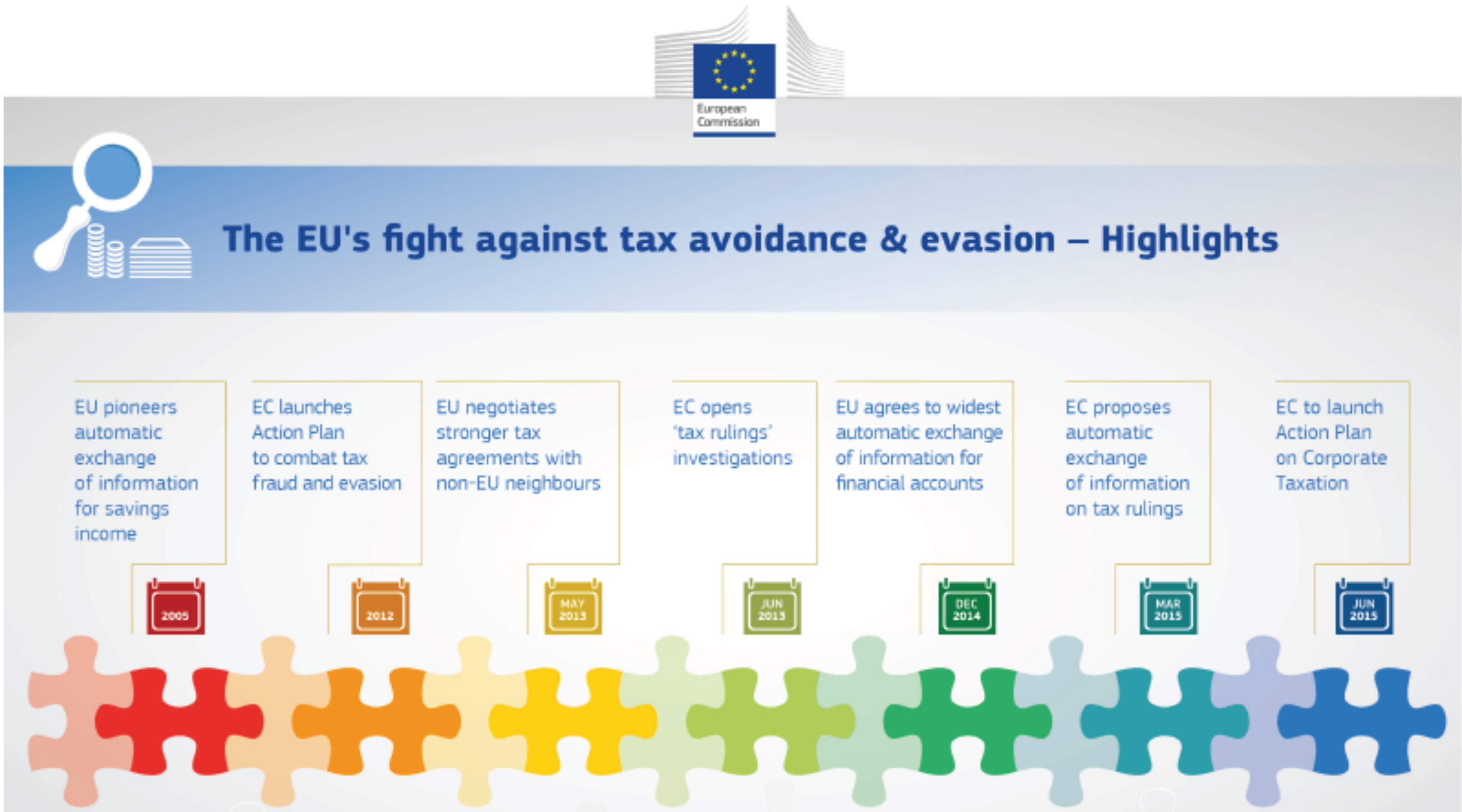
JOHANNES KEPLER
UNIVERSITÄT LINZ

Univ.-Prof. DDr. Georg Kofler, LL.M. (NYU)

Recent Commission Initiatives in Direct Taxation

EU Tax Policy in the 21st Century
Luxembourg, 14 January 2016

Current Developments | *Overview*



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Current Developments | *Overview*

