-list-of-tax-havens-not-living-up-to-its-potential-says-tax-subcommittee-chair.
24. *Supra* n. 17, at para. 3.
25. Id., paras. 13 and 15.
26. Id., para. 15; European Parliament Press Release 20210114IPR95631, *EU tax haven blacklist is not catching the worst offenders* (21 Jan. 2021), available at https://www.europarl.europa.eu/news/en/press-room/20210114IPR95631/eu-tax-haven-blacklist-is-not-catching-the-worst-offenders. The addition of substance as a criterion would also be welcomed by Dourado. She noted that what needs to be taken into account more concretely is what is going on in the jurisdictions being examined. *See* Dourado, *supra* n. 20. In the meantime, the European Commission started a public consultation on the introduction of harmonized substance requirements as ATAD III, which should lead to legislative action in the first quarter of 2022; *see* https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12999-Tax-avoidance-fighting-the-use-of-shell-entities-and-arrangements-for-tax-purposes_en.

listing process are the existence of independent courts, the index of corruption and tax secrecy.[27]

Another solution proposed by the EP in relation to increasing transparency is to include Member States in the screening process in the same manner as third countries.[28] The authors do not support this suggestion. Within the European Union and under current (secondary) EU law, Member States are already required to automatically exchange information on numerous accounts. In addition, the EU Member States are agreeing to legislation to counter tax avoidance at breakneck speed. Although this requires unanimity, a lot has been achieved over the last few years, for instance through the introduction of ATAD I and ATAD II.[29] As a result, it would, from a substantive perspective, be strange to add EU Member States to the EU List. It could also be considered window-dressing, as, even if EU Member States were to be included in the list, no (or few) measures could be taken against them. If EU Member States were to deny a certain tax treatment to a resident of another EU Member State, only because the latter Member State was on the EU List, such a less favourable tax treatment might not be in line with the fundamental freedoms of the Treaty on the Functioning of the European Union (TFEU) (2007).[30] This could, after all, lead to horizontal discrimination, which is prohibited, at least in relation to the free movement of workers, following the European Court of Justice decision in *Sopora* (Case C-512/13).[31] As such, the authors would prefer that EU Member States discuss discrepancies and solutions to tax avoidance rather than including EU Member States in the EU List.

4.3. Coordinated and stronger defensive measures

Although the EU List is not a legally binding instrument, it does serve as a resource in combatting tax avoidance, harmful tax practices and unfair taxation, namely by linking all sorts of defensive tax and non-tax measures to the List. At the EU level, for example, reference is made to the EU List under the EU Mandatory Disclosure Regime (DAC6),[32] requiring intermediaries (or relevant taxpayers) to report reportable cross-border arrangements where a cross-border deductible payment is made to a recipient in a country on the EU List.[33] In addition to the references to the EU List made at the EU level, the Member States agreed, in 2017, to apply the EU List to at least one of the administrative tax related measures established by the Council, which includes reinforced monitoring of certain transactions, increased audit risks for taxpayers benefiting from certain tax regimes and increased audit risks for taxpayers using structures or arrangements involving non-cooperative jurisdictions.[34] At the same time, the Council mentioned that Member States could choose to apply additional defensive tax measures of a legislative nature, while emphasizing that implementation of any of these measures is left to the competence of the Member States.[35] In other words: Member States have committed themselves to creating domestic tax law that refers to the EU List in order to make the EU List have an actual impact on the application of domestic tax rules and the granting of (or exclusion from) certain tax benefits.

In November 2019, the Council's conclusions seemed to go further than the existing commitments with regard to defensive legislative measures by inviting Member States to introduce effective and proportionate national legislative defensive tax measures towards non-cooperative jurisdictions as of 1 January 2021.[36] What is noteworthy in this respect is that, although there is undoubtfully a higher expectation for Member States to implement defensive measures into their national legislation than was the case when the List was introduced in 2017, it remains unclear how strong the call to Member States in this regard exactly is. The Code of Conduct Group states that "Member States should ensure that at least one of the defensive measures […] is applied from 1 January 2021 at the latest".[37] According to the Code of Conduct Group, these national measures should, on the one hand, include (but are not limited to) at least one of the following: non-deductibility of costs related to entities in a listed jurisdiction, withholding tax on payments, controlled foreign corporation (CFC) treatment of income or a limitation on the participation exemption applicable to shareholder dividends.[38] On the other hand, the notes of the Council's meeting mention that the Council "[…] invites all member states to apply a legislative defensive measure in taxation vis-à-vis the listed jurisdictions as of 1 January 2021 […]".[39] Although the Council explicitly endorsed the Guidance of the Code of Conduct Group on further coordination of defensive measures,[40] due to a difference in wording, these developments do not make it entirely clear whether or not Member States are obliged to implement national

