BRUSSELS I 4 MARCH 2019

Member States Veto EU Commission's Blacklist of High Risk Third Countries for AML Purposes

At a working group meeting last week, 27 of the 28 Member States indicated they will vote against the Commission's Delegated Regulation identifying a list of high-risk third countries with deficiencies in their anti-money laundering and counter terrorist financing regimes, in compliance with obligations under the 4th and 5th Anti-Money Laundering Directives.

The jurisdictions included on the Delegated Regulation are: Afghanistan, American Samoa, The Bahamas, Botswana, Democratic People's Republic of Korea, Ethiopia, Ghana, Guam, Iran, Iraq, Libya, Nigeria, Pakistan, Panama, Puerto Rico, Samoa, Saudi Arabia, Sri Lanka, Syria, Trinidad and Tobago, Tunisia, US Virgin Islands and Yemen.

Member States were reportedly discontent with the methodology used to determine whether a jurisdiction would be included on the list, as well as the limited number of days to review the Regulation. Certain inclusions also threaten trade deals between Member States and countries included on the list, in particular with Saudi Arabia. To that end, a group of center-left and left MEPs have written a letter expressing their displeasure that Member States are attempting to have certain jurisdictions removed from the list. The final deadline for Member States to oppose the Regulation is 13 March, and will be formally voted in the coming week.

Parliament's TAX3 Committee Approves Report

On 27 February, the European Parliament's Special Committee on Financial Crimes, Tax Evasion and Tax Avoidance, "TAX3", voted, by a majority of 34 votes to 4, with 3 abstentions, its draft report. The report presents the recommendations of the Committee following ten months of hearings concerning anti-money laundering and aggressive tax planning.

The report recommends that Commission and Council adopt a comprehensive definition of aggressive tax planning, as well as a definition of permanent establishment, economic activity requirements and expenditure tests to avoid companies having an artificial taxable presence in a Member State.

Additional recommendations include that an EU anti-money laundering watchdog ought to be established, the Commission ought to propose that a European financial police force be established, that golden visas ought to be phased out and that whistleblowers need to be provided with better protection. An amendment which recommends imposing a mandatory rotation for auditors after 7 years of service was also approved. A finding to include in the report that Belgium, Cyprus, Hungary, Ireland, Luxembourg, Malta and The Netherlands all display traits of a tax haven and facilitate aggressive tax planning was also approved.

Chair of the committee, Petr Ježek, said of the voted report: *"The considerable amount of work achieved by this committee over its twelve-month mandate has shed light on unprecedented issues affecting the banking and financial sectors. The investigations and hearings have helped us draft stronger recommendations, notably on the need to enforce EU AML/CFT legislation better, stricter banking supervision, and enhanced information exchange among FIUs and tax authorities. It is now crucial to maintain pressure for the implementation of our recommendations to the governments and the relevant actors."*

The report will now be voted by the European Parliament Plenary in the second sitting in Strasbourg between 25 – 28 March.

3. CJEU Decisions in Danish Beneficial Ownership Cases

On 27 February, the Court of Justice of the European Union handed down the long-anticipated decisions in the joint cases of T 116/16 -T Danmark & 117/16 - Y Danmark, concerning the Parent-Subsidiary Directive, and joined cases C 115/16 – N Luxembourg 1, Case C 118/16 - X Denmark, Case C 119/16, C Danmark I and Case C 299/16, Z Denmark, concerning the Interest and Royalty Directive.

The Danish companies in the cases concerned were owned by parent companies in other Member States, who were themselves owned by companies in third countries. Dividends or interest were paid by the Danish companies to the EU parent companies, which the Danish companies argued were either free of withholding tax according to the Parent-Subsidiary Directive or Interest and Royalty Directive. The Danish tax administration disagreed, arguing that given recipients of the dividends/interest were not the beneficial owners of the payments, the exemption should not apply.

Concerning the Interest Directive, the CJEU was accordingly asked to indicate whether the recipient of the interest payment was indeed the beneficial owner and could avail itself of the withholding tax exemption in the directive. In answering the question, the Court looked to the OECD Model Tax Convention for the definition of beneficial ownership, and held that if a company would be deemed to be a beneficial owner under the OECD Convention, i.e. benefited economically, it would be likely that it would be a beneficial owner of interest under the Interest and Royalty Directive.

In respect of the Parent-Subsidiary Directive, the beneficial ownership test was not relevant. However, it mandates that a Member State must apply either the credit method or exemption method to a dividend paid to another Member State, except in the case of fraud or abuse. The Court was accordingly asked whether the anti-abuse provision needs to be enacted in domestic legislation in order for a Member State to invoke this argument.

The Court held that a general anti-abuse provision can be relied on by a Member State, based on the EU principle of abuse of law, such that no domestic legislative provision is necessary. However, the Court noted that the *Cadbury Schweppes* test concerning abuse, i.e. that the transaction is purely artificial and was designed to circumvent the proper application of legislation of the Member State in the case in question, must continue to be met.

This aspect of the judgment will be significant for Member States where no anti-abuse provisions have been implemented into national legislation.

4.

Commission Releases 2019 Winter Semester Reports

The EU Commission has released its 2019 Winter Semester Reports detailing the economic and social challenges and policies of each of the Member States. The Reports confirm the expectation that the European economy is expected to grow, with growth forecast for each Member State. However, imbalances remain in many of the Member States' social and economic policies and situations.

The reports note that many Member States will continue to implement reforms to taxation systems, in particular to reduce taxation of labour. Latvia and Lithuania are introducing a revised personal income tax rate to that effect. Similarly, The Netherlands is reducing personal income tax whilst increasing value added tax rates. Germany and Ireland are also reducing labour tax rates for low and middle-income earners. In terms of resource management through taxation, it was noted that Denmark, Greece and Slovenia have a high rate of environmental tax revenue.

The reports note that in terms of tax planning, transposition of agreed initiatives by all Member States, such as the ATAD legislation, will help reduce tax avoidance, but that tax planning can be further curtailed by increasing the strength of national legislation, increasing administrative cooperation and transparency.

The Commission will now hold bilateral meetings with Member States concerning the findings and recommendations in the reports. Member States are then expected to incorporate fiscal strategies and reform priorities in their National Reform Programmes by mid-April. The Commission will thereafter develop further Country-Specific Recommendations on the basis of these Programmes.

5.

Finland Ratifies OECD's MLI

Finland has deposited its instrument of ratification for the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. The multilateral tax treaty allows jurisdictions to update their existing double tax treaties and transpose measures agreed in the BEPS project without further need for bilateral negotiations.

The MLI entered into force on 1 July 2018 following on from 5 countries having ratified the instrument, namely Austria, the Isle of Man, Jersey, Poland and Slovenia. There are now 87 jurisdictions that are signatories to the treaty.