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TAX HAVEN LISTING IN MULTIPLE HUES: BLIND, WINKING OR CONNIVING?

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NOTE

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ABSTRACT

Tax havens are among the biggest challenges faced by developing countries in achieving their national development goals. States, international organisations, multilateral agencies and non-governmental organisations have all made several efforts at compiling 'lists' of tax havens at the multilateral and national levels, with varying levels of seriousness and outcomes. This research paper examines these efforts by analysing the objectivity of criteria used and the clarity of the final outcome in a comparative manner. The paper is organized into four sections dealing with the tax haven blacklisting by the Organisation for Economic Co-operation and Development (OECD), the countries of the South, the European Union (EU) and an analysis across lists. The concluding section offers some suggestions.

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I. INTRODUCTION

Tax havens, variously referred to as secrecy jurisdictions, non-cooperative jurisdictions or offshore financial centers (OFCs), are the dirty underbelly of globalization. They are used by multinational corporations (MNCs) and high net worth Individuals (HNIs) to avoid paying their legitimate taxes in the countries of residence or where they create economic value. Their conduit roles in money laundering and hosting the proceeds of the criminal underworld have been commonly acknowledged. Hyper mobile capital, and so called "tax competition" between countries for attracting it, lies at the foundation of these financial networks through which one third of foreign direct investment (FDI) by MNCs and half of all banking assets are routed (Palan et al., 2010, p. 51). Estimates of untaxed or lowly taxed income and wealth managed through these jurisdictions have varied from a conservative $7.8 trillion (Zucman, 2013; 2014) to a middling $10.3 trillion (The Boston Consulting Group, 2017, p. 14) and higher $21-32 trillion (Henry, 2012); growth rates of about 4% (The Boston Consulting Group, 2017) to 10% (Kar & Spanjers, 2014) are part of the estimate.

The tax havens were central actors in the global financial crisis of 2008, being core elements of the 'shadow banking system' (Financial Stability Board, 2018), allowing creation of complex opaque financial products that escalated the crisis. These jurisdictions are, therefore, "virtually always both tax and regulatory havens" (Fichtner, 2015, p. 1) which allow HNIs and MNCs to be "elsewhere, ideally nowhere" through legal spaces created to duck regulations and controls of "onshore" countries (Palan and Nesvetailova, 2014).

The early response of the developed countries, using the Organisation for Economic Co-operation and Development (OECD), was to draw up 'blacklists' of tax havens to "stop harmful tax practices arising from the discrepancy between the global reach of financial flows and the geographically limited scope of jurisdictions, matching or inside national borders" (Remeur, 2018). Threats of sanctions were part of the strategy. The OECD initiative was intended, in particular, "to develop a better understanding of how tax havens and harmful preferential tax regimes, collectively referred to as harmful tax practices, affect the location of financial and other service activities, erode the tax bases of other countries, distort trade and investment patterns and undermine the fairness, neutrality and broad social acceptance of tax systems generally" (OECD, 1998, p. 8).

The compilation of tax haven 'lists' has found its latest expression in the December 2017 blacklist of non-cooperative jurisdictions drawn up by the European Union (EU), ostensibly to trigger anti-tax avoidance rules. Some developing countries have also adopted this strategy, albeit with varying levels of seriousness and outcome. This paper examines these exercises of "list making" at the multilateral and national levels to analyse the objectivity of criteria used and the clarity of the final outcome. The national lists are discussed as illustration, without any attempt at being exhaustive. The blacklists drawn up by other multilateral agencies such as the Financial Action Task Force (FATF) or by international organizations like the International Monetary Fund (IMF), the Financial Stability Board and by non-governmental organizations (NGOs) such as Oxfam and the Tax Justice Network are discussed in a separate section where jurisdictions across various "lists" have been compared.

The paper is organized into four sections dealing with the tax haven blacklisting by the OECD, the countries of the South, the EU and an analysis across lists. The concluding section offers some suggestions.