27. *See* Dourado, *supra* n. 20.
28. *Supra* n. 17, at para. 9.
29. Council Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/1 (2016), Primary Sources IBFD [ATAD I] and Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, Primary Sources IBFD [ATAD II].
30. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), Primary Sources IBFD.
31. NL: ECJ, 24 Feb. 2015, Case C-512/13, *Sopora*, ECLI:EU:C:2015:108, para. 25, Case Law IBFD. It could be argued that a comparable analysis should work for other fundamental freedoms, like the freedom of establishment, as well. To that end, *see* J. Korving, *Internal Market Neutrality*, SDU, p. 265 (2020).
32. Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L 139 (2018), Primary Sources IBFD.
33. DAC6, hallmark C-1-b-ii. For this hallmark, the Main Benefit Test is not even applicable, assuming it is tax preferential per se.
34. *Supra* n. 16, at Annex III, para. B.1.
35. Id., Annex III, para. 5 and B.2.
36. Council of the European Union, Council conclusions of 25 Nov. 2019, available at https://data.consilium.europa.eu/doc/document/ST-14114-2019-INIT/en/pdf.
37. Code of Conduct Group, Report to the Council of 25 Nov. 2019, p. 50, available at https://data.consilium.europa.eu/doc/document/ST-14114-2019-INIT/en/pdf.
38. Id., p. 46.
39. *Supra* n. 16, at p. 11.
40. *Supra* n. 36, at p. 2.

legislative measures in respect of jurisdictions on the EU List or are merely "invited" to do so.

From the EP's resolution of January 2021, it is apparent that the focus on defensive measures has been further increased. In order to effectively serve as a tool to reduce tax avoidance, the EP recognizes that strict countermeasures towards listed jurisdictions are required. Not only should the administrative measures be strengthened but it is also explicitly mentioned that defensive measures are "critical in order for the list to have impact".[41] Even more notable is the fact that the EP does not speak to the Member States and their responsibility to improve the impact in the field of defensive measures. In contrast, it calls on the European Commission to work on a legislative proposal for coordinated defensive measures against tax avoidance and evasion, especially relating to jurisdictions on the EU List. This can be explained by the fact that the EP is of the opinion that the current system, based on discretionary application of the defensive measures by individual Member States, is ineffective.[42] The authors endorse the EP's effort to make the measures linked to the EU List more specific than the Council's 2019 conclusions, as the EP's perspective on the future of the defensive measures at least gives direction in terms of which measures the EP is striving towards. By doing so, the EP creates a starting point for a discussion based on content. Furthermore, the EP's resolution expands the possibilities for defensive measures suggested in the 2019 documents to include a switch-over rule,[43] consequences for public procurement and State aid, special documentation requirements and suspension of tax treaty provisions.[44] In summary, the EP advocates both coordinated and stronger defensive measures.

4.4. Interim comments

Even with an effective and fair listing process, the authors doubt that the EU List will have much of an impact as long as the listed jurisdictions do not actually feel the consequences of being listed. Otherwise, the EU List will remain a tool to merely name and shame third jurisdictions that are deemed non-cooperative for tax purposes. From that perspective, the authors agree that strong defensive measures would enhance the effectiveness of the EU List. They wonder, however, how a coordinated approach with regard to the defensive measures relates to both the different status given to the EU List by individual Member States and the coexistence of the EU List with national lists. The authors will elaborate on both aspects in section 5.

5. Status and Implications of the EU List

5.1. Introduction

Before providing insight into the choices Member States have made to date in the context of defensive measures, the authors clarify why the status and implication of the EU List, as indicated, differ from one Member State to another. In this regard, the coexistence of national lists and the implications of the EU List will be discussed.

