

## Editorial: European Union ‘blacklist’ decision due in December

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The Cayman Islands is one of 92 jurisdictions that expect to learn by December if they will be placed on a European Union “blacklist” being drawn up as part of a tax avoidance crackdown.

The European Commission’s Tax Code of Conduct Committee, one of the EC’s most private governing bodies, has been reviewing various taxation criteria since January 2016 for all jurisdictions that have significant dealings with the EU.

Placement on the EU tax blacklist could lead to as yet unspecified economic sanctions being imposed by year’s end, according to earlier statements from the commission.

“Cayman has no expectation that we will be blacklisted because we have implemented appropriate standards,” Premier Alden McLaughlin said Wednesday. “In the past, countries that have been placed on such lists have experienced a loss of financial services and other business based upon reputational issues. Any loss of business, for any reason, would affect a jurisdiction’s economy and society.”

Cayman Finance Chief Executive Jude Scott said it would be “counter-productive” for the EU to include Cayman on a blacklist of uncooperative taxing jurisdictions.

“If the EU uses a transparent and objective evaluation process to determine its blacklist, the Cayman Islands should not be included on a list of ‘noncompliant countries,’” Mr. Scott said. “Cayman scored positively in the initial evaluations by the EU ... and better than some other major countries, so it would be unfair to include Cayman on any list unless those other major countries were also included.”

### Brussels meetings

Premier McLaughlin said he was encouraged by successful meetings held last week in Brussels, Belgium, with top EU officials to discuss Cayman’s position on the preparation of the blacklist. These were the third such face-to-face meetings with EU officials on that topic since April 2016, the premier said, in addition to more frequent updates provided via written correspondence.

EU officials told Cayman representatives during these meetings that all countries will be informed of the outcome of the EU’s analysis and given the opportunity to reply before the publication of the blacklist. The date of the last meeting of the 28 EU finance ministers for 2017 is Dec. 5, and Ministry of Finance officials expect that the list will be published on that day or shortly afterward.

“Our objective is to assist EU ministers of finance in their un-

derstanding of Cayman’s [tax] compliance efforts prior to the EU’s December 2017 announcement of the jurisdictions that it considers to be non-compliant with global tax good governance standards,” Mr. McLaughlin said.

Finance Minister Tara Rivers said that during the recent meetings in Brussels, the European ministers “lauded our efforts as frontrunner for implementing and shaping international transparency standards.”

“During every meeting, EU officials praised our engagement and active pursuit of dialogue,” Ms. Rivers said.

Some in Cayman’s financial services industry have questioned the EU’s political, rather than practical or operational, motives in issuing this latest list and wonder whether Cayman’s government is taking a firm enough stance to protect its most profitable business sector.

“You cannot appease an alligator by giving it just one of your legs,” said Anthony Travers, senior partner at the Travers Thorp Alberga law firm. “You will end up legless, very possibly worse.”

“If there is any suggestion that the Cayman Islands is ‘black-listed’ by the EU, the Cayman Islands government should reassess the importance of the EU to the Cayman Islands and, particularly, in the light of Brexit. In fact, less than 8 percent of investment flows into Cayman Islands hedge funds originate from the EU,” Mr. Travers said. “The Cayman Islands would do better to repeal the transparency arrangements with EU jurisdictions, repeal the Common Reporting Standard and focus on transactional flows from the rest of the world without further interference.”

### What is the blacklist?

The proposed EU blacklist is for countries or territories that the European Commission does not consider to be implementing proper tax governance structures.

Premier McLaughlin said there are three general areas that European committee members are looking into during their evaluation of jurisdictional tax systems. These are compliance with measures aimed to prevent tax base “erosion” when companies shift profits from their home country to lower or no-tax jurisdictions; general adherence to tax transparency practices; and whether the jurisdictions operate a “fair” tax system – according to EU standards.

The last point is where Cayman's financial services industry and the local government have some concerns.