II. THE OECD BLACKLISTS: MOVING THE CRITERIA FROM STEELY TO SOPPY

The OECD Blacklist of 2000

In 1998 the OECD produced a seminal report called "Harmful Tax Competition: An Emerging Issue" (OECD, 1998) where it called for action against the special tax regimes for multinationals in OECD countries and tax havens outside the OECD. It specified a fourfold tax driven criteria for identifying tax havens. These were as follows-

a) No or only nominal taxes
b) Lack of effective exchange of information
c) Lack of transparency
d) No substantial activities

For identification of harmful 'preferential tax regimes' the first three factors continued to be relevant along with the additional factor of "ring fencing" of the regime from the domestic economy. Switzerland and Luxembourg abstained from the OECD Ministerial Council's approval of the report and its decision to draw up a blacklist of tax havens.

The promised blacklist, with 35 jurisdictions[1] meeting the four criteria as above, and identified from publicly available sources by the OECD's Forum on Harmful Tax Practices, was published in June 2000 (OECD, 2000). A range of possible defensive measures that could be taken against the tax havens was also identified, including disallowance of deductions and credits, enhanced audit and enforcement, higher withholding taxes, imposition of transactional charges etc.

Reactions to the blacklist were dramatic and varied. There was anger from the targeted countries with accusations of neocolonialism since they were being held up to standards they had not participated in setting. Development concerns were raised by smaller tax havens in the Caribbean and Pacific who anticipated a crushing of their financial centers. The OECD was projected with a "big bully syndrome since many OECD member states that are major tax havens themselves avoided the blacklist" (Shaxson and Christensen, 2016). The tax havens and their lobbyists formed the International Tax and Investment Organization (ITIO) to mobilize a counter offensive framing the OECD as being against the efficiencies created by competition itself. Many others highlighted arguments of democratic decision making - the United Nations, and not the OECD, was held up as the appropriate forum for eliminating harmful tax practices (Hishikawa, 2002).

The OECD's move to the back foot was accelerated by the US administration, under President George W. Bush, changing track on the question of tax havens (Carroll, 2001). The US Treasury Secretary echoed the language of the lobbyists - "the United States simply has no interest in stifling the competition that forces governments – like business - to create efficiencies" (cited in Shaxson and Christensen, 2016, pp. 286-87). On this slippery slope to dilution of criteria the OECD dropped 'zero tax rates' and 'lack of substantial activities' from the factors used to identify jurisdictions (OECD, 2001). The shift from "bombshell" to "damp

[1] Listed in Part IV of this paper in comparison with other lists

squib" had effectively begun (Kudrle, 2008) as uncooperative tax havens were to be determined only on the basis of the criteria of transparency and effective exchange of information on request. The proposals for internationally coordinated sanctions also moved to the back burner.

The jurisdictions in the 'blacklist' were called upon to make public commitments to the two standards of transparency and exchange of information which all but seven[2] had done by April 2002. No questions were raised about the level of implementation of the commitments as the 'list' effectively shrunk out of sight amidst a new "cozy relationship between the OECD membership and tax havens" (Lesage, 2010, p. 2) now considered as "participating partners" (OECD, 2001).

OECD's Black, Grey & White Lists of 2009

A new momentum towards 'list making' by the OECD took off in 2008. The Group of Seven (G7) countries were dissatisfied by the tax havens dragging their feet on implementation of the committed standards and there was public consternation at several tax scandals involving financial institutions in Liechtenstein and Switzerland (Kubisova, 2008). The US administration under Obama was calling for tougher action, especially against the strains of the global financial crisis. The OECD this time published three lists – a white list of countries that had fully implemented the OECD standards, a blacklist of renegade countries and a grey list. They were presented at the London summit of the Group of Twenty (G20) in April 2009 (OECD, 2009a).

The criteria employed for inclusion in the white list was commitment to the OECD standard which consisted of the following (OECD, 2009a):

a) Exchange of information on request where it is "foreseeably relevant" to the administration of the domestic law of the requesting jurisdiction
b) No restriction on exchange of information due to bank secrecy, or domestic tax interest requirement
c) Safeguards to protect confidentiality of information exchanged
d) Respect for taxpayer's rights
e) Availability of reliable information and power to obtain it

Since an evaluation of compliance with the above standards would necessarily entail complex fact finding/reporting, the OECD's Global Forum used a convenient shorthand as a replacement criteria for the above. In order to make it to the white list the OECD specified that a jurisdiction should have "substantially implemented" the standards, i.e. concluded at least 12 bilateral agreements with other countries containing provision for information exchange. The basis for "12" was not elaborated and the original insistence that the information exchange agreements should be with 12 OECD countries only also weakened.