5.2. Coexistence of national lists

There is little consistency in how the EU Member States have responded to the EU List initiative and the influence the EU List has had at the national level. In the first place, and despite the initial intention to devise a single EU List that would replace all national lists,[45] the EU List still qualifies as soft law and is not, therefore, legally binding on the Member States. This explains why there are still quite a few national lists. For all Member States with national lists, the question is whether or not these lists include all the jurisdictions in the EU List. They could either be individually included or the EU List could be directly referenced. Another possibility is to have a standalone national list drawn up on the basis of national criteria and therefore functioning completely independent of the EU List. Essentially, such a list could have the same objective as the EU List, i.e. a deterrent effect on the application of tax benefits in relation to listed countries. Further, even if a national list includes all EU listed jurisdictions, the question that arises is whether or not an update to the EU List would have immediate effect on such a national list or whether, for example, a national legislative step would be required to implement the EU update. It follows from this that, depending on the impact of the EU List in a particular Member State, an update to the EU List can potentially activate measures at a national level.

In the context of the EP's intended coordinated approach, the above discussion raises the question of whether it would suffice for a Member State to link a defensive measure to its national list, in circumstances in which the list is drawn up based on different listing criteria than that used for the EU List. In this regard, it is worth noting that both the EP and the European Commission have recognized the significant divergence between the (listing process of the) EU List and the national equivalents and aim for alignment.[46] The EP even calls for harmonization of the screening process.[47] In the authors' opinion, making the EU List a minimum standard, with the result that Member States would remain free to link defensive measures to their national lists but would have to ensure that those national lists include all EU listed jurisdictions, would be a logical step forward as part of a coordinated approach.[48] To this end, the preferred option would be to automatically amend the national list upon a change in the EU List.

41. *Supra* n. 17, at para. 25.
42. Id., para. 26.
43. The authors note that a switch-over rule initially was included in ATAD I as well, but was removed from the proposal, as not all EU Member States were aligned on the matter.
44. *Supra* n. 17, at para. 26.
45. COM(2016) 24 final, *supra* n. 1, at p. 10.
46. *Supra* n. 17, at para. 18; European Commission, *Communication from the Commission to the European Parliament and the Council on Tax Good Governance in the EU and beyond* (15 July 2020), COM(2020) 313 final, p. 8, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:0313:FIN.
47. *Supra* n. 17, at para. 18.
48. The option of the EU List working as a minimum standard was also put forward by Dourado, *supra* n. 20.

5.3. Implications of the EU List

At this point, it is still up to the Member States to decide whether or not to implement a legislative defensive tax measure targeting non-cooperative jurisdictions. Furthermore, it is possible that a Member State will adopt legislation but link it to a national list, which is where the relevance of the palette of choices a Member State has, as described in the previous section, comes into play. Let us say, for example, that Member State X has no national list but did implement national legislation that provides that the participation exemption will not apply when a resident company of X receives dividends from a participation that it holds in a company that is established in a listed jurisdiction. This direct link to the EU List implies that, if the list is updated and a jurisdiction is added to the list, the participation exemption in relation to that newly listed jurisdiction will suddenly no longer apply. Another example is Member State Y, which has a national list, but the EU List does not have immediate effect in relation to the list. Member State Y introduces a withholding tax on all interest payments to related entities established in a jurisdiction that is included in Y's national list. In that instance, the addition of a jurisdiction on the EU List will not immediately activate Y's withholding tax for payments to this added jurisdiction. Finally, in Y's example, it is also relevant whether or not Y's national list includes all EU listed countries because, if it does, the EU update will most likely have an impact at a later point in time. Y's withholding tax will eventually apply to the jurisdiction that has been added to the EU List (namely, at the moment Y's national list is aligned with the EU List).

Inevitably, the interplay between multiple national lists, which may be based on different criteria than the EU List, and the many options individual Member States have in implementing defensive legislative measures targeting listed jurisdictions, creates a lot of legal uncertainty for both third jurisdictions and (multinational) businesses. In addition, the authors question the effectiveness of the national defensive measures currently being taken when a multinational business is, in principle (and to a certain extent), able to avoid those measures by structuring investments in such a way that no measures are triggered in individual Member States.[49] In principle, regardless of whether a national list or the EU List is at issue, it would not be very difficult for a multinational enterprise established in a listed jurisdiction to circumvent an interest deduction limitation in Member State X by structuring its investments such that interest is paid from another (Member) State that does not apply such a deduction limitation to interest payments related to listed jurisdictions. The possibility of exploiting mismatches between Member States' defensive tax measures thereby undermines the effectiveness of the EU List in general and of the national defensive tax measures in particular.[50]