- ***Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion (December 2012)*** → Commission's Communication on An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final (6 December 2012) – 34 concrete Actions, including …
  - ***Administrative Cooperation*** → Mandatory automatic exchange of information in the field of taxation in the Directive on Mutual Assistance – Proposal COM(2013) 348 final (12 June 2013), adopted as Directive 2014/107/EU of 9 December 2014, [2014] OJ L 359/1
  - ***Aggressive Tax Planning*** → Recommendation C(2012)8806 final (6 December 2012)
  - ***Third Countries and Good Tax Governance*** → Recommendation C(2012)8806 final (6 December 2012)
  - ***Hybrid Loans*** → Amendment of the Parent-Subsidiary-Directive – Proposal COM(2013)814 final (25 November 2013), adopted as Directive 2014/86/EU of 8 July 2014, [2014] OJ L 219/40 → ***OECD BEPS Action 2***
  - ***Anti-Abuse Provisons in EU Legislation*** → Amendment of the Parent-Subsidiary-Directive – Proposal COM(2013)814 final (25 November 2013), adopted as Directive (EU) 2015/121 of 27 January 2015, [2015] OJ L 21/1.
- ***Tax Transparency Package (March 2015)*** → Commission's Communication on tax transparency to fight tax evasion and avoidance, COM(2015) 136 final (18 March 2015)
- ***Action Plan on Corporate Taxation (June 2015)*** → Commission's Communication on A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final (17 June 2015)

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  - ***Transparency on Tax Rulings*** → Amending the Directive on Mutual Assistance – Proposal COM(2015) 135 final (18 March 2015), adopted by Council on 6 October 2015 (Doc. 12774/15 FISC 122 ECOFIN 752)
  - ***Other Tax Transparency Initiatives***
    - Assessing possible new transparency requirements for multinationals → Specifically "Country-by-country reporting" ("CBCR") → ***OECD BEPS Action 13***
    - Reviewing the Code of Conduct on Business Taxation → *Action Plan on Corporate Taxation* → ***OECD BEPS Action 5***
    - Quantifying the scale of tax evasion and avoidance ("tax gap")
    - Repealing the Savings Tax Directive (in light of the extended Directive on Mutual Assistance) → Proposal COM(2015) 129 final (18 March 2015)
- ***Action Plan on Corporate Taxation (June 2015)*** → Commission's Communication on A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final (17 June 2015)

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- ***Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion (December 2012)*** → Commission's Communication on An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final (6 December 2012)
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- ***Action Plan on Corporate Taxation (June 2015)*** → Commission's Communication on A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final (17 June 2015)
  - Re-launching the ***Common Consolidated Corporate Tax Base*** (CCCTB)
  - Ensuring ***fair taxation where profits are generated*** → CCCTB, CoC, double non-taxation in EU legislation (i.e., in the Interest-Royalties-Directive and the Parent-Subsidiary-Directive), transfer pricing framework in the EU, linking preferential regimes to where value is generated (i.e., for "patent boxes") → ***OECD BEPS Action 5***
  - Creating a ***better business environment*** → Greater coordination between Member States on tax policy, along with measures to reduce administrative burden, compliance costs and tax obstacles in the internal marekt, specifically by *(1)* enabling cross border loss offset (with recapture) and *(2)* improving double taxation dispute resolution mechanisms
  - Increasing ***transparency*** → E.g., adopt a common approach to non-cooperative tax jurisdictions, specifically by *(1)* publishing an EU-wide list of third country non-cooperative tax jurisdictions and *(2)* coordinating possible counter-measures towards non-cooperative tax jurisdictions
  - Improving ***EU coordination*** – Specifically by *(1)* coordination on tax audits and *(2)* reforming the Code of Conduct for Business Taxation and the Platform on Tax Good Governance

Administrative Cooperation | *Automatic Exchange of Information*

Step 1 – Certain Types of Non-Financial Income (2011)

- Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, [2011] L 64/1 (based on Proposal COM(2009) 29 final [2 February 2009])
- Automatic exchange of information with effect from 1 January 2015, where information is available, in respect of five non-financial categories of income and capital, i.e., for
  - income from employment,
  - director’s fees,
  - life insurance products not covered by other Directives,
  - pensions, and
  - ownership of and income from immovable property.
- Implementation (computerized format) → Commission Implementing Regulation (EU) No 1353/2014 of 15 December 2014 amending Implementing Regulation (EU) No 1156/2012 laying down detailed rules for implementing certain provisions of Council Directive 2011/16/EU on administrative cooperation in the field of taxation, [2014] OJ L 365/70 → Repealed and replaced by Commission Implementing Regulation (EU) 2015/2378 of 15 December 2015 laying down detailed rules for implementing certain provisions of Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Implementing Regulation (EU) No 1156/2012, [2015] OJ L 332/19
- *Also:* First Report of the Commission AEFI expert group on the implementation of Directive 2014/107/EU for automatic exchange of financial account information (March 2015)