The white list contained 40 jurisdictions, including most OECD countries, along with well-known tax havens such as Mauritius, the Isle of Man and Jersey who had faced blacklisting under the 1998 criteria. There was a grey list of 30 jurisdictions, each a tax haven as per the 1998 criteria, and 8 other financial centers which had committed to the standards

[2] Andorra, Liechtenstein, Liberia, Monaco, Marshall Islands, Nauru and Vanuatu

but not substantially implemented it. The blacklist contained just 4 jurisdictions that had not committed to the standards (Costa Rica, Malaysia, Philippines and Uruguay).

Preceding the publication of the white list in 2009 there was intense jockeying, shoving and power games to enter the white list. Chinese pressures kept Hong Kong and Macau out of the blacklist, in spite of satisfying the criteria. Instead they were mentioned, conveniently without names, in a footnote to China in the white list as “excluding the Special Administrative Regions which have committed to implement the internationally agreed tax standard” (Mason, 2009). Singapore, which was in the grey list along with other financial centers like Switzerland, considered itself to be on the same footing as Hong Kong, even though the latter had missed this list too (Chow, 2009). Very soon after the London summit of G20, the truncated blacklist was also emptied completely with the four jurisdictions committing to the standards (OECD, 2009b).

The OECD Blacklist of 2017

The latest attempt of the OECD, tasked by the G20 to identify non-cooperative jurisdictions through “objective criteria” on “tax transparency” (G20, 2016), amounted to a blacklist even though it was not called one. It was mentioned in the G20 summit that although considerable progress had been made in jurisdictions previously identified as non-cooperative, the option of blacklisting was left open for 2018. To avoid it a country should have met two out of the following three criteria (OECD, 2017):

a) get a rating of “largely compliant” or better in the peer review on exchange of information under request (EOIR) standards by the OECD’s Global Forum on Transparency and Exchange of Information for Tax Purposes
b) commit to adopting the Common Reporting Standards (CRS) for Automatic Exchange of Information, starting latest 2018
c) should have signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MCMAA) or a sufficiently broad exchange network

The ostensible ‘black list’ which emerged in June 2017 from the above criteria contained only one country – Trinidad and Tobago. Since, in any case, the country did not have a significant financial sector the list was as good as empty. Unsurprisingly, many considered it a farce (Lu, 2017).

Effectiveness of the OECD Criteria for Blacklisting

The original four-fold criteria employed by the OECD in 1998 to identify tax havens had quickly shrunk to two, dropping the critical criteria of ‘zero tax rate’ and ‘lack of substantial activity’. The dropped criteria, in fact, are at the heart of the mechanism by which the tax havens have succeeded in eroding the tax base of other countries. The remaining criteria of ‘transparency’ and ‘information exchange’ only provide the shroud. Most discussions of tax havens in academic literature, popular writings, and government reports or in activist publications have included zero or low tax rate as a defining feature of tax havens. The list of top 15 corporate tax havens identified by Oxfam in 2015, for instance, reflects this criterion centrally (Oxfam, 2016, p. 13). Similarly, the US Government Accountability Office (GAO, 2008) had considered the four criteria based OECD definition of tax havens as representative.

The manner in which the two criteria were junked is testimony to the power equations, lobbying, bias and subjectivity which have imperiled the OECD's process of blacklisting of tax havens. In fact, the wheel, ironically, has turned full circle in the recent admission by OECD of the criticality of these two criteria in identifying and dealing with preferential regimes under Base Erosion and Profit Shifting (BEPS) Action 5 via the Inclusive Framework (OECD, 2018). However, since the present process also relies upon "commitments" rather than actual practices on the ground, the outcome is likely to be diluted.

The manner of implementation of the criteria also made the OECD's seriousness of purpose suspect in the blacklisting episodes. The criteria of the blacklist of 2009, after being watered down from four to two, was as good as decimated through the so-called "Isle of Man" clause under which no reforms were required in tax havens until every listed state, OECD member states (including Switzerland and Luxembourg) and third party states like Hong Kong and Singapore had committed to the same. In effect, therefore, there was zero real commitment (Sullivan, 2007).