The authors are in favour of the current trend, pursuant to which the EU List and the linking of defensive tax measures to the List at the national level, have become less non-committal. They certainly consider this a step in the right direction. Nevertheless, since resolutions adopted by the EP are not binding on the Council or the Commission, it remains to be seen what the actual effect of the proposed changes will be. That is why the EU List seems to remain a rather soft instrument. The desire to strengthen and better coordinate the EU List and the defensive measures linked to it is there, but concrete action in this regard does not seem to be forthcoming. Or, as the European Commission has put it: "This coordinated approach goes in the right direction but it lacks ambition".[51]

6. Country-Specific Choices

6.1. Introduction

As indicated, Member States were requested to use references to the EU List in their domestic tax law. In section 6., the authors elaborate on two aspects: (i) whether and, if so, how the Member States apply the EU List (i.e. either through a direct reference or as part of or in combination with national lists) and (ii) the types of measures that are referenced.[52] Based on the authors' research, only seven Member States do not[53] refer to any list of non-cooperative jurisdictions: Austria, Czech Republic, Denmark, Germany, Italy, Malta and Romania. These countries are not addressed further herein.

The relevance of the overview relates to the impact amendments to the EU List could potentially have. When a Member State, for instance, applies an interest deduction limitation rule that relates to jurisdictions on the EU List, adding a country to the EU List could immediately cause interest to be non-deductible. The overview in section 6.2., however, should only be viewed as indicative of the potential outcome.

6.2. EU lists and/or national lists

Twenty EU Member States apply national rules that are linked to the EU List or a national list of non-cooperative jurisdictions. Six countries[54] refer directly to the EU List in their national legislation. Consequently, amendments to the EU List would directly impact domestic tax law. Most countries, however, use a national list of non-cooperative jurisdictions. Three main varieties can be distinguished: (i) national lists that contain a direct reference to the EU

49. Prof. Ana Paula Dourado states that because the EU List itself and the defensive measures are not included in a binding EU law instrument, which implies that Member States are still free to adopt them or not and to keep their national lists, this can lead to circumvention schemes; *see* A.P. Dourado, *Editorial: The EU Black List of Third-Country Jurisdictions*, 46 Intertax 3, pp. 178-180 (2018).

50. *Supra* n. 46, at p. 11.

51. Id.

52. The authors realize that Member States have not yet had sufficient time to fully catch up on the latest developments in the area of defensive measures. They nonetheless think it is relevant to provide insight into the choices that Member States have made to date in this context.

53. Except for the implementation and application of DAC6, which requires countries to report reportable cross-border arrangements relating to intragroup deductible payments if the recipient is resident in a jurisdiction on the EU List (following hallmark C-1-b-ii).

54. Croatia, Cyprus, Estonia, Finland, Luxembourg and Sweden.

List, (ii) a national list that includes specific countries, as well as all countries on the EU List, or (iii) a national list that includes specific countries but not all countries on the EU List.

Bulgaria and Ireland have opted for the alternative of directly referencing the EU List (i). Both countries apply a national list that directly refers to jurisdictions on the EU List. Therefore, an update to the EU List would directly be mirrored in the national list. The only three other EU Member States having a national list including all jurisdictions on the EU List (alternative (ii)) are France, the Netherlands and Portugal. In the Netherlands, for instance, a specific list of non-cooperative and low-taxed jurisdictions has been created, consisting of jurisdictions with a statutory corporate tax rate of less than 9%, as well as all the countries on the EU List.

Eight[55] other EU Member States currently, effectively, apply alternative (iii), meaning that not all jurisdictions on the EU List are included in the national list. That does not automatically mean that this is the explicit objective of these countries. Spain, for instance, intends to live up to the EU List but, as the national list now stands, some jurisdictions listed by the European Union have not (yet) been included on the Spanish national list. This might be resolved in the next updating round of the Spanish national list.

Belgium takes a hybrid position. It partially links its defensive measures to the EU List and partially to national lists. Historically, several national lists of "tainted jurisdictions" have been applied in the context of various tax provisions (for example, provisions rendering certain payments to "tax havens" reportable to the tax authorities and non-deductible in the case of, for example, non-reporting; provisions excluding certain dividends and capital gains on shares from the scope of the participation exemption; provisions barring access to the tax ruling procedure if a transaction involves a tainted jurisdiction, etc.). However, as per a Law of 20 December 2020, the EU List now applies alongside the existing national lists for many (but not all) of these provisions. An update to the EU List would, therefore, have immediate effect on the application of those provisions.