Administrative Cooperation | *Automatic Exchange of Information*

Step 2 – Financial Information (2014)

- Council Directive 2014/107/EU of 9 December 2014, [2014] OJ L 359/1 (based on Proposal COM(2013) 348 final [12 June 2013]) → Implementation of the OECD's Common Reporting Standard (CRS)
- Automatic exchange of information with effect from 1 January 2017 (without the requirement of "availability") for financial information, i.e.,
  - interest, dividends and similar types of income,
  - sale proceeds from the sale of financial assets,
  - account balances.
- Implementation (computerized format) → Commission Implementing Regulation (EU) 2015/2378 of 15 December 2015 laying down detailed rules for implementing certain provisions of Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Implementing Regulation (EU) No 1156/2012, [2015] OJ L 332/19

Administrative Cooperation | *Automatic Exchange of Information*

Step 2 – Financial Information (2014)

- Relation to Savings Interest Directive? → Repeal of the Savings Interest Directive by Council Directive (EU) 2015/2060 of 10 November 2015, [2015] OJ L 301/1 (based on Proposal COM(2015) 129 final (18 March 2015)) (aligned with entry into force of Council Directive 2014/107/EU)
- Third countries
  - Negotiations/agreements with Switzerland (Council Decision (EU) 2015/2400 of 8 December 2015, [2015] OJ L 333/10), Liechtenstein (Council Decision (EU) 2015/2543 [2015] OJ L 339/1), Monaco, Andorra (Proposals COM(2015)631 final and COM(2015)632 final) and San Marino (Proposals COM(2015) 518 final and COM(2015) 519 final) (mandate in Dok. 9487/13 Presse 193; Dok. 9356 FISC 90 [20 June 2013])
  - "The agreements will be significantly more ambitious than previously foreseen, as they will be aligned to the new global standard and will secure the widest scope of automatic information exchange between the parties."

Administrative Cooperation | *Automatic Exchange of Information*

Step 3 – Tax Rulings (2015)

- Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, [2015] OJ L 332/1 (based on Proposal COM(2015) 135 final (18 March 2015) → ***OECD BEPS Action 5***
- Exchange of basic information on advance cross-border rulings and advance pricing arrangements with effect from 1 January 2017
- Applies for cross-border rulings and advance pricing arrangements that were issued, amended or renewed
  - after 31 December 2016 or
  - within a period beginning five years before 1 January 2017, but for those issued, amended or renewed
  - between 1 January 2012 and 31 December 2013 only if they are still valid on 1 January 2014,
  - between 1 January 2014 and 31 December 2016 irrespective of whether they are still valid or not, and
  - before 1 April 2016, Member States may exclude such ruling if it concerns a particular person or a group of persons (excluding those conducting mainly financial or investment activities) with a group wide annual net turnover of less than € 40 million.
- Does not apply in a case where an advance cross-border ruling exclusively concerns and involves the tax affairs of one or more natural persons.

Aggressive Tax Planning | *Subject-to-Tax and GAAR*

- Action 8 of the EU Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion calls for a recommendation on aggressive tax planning → ***Recommendation on aggressive tax planning***, C(2012)8806 final (6 December 2012)
- Contains ***recommendations to Member States*** to …
  - ... include a ***Subject-to-Tax-Clause*** in their tax treaties:

    'Where this Convention provides that an item of income shall be taxable only in one of the contracting States or that it may be taxed in one of the contracting States, the other contracting State shall be precluded from taxing such item only if this item is subject to tax in the first contracting State'.

  - … adopt a ***general anti-avoidance rule***:

    'An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored. National authorities shall treat these arrangements for tax purposes by reference to their economic substance'.

- Implementation is monitored through the “Platform on Tax Good Governance”.