The blacklist of 2009 was similarly plagued, with reports of tax havens like Switzerland bulldozing the OECD with threats of blocking 136,000 euros due to the organization apart from non-payment of their annual fee of 6.5 million euros (Eurodad, 2009). Compromises are evident when powerful countries such as USA, which have low tax secrecy jurisdictions in their states, most notably Delaware but also Nevada, South Dakota, Wyoming and Florida (Institute on Taxation and Economic Policy, 2015) are able to easily enter the white list. This is, ironically, in spite of the US Congressional Research Service accepting these US states as having features of tax havens (Gravelle, 2013). This raises serious questions on the OECD's objectivity of application of its criteria and the motivation behind the deliberately weak criteria used by it to ensure that all are in the clear.

The OECD's compromised position is further evident when we find many US states themselves adopting the OECD's fourfold criteria of 1998 to identify tax havens for purposes of implementing their laws on unitary taxation with formulary apportionment. The state of Montana, for instance, developed its original list of 40 tax havens using these criteria along with other public information. It was intended to force taxpayers to include the income and apportionment factors of corporations registered in these jurisdictions if they have a unitary relationship with the taxpayer (Choi, 2015). Oregon, Rhode Island, Washington DC, West Virginia etc. are some of the other states which have, with minor modifications, adopted the OECD's 1998 criteria for listing out tax havens with the intention of protecting their tax base.

In 2017 the scope for dilution was built into the OECD's criteria from the very beginning. A country could get by with only a signature for the MCMAA, and not ratification, or it could "commit" to the CRS but delay implementation; or even, as has been the case with the US, not even commit to the CRS, and get away with it. Critics point to Germany which took seven years to ratify the MCMAA after signing it while the Bahamas, although part of CRS, chose the path of bilateral treaties instead of an all-encompassing multilateral instrument (Shaxson, 2016). The criterion had redundancy built in. It relied upon outdated standards for exchange of information on request, with countries expected to get a rating of at least "largely compliant", even though the standard has not really worked and the Global Forum itself had moved on to the CRS for automatic exchange. OECD, in effect, has practiced creation of tax haven blacklists on the basis of deliberately weak criteria, and then claimed success when the list falls empty. Its motivation can be traced to many of its member countries opposing transparency, thereby making low standards the only viable compromise. However, it could also reside in the OECD's underlying commitment to the principles of international tax competition (Palan et al., 2010, p. 211).

III. 'LISTINGS' BY THE SOUTH: HETEROGENEITY AND SOME SPINE

The multilateral forums such as the OECD and EU are not the only ones who have drawn up blacklists of tax havens and preferential tax regimes. National blacklists in this regard have also been created by countries for administering various sanctions to non-cooperative jurisdictions. Enforcement of Transfer Pricing regulations, implementing legislations on Controlled Foreign Company (CFC), disallowance of deductions for expenses, higher withholding taxes etc. are included in the scope of such sanctions (Sharman et al., 2005).

Amongst the developing countries, those in Latin America have been particularly focused on the list making exercise. From the study made by Valerdi (2016) of 13 Latin American countries, six i.e. Brazil, Mexico, Ecuador, Colombia, Peru and El Salvador, have active lists of tax havens; two others – Nicaragua and Honduras - have incorporated the concept of tax haven in their legislation but have not issued their own list. The heterogeneity of the tax haven lists in the six jurisdictions has been noted by Valerdi – only 17 jurisdictions are common to all six active blacklists while 42 are found in only one of the six lists. There is huge variety even in the sanctions and restrictions on tax dodging that are implemented in the regulation of the countries issuing the black lists.

While the set of criteria used for drawing up the blacklists may vary from country to country there are some common resonances, especially around low tax rates and absence of information sharing and transparency. Five cases are described below as a sample exposition out of the numerous developing country experiences available.

