

BERMUDA ADDED TO EU'S LIST OF NON-COOPERATIVE JURISDICTIONS

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On 12 March 2019, the Council of the European Union added Bermuda to its list of non-cooperative jurisdictions for tax purposes.

Being added to the “blacklist” amounts to a move to “name and shame” rather than to impose practical measures on Bermuda. However, Bermuda is understandably disappointed by the change in its status, given its steps to introduce economic substance rules. The Government in Bermuda has expressed a hope and expectation that they will be removed from the blacklist on the next review of the list, understood to be in May 2019.

What is the European Union list of non-co-operative jurisdictions for tax purposes?

The European Union (the “EU”) list of non-cooperative jurisdictions for tax purposes (commonly referred to as the “blacklist”) is a list of jurisdictions which are considered to meet some of the criteria set out by the EU to identify tax havens.

The objective of the list is to pressure tax havens to apply tax rules and information exchange standards approved by the EU.

What is the status of Bermuda?

Bermuda was previously included on a watch list, meaning that their commitments in relation to taxation and information exchange were deemed sufficient, but their implementation was to be closely monitored by the EU. The Council of the European Union (the “Council”) considers that a number of jurisdictions (including Bermuda) have not enacted by the end of 2018 all the measures to which they had committed. As such, the Council expanded their blacklist on 12 March 2019, adding ten jurisdictions to the list, including Bermuda.

The Bermudan Government have expressed that they consider Bermuda to be compliant with the EU’s requirements and they hope and expect their inclusion on the blacklist to be only temporary.

What is the impact for Bermuda and companies incorporated in Bermuda?

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The blacklist was initially formulated and has been expanded by way of Council conclusions. Importantly, Council conclusions are documents which do not intend to have legal effects and only set out political commitments or positions. They are not legally binding.

The EU has said that the jurisdictions considered as tax havens could potentially face financial sanctions, and whilst this idea has created some headlines, no sanctions have been implemented as at the date of this briefing.

The status of the list as a “political position” rather than a legal instrument is likely to mean that Bermuda is not subject to sanctions as that term is used in finance documents.

There are some limited practical consequences of being included on the blacklist. These include that a country’s tax status is a matter to be taken into account when making a decision about certain EU funded projects. Transacting with connected companies incorporated in states labelled as non-cooperative jurisdictions is one of the hallmarks within the EU’s disclosure rules on cross border tax arrangements (although transacting with companies in jurisdictions with a zero or close to zero corporate tax rate is also a hallmark, so this may have no impact for groups with Bermuda companies in their structure).

Conclusion

The main impact of this change is likely to be on the perception of Bermuda, and similar offshore jurisdictions. Blacklisting is part of a growing list of steps that have been taken to discourage the use of offshore entities, and is closely connected to the economic substance rules now in place in many traditional offshore centres.

The long term viability of offshore companies in global group structures is a matter high on the agenda of boards and tax directors in many shipping groups. With the Marshall Islands and Liberia also under scrutiny from the EU and the OECD, on-shoring of shipping businesses is likely to become an increasing trend, with tonnage tax regimes and states with special shipping tax incentives the likely alternatives.

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