Aggressive Tax Planning | *Hybrid Loans*

- Action 14 of the EU Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion calls for a revision of the Parent-Subsidiary-Directive with regard to ***hybrid loans → OECD BEPS Action 2***
  - Amendment of the Parent-Subsidiary-Directive by Council Directive 2014/86/EU of 8 July 2014, [2014] OJ L 219/40 (based on Proposal COM(2013) 814 final [25 November 2013])
  - Background: "In as far as payments under a hybrid loan arrangement are qualified as a tax deductible expense for the debtor in the arrangement, Member States shall not exempt such payments as profit distributions under a participation exemption" (Report of the Code of Conduct Group of 25 May 2010, Doc. 10033/10, FISC 47, par. 31 [access to the public restricted]).
  - Amendment of ***Art 4(1)(a) of the Parent-Subsidiary-Directive*** (to be implemented since 31 December 2015):

    (1) in Article 4(1), point (a) is replaced by the following:

    '(a) refrain from taxing such profits to the extent that such profits are not deductible by the subsidiary, and tax such profits to the extent that such profits are deductible by the subsidiary; or';

  - ***Points of discussion***, e.g., *(1)* meaning of "deductible" (e.g., notional deductions, exemptions, split-rate), *(2)* meaning of "tax" (e.g., zero- or low-rate, in loss situations etc), *(3)* relationship to tax treaties, *(4)* relationship to subsidiarity and proportionality (Art. 5(3) TEU), *(5)* impact of the Directive on domestic correspondence rules before the 2014 amendment, *(4)* lack of similar rules in other directives, and *(5)* lack of rules for the reverse case (i.e., payments that are non-deductible in one MS but taxable in the other MS).

Aggressive Tax Planning | *Minimum Anti-Abuse Standard*

- Action 15 of the EU Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion calls for a ***review of anti-abuse provisions in EU legislation***
  - Amendment of the Parent-Subsidiary-Directive by Council Directive (EU) 2015/121 of 27 January 2015, [2014] OJ L 21/1 (based on Proposal COM(2013) 814 final [25 November 2013])
  - ***Mandatory minimum standard of anti-abuse*** in the Parent-Subsidiary-Directive (to be implemented since 31 December 2015):

In Directive 2011/96/EU, Article 1(2) is replaced by the following paragraphs:

'2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.

An arrangement may comprise more than one step or part.

3. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

4. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse.'

  - Also: Planned inclusion of a minimum anti-abuse rule in the Interest-Royalties-Directive (compromise text in Doc. 9674/15 FISC 68 ECOFIN 456 [9 June 2015])

Third Countries and Good Governance | *Transparency*

- Action 7 of the EU Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion calls for a recommendation regarding minimum standards of good governance in tax matters for third countries → ***Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters***, C(2012)8806 final (6 December 2012)
- Contains …
  - … a list of minimum standards of good governance (transparency and effective exchange of information, no harmful tax measures in the area of business taxation)
  - … measures against third countries not complying with these standards
  - … measures in favor of third countries complying with these standards
  - … measures in favor of third countries which are committed to comply with these standards
- Implementation is monitored through the "Platform on Tax Good Governance".

4. Measures directed against third countries not complying with minimum standards set out in point 3

4.1. Member States should publish blacklists of third countries not complying with minimum standards set out in point 3, with a view to the application of point 4.3. Those blacklists should make reference to this Recommendation.

4.2. Member States that have adopted national blacklists should include in such lists third countries not complying with minimum standards set out in point 3.

4.3. Each Member State having concluded a double taxation convention with a third country not complying with minimum standards as set out in point 3 should, as most appropriate with a view to improve compliance by that third country with these standards, either seek to renegotiate the convention, suspend or terminate the convention.

Third Countries and Good Governance | *“Black List”*

- Annex to the Commission’s Communication on a Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final ANNEX 1 (17 June 2015)
- Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters, C(2012)8806 final (6 December 2012) → “Platform on Tax Good Governance” (Member States’ independent national blacklists) → ***EU-wide list of third country non-cooperative tax jurisdictions*** (covers countries that were identified by at least 10 Member States) that will be further amended on a periodic basis.
- The list offers Member States a transparent tool to compare their national lists and adjust their respective approaches to non-cooperative tax jurisdictions as necessary.

ANNEX: List of third country non-cooperative tax jurisdictions

As part of the work of the Platform on Good Tax Governance, in late 2014 Member States provided the Commission with lists of those jurisdictions they determined met their definition of non-cooperative tax jurisdictions. Member States use a variety of criteria to identify these jurisdictions, including lack of transparency and exchange of information, the presence of harmful tax measures, and the use of a low or no tax rate.