Brazil

Considering the size of its population and market the Brazilian blacklist carries the most weight in Latin America. It was initiated in 2008 for "low tax jurisdictions" and expanded conceptually in 2009 to include "tax privileged regimes". The criteria adopted by Brazil for identifying its list of tax havens are the following (Normative Instruction 1,037) –

a) Low tax (for blacklist): Countries with no income tax or which impose tax at a maximum rate lower than 20%. Since 2014, for countries showing "good behavior" the Brazilian tax authorities can consider a limit of 17% and below instead of 20%. Brazil has a corporate tax rate of 34%.
b) Non cooperative countries: with secrecy laws on corporate shareholding composition, ownership and identity of ultimate beneficiaries
c) Privileged tax regimes (for "grey list"): which grant specific tax benefits to non-resident entities or individuals without the requirement of substantial economic activities.

The simplicity of the Brazilian criteria has made it effective in terms of consequences for those who transact with a tax haven country. The consequences include

a) application of Transfer Pricing rules regardless of whether the parties are related

b) stricter "thin capitalization" standards i.e. reducing debt to equity ratio (1:3 rather than 2:1) and increased rate of withholding on outbound payments (25% instead of 15%).
c) Denial of beneficial customs treatment

Those in the "grey list" face transfer pricing and thin capitalization consequences. While the blacklist affects all transactions between Brazilian entities and those in the tax haven, the grey list impacts transactions with some specific types of companies in the grey listed jurisdiction. The United States Limited Liability Company (US LLC), owned by non-residents not subject to US taxation, was included in the grey list (Winston, 2010), bringing Nevada and Delaware close to blacklisting (Sheppard, 2017, p. 1788).

The simplicity of criteria and effectiveness of impact, however, has not protected Brazil from the conundrums of including reputed secrecy jurisdictions like Switzerland and Ireland in its blacklist. Switzerland entered the blacklist of Brazil in 2010 when the privileged tax regime list was introduced. However, its status as a tax haven was 'suspended' soon thereafter, upon application by Switzerland seeking removal from the list; in 2014 it entered the grey list with some identified structures that result in a lower taxation threshold of 20% (Deloitte Tax, June 2014).

Ireland's corporate tax rate of 12.5% brought it squarely within Brazil's criteria for tax haven, which it entered in 2016. Since many of the world's aircraft leasing companies are based in Ireland for tax reasons the blacklisting has made it expensive for Brazilian airlines to lease planes (O'Donoghue, 2017). However, in spite of requesting, like Switzerland, to be taken off the list, Ireland was not successful in winning a suspension during the period of consideration of its appeal. The relative strength of *realpolitik* in negotiations by Switzerland and Ireland are clearly evident in this differentiated handling of Ireland's request. Along with Ireland, Brazil had added the Caribbean island nations Curacao and St. Martin to its black list in 2016, which already included well known low tax jurisdictions like Isle of man, Monaco and Panama. Recently Austrian holding companies have also entered the grey list.

In May 2017 Brazil applied for full membership of the OECD. It remains to be seen whether Brazil's independent non Arm's Length Pricing (ALP) based transfer pricing regulation and the strictness of its tax haven listing will survive the dilutors of the multilateral body.

Argentina

Through its Decree 1037/2000 Argentina had introduced the blacklist of tax havens for purposes of Transfer Pricing, Controlled Foreign Company rules and disallowance of deductions. 88 jurisdictions were identified as "low or zero tax countries".

It should be mentioned that a last paragraph added at the end of the list of 88 jurisdictions established that those jurisdictions which signed information exchange agreements with Argentina or, where relevant, made amendments to their domestic income tax legislation in order to bring it into line with international parameters such that they are no longer characterized as a low or zero tax country were to be excluded from the list.

The consequences of inclusion in the blacklist included:

a) All transactions with entities in tax havens were automatically considered as between related parties and subjected to Transfer Pricing documentation rules.
b) Foreign tax credits generated by companies in the listed jurisdiction were disallowed.
c) There was a denial of deferral of passive income.
d) The procedural rules were amended in 2003 to include a provision that, unless proved to the contrary, any fund transferred from tax havens was to be treated as unreported income for purposes of income tax, VAT and excise tax.
e) In 2012 foreign exchange limitations were extended to royalties, leasing and rent payments made to beneficiaries resident in listed jurisdictions.