6.3. Defensive measures

6.3.1. Introduction

The 20 EU Member States that use either the EU List or a national list apply it, in particular, to three types of rules: CFC rules, withholding taxes and the participation exemption.[56] There are, however, EU Member States that apply their lists to other types of measures as well. In this part, the authors will try to provide an overview of national tax rules that relate to either the EU List or national lists.

6.3.2. CFC rules

Almost all Member States using any list of non-cooperative or low-taxed jurisdictions apply the list, to some extent, to domestic CFC rules.[57] To start, eight Member States consider a company that is a resident of a listed jurisdiction to automatically qualify as a CFC. This applies to Belgium,[58] Estonia,[59] Latvia,[60] Lithuania,[61] the Netherlands,[62] Poland,[63] Portugal[64] and Spain.[65] More specifically, Belgium and Spain apply general conditions in classifying a company as a CFC, like participation requirements and certain conditions in relation to the level of taxation of the company. When the company, however, is located in an EU listed jurisdiction, these requirements are no longer relevant, with the result that the company would automatically qualify as a CFC. Spain and the Netherlands allow for the provision of counterevidence. Consequently, a subsidiary that is resident in a jurisdiction on the EU List would be considered to be a CFC unless it can prove that it performs genuine business activities.

Countries that do not link the fact that an entity is a resident of a listed jurisdiction to qualification as a CFC, apply various rules. The Finnish CFC rules make the application of the exemptions dependent on whether or not a jurisdiction is listed. Generally, low-taxed entities can be exempted from the CFC rules if they have sufficient economic presence/substance and if they are engaged in certain active business operations in their location.[66] Under Finnish law, however, these exemptions

55. Greece, Hungary, Latvia, Lithuania, Poland, Slovak Republic, Slovenia and Spain.
56. Eight EU Member States relate their list to the application of the participation exemption (i.e. limitation of the participation exemption in respect of shareholder dividends): Belgium, France, Latvia, Lithuania, Portugal, Slovak Republic, Slovenia and Spain. In addition, Germany has published draft legislation that includes a limitation of the participation exemption for dividends received from a subsidiary that is resident in a non-cooperative jurisdiction or gains from the sale of shares in such a subsidiary.
57. Belgium, Estonia, Finland, France, Hungary, Ireland, Latvia, Lithuania, the Netherlands, Poland, Portugal, Slovak Republic, Slovenia and Spain.
58. *See generally* G. Van Hulle & J-P Van West, *Controlled Foreign Company Legislation in Belgium*, in *Controlled Foreign Company Legislation* p. 89 (G. Kofler et al. eds. IBFD 2020).
59. *See generally* M. Herm, *Estonia – Corporate Taxation* sec. 10., Country Tax Guides IBFD (accessed 30 Apr. 2021), Books IBFD.
60. K. Ketners, *Controlled Foreign Company Legislation in Latvia*, in *Controlled Foreign Company Legislation*, *supra* n. 58, at p. 405. *See generally* Z.G. Kronbergs, *Latvia's New CFC Rules*, 59 Eur. Taxn. 7 (2019), Journal Articles & Opinion Pieces IBFD.
61. T. Vaiciuliene, *Lithuania – Corporate Taxation* sec. 7., Country Tax Guides IBFD (accessed 30 Apr. 2021).
62. R. Adema, J. Bouwman & I. Burgers, *Controlled Foreign Company Legislation in the Netherlands*, in *Controlled Foreign Company Legislation*, *supra* n. 58, at pp. 440-441.
63. A. Wardzynski, *Controlled Foreign Company Legislation in Poland*, in *Controlled Foreign Company Legislation*, *supra* n. 58, at p. 551; and B. Kuźniacki, *Poland – The (In)Compatibility of Polish CFC Rules with the Constitution Pre and Post-Implementation of the EU Anti-Tax Avoidance Directive (2016/1164)*, 58 Eur. Taxn. 4 (2018), Journal Articles & Opinion Pieces IBFD.
64. R. da Palma Borges & M. Carmo, *Controlled Foreign Company Legislation in Portugal*, in *Controlled Foreign Company Legislation*, *supra* n. 58, at p. 573.
65. *See generally* J.M. Almudí Cid, *Controlled Foreign Company Legislation in Spain*, in *Controlled Foreign Company Legislation*, *supra* n. 58, at p. 695.
66. K. Äimä & H. Lyyski, *Controlled Foreign Company Legislation in Finland*, in *Controlled Foreign Company Legislation*, *supra* n. 58, at p. 259; and *see generally* A. Tokola, *The Implementation of the Controlled Foreign Company Rules in the EU Anti-Tax Avoidance Directive in Finland, Luxembourg and the Netherlands – The Effects on the Holding*