The below list indicates those tax jurisdictions which appeared the most often on those lists Member States discussed in the December 2014 Platform on Good Tax Governance. Those listed below appear on the list of at least 10 Member States. The Commission will amend this list on a periodic basis to reflect changes to Member States' national lists.

Andorra**
Anguilla *
Antigua and Barbuda**
Bahamas**
Barbados*
Belize**
Bermuda*
British Virgin Islands*
Brunei**
Cayman Islands*
Cook Islands
Grenada**
Guernsey*
Hong Kong**
Liberia
Liechtenstein***
Maldives
Marshall Islands**
Mauritius*
Monaco**
Montserrat*
Nauru
Niue*
Panama
Saint - Vincent and the Grenadines**
Saint Christopher and Nevis**
Seychelles*
Turks and Caicos Islands*
US Virgin Islands
Vanuatu

* Early adopter of the new global standard on the automatic exchange of information, first exchanges in 2017.
** Committed to adopting the new global standard on automatic exchange of information, first exchanges in 2018
*** Early adopter of the new global standard on the automatic exchange of information, first exchanges in 2017. Currently engaged in a dialogue on company taxation with the Code of Conduct for Business Taxation Group.

As Member States may use a number of different criteria when assessing tax jurisdictions, it is not clear how the adoption by some jurisdictions of global reporting standards will affect this list.

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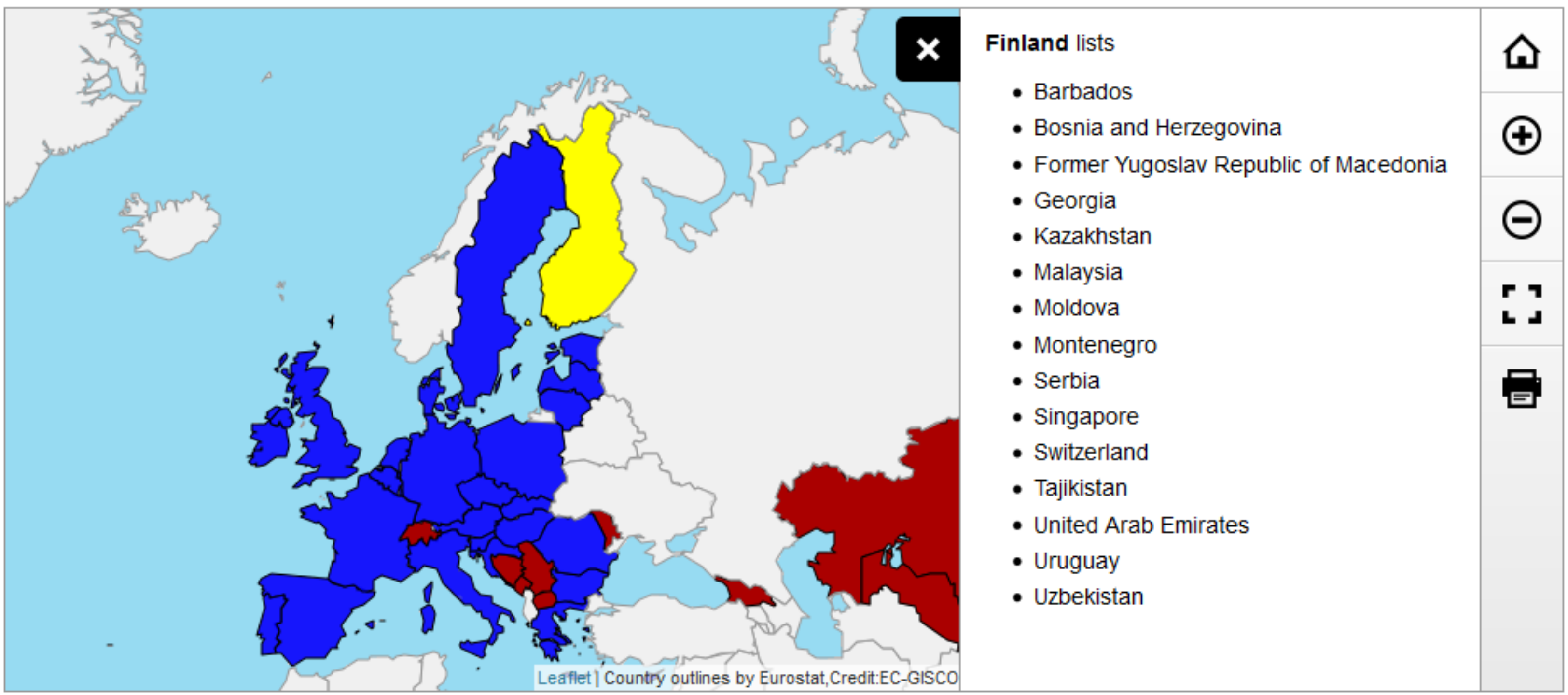
Third Countries and Good Governance | *“Black List”*