The list was significantly emptied since 2009 due to the fact that the national revenue collection and customs agency (AFIP) began an active policy of signing Tax Information Exchange Agreements (TIEA) with several countries and territories on the list, plus San Marino, Bahamas and Andorra; in 2010 with China (including Hong Kong); in 2011 with Bermuda, Guernsey, Jersey, Cayman Islands and Monaco; and in 2012 with the Isle of Man and Uruguay. Similar agreements were also signed with countries and territories which did not appear on the list of low or zero tax countries, such as Spain, Chile, Costa Rica, Ecuador and India, and the Multilateral Convention has been signed with the OECD[3].

In a conceptual turnaround in 2013, Argentina stopped publishing its list of tax havens and, instead, replaced its "blacklist" with a list of jurisdictions considered "cooperative for purpose of fiscal transparency" (decree 589/2013) i.e. the "cooperative jurisdiction list" consisting of jurisdictions, territories and tax systems. These were expected to have signed double tax treaties with a wide information exchange clause or tax information exchange agreements with Argentina, or at least initiated this process. The list was periodically updated and removal from the "positive list" could be made if no effective exchange of information took place.

This new approach was heavily criticized, among other things, due to the lack of transparency and certainty of a listing process that included jurisdictions with which Argentina had initiated a process, usually secretive, to sign a treaty.

A further turnaround took place with the recent enactment of a tax reform legislation, effective 1 January 2018 (Law 27,430), which brought back the blacklisting approach to tax havens. The Executive Power is now entitled to draw lists of "non-cooperating" jurisdictions that do not have TIEAs/Double Taxation Avoidance Agreements (DTAAs)/effective exchange of information with Argentina. An additional criteria is "low or no tax" consisting of jurisdictions or regimes whose corporate tax rate is lower than 60% of the Argentinian rate, the latter taken at its 2020 target rate of 25%. The resulting 15% would shovel Ireland (12.5%) and Hungary (9%) into the blacklist while Singapore (17%) and Hong Kong (16.5%) would narrowly escape. The consequences from the standpoint of transfer pricing rules, special deductibility rules, exclusion from capital gains, among others, would kick in (Rodriguez, 2018).

However, since by February 2019 the implementing guidelines for this part of the legislation concerning listing criteria for tax purposes have not yet been issued and it still

[3] The list of international agreements signed by the AFIP and the corresponding PDFs can be consulted at: http://www.afip.gov.ar/institucional/acuerdos.asp.

includes the reference to non-cooperative jurisdictions, given the amount of treaties Argentina has signed, and the fact that the current government is very eager to belong to the OECD (even while Argentina is not yet a candidate) there is still a chance this list ends up in an empty effort or no effort at all.

Moreover, it should be noted that Panama brought up a case against Argentina (and another one against Colombia) to the World Trade Organization (WTO), in which it invoked WTO rules to defend its tax regime, on the basis of trade non-discrimination rules, the loophole that has been used against anti-tax avoidance rules used by, e.g. Argentina (Eskelinen and Ylönen, 2017).

Mexico

Mexico had an old blacklist regime for tax havens which was substantially changed in 2005 by widening the tax and reporting consequences of holding assets outside Mexico. The criteria adopted by Mexico to identify tax havens or preferential tax regimes (REFIPRE) are as follows

a) tax rate less than 75% of the rate applicable in Mexican tax legislation.
b) The old black list has been synced with CFC rules, identifying 90 low or no tax jurisdictions.

The consequences of transactions undertaken with the above regimes are

a) 40% withholding tax rate for transactions with the residents of REFIPRE. The rigour of this rule has been softened since 2005 by making the list suggestive, instead of legally binding.
b) Disallowance of deduction for payments or amortization of losses unless proven to be at arms' length.
c) Investments in listed jurisdictions and relevant bank information are to be strictly reported by taxpayers, with failure being treated as felony under the criminal law, to be met with imprisonment of three months to three years. Since 2016 the reporting requirements have been further tightened by eliminating some previously available exceptions.

The US' refusal to sign the CRS, some of its liberal preferential tax provisions regarding non taxing of non-realty investments of foreign non-residents, and the recent tax cuts undertaken by the Trump administration, have raised concerns that it could be covered in the Mexican 'less than 75%' rule and classified as a tax haven (Bullman, 2018).