do not apply if an entity is located in a jurisdiction that is included on the EU List.[67] Comparable rules apply in Hungary[68] and Ireland.[69] France applies a different sanction for CFCs. Where a French company's CFC receives income that includes dividends, interest or royalties from a state other than where the CFC is located, any withholding tax that may have been levied can be subtracted from the tax amount due in France in proportion to taxable income attributable to the French entity. This deduction only applies if the CFC is located in a jurisdiction that has a tax treaty with France and if the CFC is not located in a listed jurisdiction.[70] Additionally, the Slovak Republic[71] links the EU List to CFC rules for individuals.[72] Lastly, recently published draft legislation shows that Germany intends to significantly tighten its CFC rules for German taxpayers that (in)directly hold shares in a company that is resident in a non-cooperative jurisdiction. It intends, for example, to eliminate the exceptions and exemption thresholds for subsidiaries resident in non-cooperative jurisdictions.[73]

6.3.3. Withholding taxes

Twelve EU Member States apply withholding taxes referring to listed jurisdictions.[74] Croatia,[75] France,[76] Latvia,[77] Portugal[78] and the Slovak Republic[79] apply higher withholding tax rates on dividends, interest, royalties and certain service fees to listed jurisdictions. Other countries, like the Netherlands,[80] have withholding tax legislation that specifically targets payments to listed jurisdictions. Bulgaria, Estonia and Slovenia have introduced a withholding tax on a more specific type of payment for services. For Bulgaria, this relates to penalties and damages payments (except for insurance related damages).[81] The Estonian levy relates to service fees in general.[82] In Slovenia, the scope of withholding tax is limited to advisory, marketing, marketing research, human resource, administration, information technology and legal services.[83] Lithuania does not apply its withholding tax exemption to payments to companies in listed jurisdictions.[84] In Cyprus, new withholding taxes on payments of dividends (17%), interest (30%) and royalties (10%) to jurisdictions on the EU List have been proposed.[85] In Germany, draft legislation has been published eliminating the reduced or zero percent withholding tax rates that may be provided by an applicable tax treaty or by way of unilateral relief in respect of payments to listed jurisdictions.[86]

6.3.4. Other defensive measures

Besides linking CFC rules, withholding taxes and the participation exemption to listed jurisdictions, several EU Member States have created a link between listings and individual and more specific national measures as well. Within this category, the most commonly applied link between listed jurisdictions and national defensive measures is to deny the deduction of different types of expenses made to listed jurisdictions. As examples, Greece,[87] Luxembourg,[88] Poland,[89] Portugal,[90] Slovenia,[91] Spain[92] and Sweden[93] deny interest deductions and, occasionally, the deduction of several other expenses to listed jurisdictions.[94]

Company Structures of Finnish Groups, 72 Bull. Intl. Taxn. 3, sec. 4.2. (2018), Journal Articles & Opinion Pieces IBFD.