- Updated ***information on third countries listed by Member States for tax purposes*** available online (as of 30 June 2015)*



* At http://ec.europa.eu/taxation_customs/taxation/gen_info/good_governance_matters/lists_of_countries/

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C(C)CTB | *Status Quo*

- ***Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)***, COM(2011) 121 final (16 March 2011)
  - Impact Assessment in SEC(2011)315 and Summary in SEC(2011)316
  - Work on the level of Council on the tax base (under the Danish, Lithuanian and Hellenic Presidencies) and on international and BEPS-related aspects and issues of the financial sector (under the Italian Presidency) → Compromise text in Doc. 15756/14 FISC 197 and 15756/14 FISC 197 ADD 1 (19 November 2014)
- ***Structure*** of the Commission's proposal:

One single set of profit determination rules for EU groups of companies that opt for the common system. Optionality and "All-In".

Only corporations, not individuals or partnerships!

Common Consolidated Corporate Tax Base

Profits and losses of all group members are aggregated into one singe overall group tax base, including irrelevance of intra-group transactions. → Sharing mechanism (formulary apportionment)

No intention to harmonize tax rates!

- ***Main goals*** → *(1)* Reduction of compliance costs (no transfer pricing), *(2)* elimination of double taxation (base sharing mechanism), and *(3)* elimination of over-taxation (i.e., automatic cross-border loss relief)

C(C)CTB | *Action Plan on Corporate Taxation*

- ***Re-launch of the Common Consolidated Corporate Tax Base (CCCTB)***
  - Commission's Communication on A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, COM(2015) 302 final (17 June 2015)
  - CCCTB as a holistic solution to profit shifting in the BEPS-context → Highly effective in "tackling profit shifting and corporate tax abuse in the EU", as a CCCTB would *(1)* remove mismatches between national tax systems, *(2)* remove the possibility to manipulate transfer pricing, *(3)* address the "debt bias", *(4)* introduce transparency as to the effective tax rate in each jurisdiction, *(5)* allow Member States to implement a common approach towards third countries, *(6)* reinforce the link between profit creation and taxation, *(7)* enable a common adoption of BEPS measures (e.g., definition of permanent establishments, CFC rules)
- The Commission has announced a ***new proposal in 2016*** to revive the CCCTB, based on two key changes:
  - First, it will propose a mandatory CCCTB, as this would improve its capacity to prevent profit shifting (as compared with the optional system in the 2011 Proposal).
  - Second, it will propose that the CCCTB is introduced through a step-by-step approach, i.e.,
    - securing the common tax base, i.e., "CCTB" (starting with international elements related to BEPS) (to be discussed in Council in 2017) and
    - postpone consolidation, i.e., "CCCTB", until after the common base has been implemented (to be discussed in Council post-2017).
- Also, in 2016 the Commission will propose "that, until full CCCTB consolidation is introduced, group entities should be able to offset profits and losses they make in different Member States", i.e., temporary cross-border loss relief with recapture (Pt 3.1 of COM(2015) 302 final [17 June 2015]).

BEPS and C(C)CTB | *Anti-BEPS Directive*

- ***Documents of the Luxembourg Presidency***
  - Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) – State of play (Doc. 14509/15 FISC 169 ECOFIN 916 (1 December 2015))
  - Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) (Doc. 14544/15 FISC 171 (2 December 2015))
  - Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) – Explanatory notes (Doc. 14544/15 ADD 1 FISC 171 (2 December 2015))
- ***Commission Initiatives expected for January 2016***

Questions?

Univ.-Prof. DDr. Georg Kofler, LL.M. (NYU)
Institute for Fiscal Law, Tax Law and Tax Policy
Johannes Kepler University Linz
Altenberger Str. 69, 4040 Linz, Austria
Tel: +43/732/2468-7481
Mail: *georg.kofler@jku.at*
Web: *www.steuerrecht.jku.at/gwk*