Ecuador [4]

Ecuador decided to build up a tax haven blacklist in 2007 for which the three-fold criteria was defined in 2008. It includes (Freire G., 2018):

[4] This section extracts substantive parts from Freire G. (2018)

a) List of countries deemed to be tax havens: 88 jurisdictions[5] today are in this list which is based on comparable legislative experiences in other countries and lists drawn by multilateral bodies, but it is adjusted to reflect only those jurisdictions with which there are no treaties for the exchange of information.
b) Jurisdictions with effective income tax rate below 60% of the rate applied in Ecuador, i.e. those countries and jurisdictions with a tax rate below 13.5% as from 2013.
c) Preferential tax regimes defined according to some specific and general conditions.

The following types of specific regimes are included:

- "Ring fencing", i.e. regimes granted only to foreigners and not to nationals;
- Regimes allowing companies to have bearer shares or nominee shareholders without the identity of the beneficial owner being known;
- Those that make tax-exempt any income from economic activities not conducted in that location;
- Jurisdictions where there is no registry of companies.

In terms of general criteria, at least two of the following conditions must be met for a regime to be listed:

a) lack of economic substance;
b) effective rate of income below 60% or unknown;
c) lack of transparency and no effective mechanisms for exchanging information;
d) allowance to have bearer shares or nominee shareholders.

Finally, as from August 2017, preferential tax regimes identified in the Netherlands, the United Kingdom (UK), New Zealand and Costa Rica are included, along with Hong Kong, as tax havens (EY, 2017).

Ecuadorian law has been amended, starting with the Tax Equality Act in December 2007, further amended in 2014, along with various resolutions such as No 531 in 2016, to tighten the sanctions for users of tax havens. The financial system regulations were similarly tightened from 2012 onwards. The consequences for investors and taxpayers engaging in financial transactions with tax havens/ low tax jurisdictions/preferential tax regimes are:

a) Denial of tax credit for income earned in tax havens which is considered taxable
b) 5% overseas remittance tax on dividends transferred to tax havens as against exemption for dividends transferred to other jurisdictions
c) Non deductibility of expenses relating to commercial leasing. By amending the meaning of “related parties” to include shareholders and Directors of companies domiciled/founded in tax havens the deduction of certain interest on loans, indirect expenses, bonuses etc. has also been facilitated.
d) Higher tax rate for companies domiciled in tax havens, or when they have not enquired into the identity of the beneficial owner of the company
e) Mandatory Transfer pricing in case of exports in the important sectors of oil, banana and minerals when the related parties are in tax havens

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[5] See http://www.sri.gob.ec/BibliotecaPortlet/descargar/558c426d-570a-4655-8313-a59cc46db267/Listado%20de%20Paraisos%20Fiscales.pdf.

f) Higher tax withholding for payments to tax havens – mostly at 35% compared to the normal rate of 22%
g) The tax on assets held abroad by financial institutions is higher when the assets are in a tax haven
h) Restriction of financial entities becoming shareholders in tax haven domiciled financial institutions
i) Restriction on banks in tax havens undertaking credit or investment operations through domestic financial institutions
j) The information on the tax conduct of business groups involving tax havens is published on the internet

A pioneering initiative of Ecuador to control financial abuse and tax evasion through secrecy jurisdictions was put in place through the 2017 "ethical pact", the first ever referendum on banning politicians and civil servants from holding capital or assets in a tax haven. The move was led by President Rafael Correa, who denounced tax havens as "one of the biggest problems in our democracies" (Andes, 2016). With a 55.12% approval of voters a statute was promulgated for this purpose and those holding assets in such jurisdictions were permitted time up to March 2018 to transfer their assets.

India

For identifying non cooperative jurisdictions, the Indian government has, by and large, emphasized transparency and exchange of information clauses over the criterion of low/nil tax rates. They are officially not even called tax havens, the legal provision referring to them as "notified jurisdictional area" (section 94A of the Income Tax Act brought in through amendment in 2011-12). Having got off to an early start in the matter of exchange of tax information through bilateral TIEAs, entered mostly with secrecy jurisdictions/ tax havens, India held out the threat of blacklisting in June 2013 against Switzerland, United Arab Emirates (UAE), Hong Kong, Singapore, Samoa and Seychelles (Beniwal, 2013) for not sharing information effectively. However, the blacklist issued in November 2013 was only in respect of Cyprus which had not been mentioned in the original threats, prompting some reactions of surprise (Nishith Desai Associates, 2013).