67. The Finnish rules do include a temporal restriction in that they require the non-cooperative jurisdiction to have been listed in both the current tax year and the preceding tax year.
68. B. Kolozs & A. Köszegi, *Controlled Foreign Company Legislation in Hungary*, in *Controlled Foreign Company Legislation*, *supra* n. 58, at p. 319.
69. S. Ruane, *Ireland – Corporate Taxation* sec. 10., Country Tax Guides IBFD (accessed 30 Apr. 2021).
70. C. Garcia, *Controlled Foreign Company Legislation in France*, in *Controlled Foreign Company Legislation*, *supra* n. 58, at pp. 275-276.
71. L. Dumitrescu et al., *Slovak Republic – Corporate Taxation* sec. 10., Country Tax Guides IBFD (accessed 30 Apr. 2021).
72. M. Kačaljak & A. Koroncziová, *Controlled Foreign Company Legislation in the Slovak Republic*, in *Controlled Foreign Company Legislation*, *supra* n. 58, at p. 645.
73. The draft law proposal still must be approved by the government and then must go through the formal legislative procedure. There is no information currently available regarding the anticipated timing. As the draft law is still pending, the draft legislation may be subject to changes prior to its enactment.
74. Bulgaria, Croatia, Cyprus (draft), Estonia, France, Latvia, Lithuania, the Netherlands, Poland, Portugal, Slovak Republic and Slovenia.
75. I. van der Maas, *Croatia – Corporate Taxation* sec. 6., Country Tax Guides IBFD (accessed 30 Apr. 2021).
76. P. Burg, *France – Corporate Taxation* sec. 10., Country Tax Guides IBFD (accessed 30 Apr. 2021).
77. L. Gerzova, *Latvia – Corporate Taxation* sec. 7., Country Tax Guides IBFD (accessed 30 Apr. 2021).
78. A. Valente Vieira, *Portugal – Corporate Taxation* sec. 10., Country Tax Guides IBFD (accessed 30 Apr. 2021).
79. L. Dumitrescu et al., *Slovak Republic – Corporate Taxation* sec. 7., Country Tax guides IBFD (accessed 30 Apr. 2021).
80. Currently, this withholding tax is limited to interest and royalty payments to listed jurisdictions. A comparable levy on dividend distributions to listed jurisdictions should enter into force as of 1 Jan. 2024, which will exist alongside the currently applicable Dividend Withholding Tax Act. *See generally* H-J van Duijn & K. Sinnige, *Netherlands – Corporate Taxation* sec. 7., Country Tax Guides IBFD (accessed 30 Apr. 2021).
81. D. Shishkova & G. Ahtchieva, *Bulgaria – Corporate Taxation* sec. 7., Country Tax Guides IBFD (accessed 30 Apr. 2021).
82. M. Herm, *Estonia – Corporate Taxation* sec. 7., Country Tax Guides IBFD (accessed 30 Apr. 2021).
83. A. Maher, *Slovenia – Corporate Taxation* sec. 7., Country Tax Guides IBFD (accessed 30 Apr. 2021).
84. T. Vaiciuliene, *Lithuania – Corporate Taxation* sec. 7., Country Tax Guides IBFD (accessed 30 Apr. 2021).
85. The draft law is expected to apply from 1 July 2021.
86. As the draft law is still pending, the draft legislation may be subject to changes prior to its enactment.
87. Unless the taxpayer proves that the expenses relate to real transactions carried out in the ordinary course of business and do not intend to transfer income or profit for the purposes of tax avoidance or tax evasion. *See* S. Papademetriou & G. Kerameus, *Greece – Corporate Taxation* sec. 10., Country Tax Guides IBFD (accessed 30 Apr. 2021).
88. *See generally* R.H.M.J. Offermanns, *Luxembourg – Corporate Taxation* sec. 1., Country Tax Guides IBFD (accessed 30 Apr. 2021). This provision applies as from 1 Mar. 2021.
89. M. Olejnicka, *Poland – Corporate Taxation* sec. 10., Country Tax Guides IBFD (accessed 30 Apr. 2021).
90. *See generally* A. Valente Vieira, *Portugal – Corporate Taxation* sec. 10., Country Tax Guides IBFD (accessed 30 Apr. 2021).
91. A. Maher, *Slovenia – Corporate Taxation* sec. 1., Country Tax Guides IBFD (accessed 30 Apr. 2021).
92. Á. de la Cueva Gonzáles-Cotera & A. Arroyo Ataz, *Spain – Corporate Taxation* sec. 10., Country Tax Guides IBFD (accessed 30 Apr. 2021).
93. F.M. van der Zeijden, *Sweden – Corporate Taxation* sec. 10., Country Tax Guides IBFD (accessed 30 Apr. 2021).
94. In addition, Germany has published draft legislation that includes non-deductibility for all payments made to entities in non-cooperative jurisdictions.