According to an EU public affairs press release from November 2016: "The EU's ECOFIN Council [made up of the EU's 28 finance ministers] agreed that to avoid being on the future EU tax haven blacklist, [non-EU] countries would have to comply with the international tax transparency criteria, fair taxation – including not facilitating offshore structures or arrangements aimed at attracting profits that do not reflect real economic activity in the jurisdiction ...."

Mr. McLaughlin said, from Cayman's perspective, the definition of a fair tax system means acceptance that doing business in another country does not relieve a person or company from tax obligations to their home country. In addition, the country in which that individual does business would be expected to share information with the person's home country, to assist in the administration of that jurisdiction's tax system, he said.

### Direct taxation

The Cayman Islands has never had a direct tax system; however, the local government points out that the current system of indirect taxation brings in the equivalent of about 28 percent of the territory's gross domestic product. That is comparable to other First World jurisdictions that have direct taxation.

Cayman is participating in the Organisation for Economic Co-operation and Development's Base Erosion and Profit Sharing, or BEPS, tax initiative. This effort seeks to prevent taxable capital from leaving the jurisdiction in which the EU considers it should be paid, so it can be transferred to other lower tax or no-tax countries. Cayman was also an early signatory to the Common Reporting Standard for tax transparency as well as the Foreign Accounts Tax Compliance Act in the U.S.

"Cayman's globally responsible tax regime meets or exceeds the revenue targets used by other leading countries around the world," Mr. Scott said. "It's a taxation revenue raising system that works well for our jurisdiction and very adequately funds our government operations and keeps our debt-to-GDP ratio modest. This responsible approach to taxation is central to the Cayman model and a distinguishing feature of our jurisdiction."

### Second attempt

The Cayman Islands and a number of other offshore financial services centers were briefly blacklisted by the EU in a similar tax transparency initiative, the results of which were announced in mid-2015.

However, that listing was walked back when the OECD criticized the EU for targeting offshore centers that already had

tax information exchange agreements in place as part of the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes.

"A number of countries identified in the EU exercise are either fully or largely compliant and have committed to [automatic exchange of information], sometimes even as early adopters," according to an email the OECD sent to Global Forum members at the time. The 2015 blacklisting was widely criticized for a lack of transparent methodology and the omission of large EU-member states.

Mr. Travers said those who have been following the EU machinations regarding offshore financial centers over the past three decades were "not at all surprised" at the suggestion that Cayman might appear on the latest financial center blacklist.

"[The European Union] will doubtless label it using the pejorative term, 'tax haven black list,'" Mr. Travers said in response to Cayman Compass questions about the issue this week.

"No doubt it was prudent for the Cayman Islands government over nearly 20 years to honestly and fairly engage in the process; indeed, given the fact that the Cayman Islands now has globally leading standards of transparency through the mechanisms of FATCA, the Common Reporting Standard, and the Tax Information Exchange Agreements (notably with the most important European Union jurisdictions) and has signed up to the first stage of the OECD Base Erosion and Profit Shifting Initiative which requires yet further reporting requirements, it cannot be legitimately criticized for its efforts," Mr. Travers said. "But it can be criticized for its naiveté in dealing with the EU and the OECD. Unfortunately, the program of appeasement was bound to fail insofar as the EU was concerned and simply because the EU does not and has never had the slightest intention of allowing tax neutral jurisdictions to exist.

"In the light of the foregoing transparency initiatives, any blacklisting by the EU should cause a radical reassessment by the Cayman Islands government of its cooperation to date, since it is clear that there is no effective quid pro quo whatsoever and that the Cayman Islands is not being treated honestly and fairly by the OECD.

"The OECD have fundamentally misunderstood the importance and integrity of the role of the Cayman Islands financial services Industry from the outset and deliberately so. We say tax is paid in the jurisdictions where profits are made, indeed, a cornerstone of the BEPS initiative. But for offshore financial centers the OECD applies a blatant and discriminatory double standard. The Harmful Tax Competition Initiative of 1998 and the Base Erosion and Profit Shifting Initiatives contain within them concepts which are artificial and which are specifically designed to discriminate against jurisdictions like the Cayman Islands in an arbitrary and unjustifiable manner."