Additionally, Greece, Portugal and Spain[95] levy a tax on real estate that is related to the EU List or national list of non-cooperative jurisdictions. In Greece, this concerns a special 15% real estate tax that is calculated on the tax value of the real estate property held as of 1 January each year. No exemption from this tax applies if the property is held through an entity resident in a non-cooperative jurisdiction.[96] Under Portuguese law, corporate entities domiciled in a Portuguese listed jurisdiction acquiring Portuguese real estate, directly or indirectly, are subject to a 10% property transfer tax[97] and additional levies of 7.5% municipal property tax and a 7.5% additional tax.[98]

In Poland, transfer pricing safe harbour rules do not apply if the supplier of services or the lender has its place of residence, seat or management in a listed jurisdiction.[99] Spain applies specific (and additional) transfer pricing provisions to companies in listed jurisdictions, including restricted access to specific tax regimes.[100]

Belgium, Ireland and Luxembourg apply administrative requirements when resident taxpayers make payments to companies in listed jurisdictions. For Belgium, this concerns all (in)direct payments in excess of EUR 100,000.[101] Ireland[102] and Luxembourg[103] require resident taxpayers to disclose payments of interest, royalties or dividends to listed jurisdictions in their corporate income tax return. Comparably, France[104] and Poland[105] apply complementary disclosure requirements in respect of transactions undertaken with companies located in non-cooperative jurisdictions.

95. *See generally* Á. de la Cueva Gonzáles-Cotera & A. Arroyo Ataz, *Spain – Corporate Taxation* sec. 10., Country Tax Guides IBFD (accessed 30 Apr. 2021).
96. *See generally* S. Papademetriou & G. Kerameus, *Greece – Corporate Taxation* sec. 5., Country Tax Guides IBFD (accessed 30 Apr. 2021).
97. A. Valente Vieira, *Portugal – Corporate Taxation* sec. 14., Country Tax Guides IBFD (accessed 30 Apr. 2021).
98. Id., sec. 5.
99. *See generally* M. Aleksandrowicz et al., *Poland – Transfer Pricing*, Country Tax Guides IBFD (accessed 30 Apr. 2021).
100. A. Escoda et al., *Spain – Transfer Pricing*, Country Tax Guides IBFD (accessed 30 Apr. 2021).
101. G. Cruysmans, *Belgium – Corporate Taxation* sec. 1., Country Tax Guides IBFD (accessed 30 Apr. 2021).
102. The reporting requirement applies to the annual Corporate Tax return (Form CT1) for accounting periods ending in 2019 and onwards.
103. LU: Circular L.G. – A n° 64 issued on 7 May 2018, available at https://impotsdirects.public.lu/dam-assets/fr/legislation/legi18/lga64-0705 2018-mesures-defensives-en-relation-avec-la-liste-de-l-ue-des-pays-et-territoires-non-cooperatifs-a-des-fins-fiscales.pdf.
104. P. Burg, *France – Corporate Taxation* sec. 10., Country Tax Guides IBFD (accessed 30 Apr. 2021).
105. *See generally* M. Aleksandrowicz et al., *Poland – Transfer Pricing*, Country Tax Guides IBFD (accessed 30 Apr. 2021).

Finally, Greece appears to prohibit entities established in non-cooperative jurisdictions from purchasing non-performing loans. Lithuania disallows tax reliefs and exemptions when the income received or costs incurred are related to listed jurisdictions.[106]

7. Concluding Remarks

The EU List aims to improve tax good governance globally and to promote the EU standards and values to third countries. The fact that the listing process is not subject to regular updates is a serious shortcoming of the List. It would be positive if the listing criteria were to be critically reviewed.

The List is not a legally binding instrument. It is thus, in principle, up to the Member States to choose how exactly to use the EU List in their national legislation. As a result, currently, a wide variety of lists exists within the European Union. Additionally, the defensive measures linked to the EU List differ throughout the European Union. This reduces the effectiveness of the list, as a multinational company might be able to circumvent application of the defensive measures by structuring its investments in a certain way.

The question is whether the EU List is the right tool, given all the other developments in the international tax environment following the BEPS Project. Moreover, would it not be a better idea to combat tax avoidance at its roots? As this would require a comprehensive tax reform, it does not seem to be an option in the short run. Having said that, the use of national measures to combat tax avoidance could be linked to a list of third-country jurisdictions in respect of which it is arguable that any structuring involving those jurisdictions mainly has a tax objective. The patchwork of national lists, however, does not contribute to that objective. In other words: if lists are used within the EU internal market, it should be ensured that the list is a single harmonized list (or at least the EU List should be used as a minimum standard).

All in all, the EU List has the potential to serve as an important instrument in the fight against tax avoidance. Various amendments, however, to both the listing process, as well as the implications of the EU List are required.

106. *See generally* T. Vaiciuliene, *Lithuania – Corporate Taxation* sec. 7., Country Tax guides IBFD (accessed 30 Apr. 2021).