Cyprus, by 2015-16, was the eighth largest FDI investor into India at $3.3 billion, especially in debt-heavy sectors such as real estate and construction. The newly inserted section 94A in the Income Tax Act was meant to notify countries that were not cooperating in information exchange. The rules to make the provisions operational, however, were not notified until late in 2013, indicating the level of seriousness with which the provision was initially held.

To date, section 94A has been used only once, and that too against Cyprus (Notification no 86/2013). Blacklisting a small country was used merely to send a signal, instead of imperiling relations with large trade partners like UAE (9.4% of India's trade) or Switzerland who had been threatened with sanctions. Ultimately, political will is the missing ingredient in such exercises. No information is publicly available for analysts to compare the performance of Cyprus versus other jurisdictions in information exchange on request. The number of requests sent by the Indian Competent Authorities, the time taken for receiving replies, the proportion of incomplete or absent replies, the relevance of the information received from Cyprus versus other countries that escaped the threat needs to be examined to understand the basis of 'blacklisting' by another name.

The notification under section 94A had consequences and implications for taxpayers who entered into transactions with entities in Cyprus. This included

a) Stringent conditions to restrict deduction of payment/ expenditure, including depreciation, involving Cyprus based persons,
b) Withholding tax rates went up to the highest available 30%,
c) All transactions were automatically considered between related persons with transfer pricing requirements,
d) No deduction for payment to financial institutions in that country unless authorization for collecting information was given by the taxpayer.
e) Any sum received from a person in a notified territory might be treated as income.

After much diplomatic engagements the India-Cyprus tax treaty was renegotiated in 2016. The zero percent capital gains tax based on the residence principle was substituted by source based capital gains arising from alienation of shares, along with some grandfathering clauses to ease the transition. The provisions in relation to exchange of information were also updated. In December 2016 Cyprus was removed from the 'blacklist' with retrospective effect.

IV. THE EU'S LISTING PROCESS: FROM BLIND TO CONNIVING[6]

The EU's List of Non-cooperative Jurisdictions for Tax Purposes

Based on the existence of national listing processes inside the EU, the European Commission published a 'pan-EU list' on 17 June 2015 aimed at identifying the jurisdictions appearing on at least 10 national lists (Remeur, 2017).

The full list included: Andorra, Liechtenstein, Guernsey, Monaco, Mauritius, Liberia, Seychelles, Brunei, Hong Kong, Maldives, Cook Islands, Nauru, Niue, Marshall Islands, Vanuatu, Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Grenada, Montserrat, Panama, St Vincent and the Grenadines, St Kitts and Nevis, Turks and Caicos, US Virgin Islands (EUbusiness, 2015).

However, the 'pan-EU list' was only intended as an interim solution while a common EU list was being assessed.

The basis for building a unique EU list was presented in the European Commission's external strategy for effective taxation presented in the 2016 anti-tax-avoidance package (Remeur, 2017). The motivation was partly based on the fact that the divergence of approaches created loopholes for tax evasion and avoidance.

The methodology for the listing of the EU list of non-cooperative jurisdictions for tax purposes was based on a three step process of scoreboard, screening and listing.

Once this common EU list is fully established, Member States in the Council of the EU[7] are meant to formally agree to use it instead of national lists to address external base erosion threats and to apply defensive measures against the listed countries.

Non-tax measures are envisaged to be taken by the EU in relation to the European Fund for Sustainable Development (EFSD); and coordinated defensive tax measures are being explored although for the time being there is no agreement as some Member States called for flexibility in applying defensive measures[8].

From a unilateral perspective, defensive tax measures are envisaged to be taken by the Member States on increased audit risk for the taxpayers using arrangements involving listed jurisdictions; or the non-deductibility of costs, the application of withholding tax measures, switch-over clauses, mandatory disclosure of the tax schemes by intermediaries, or

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[6] The European Commission is currently working on an anti-money laundering and counter terrorism high-risk third country list. The identification of countries is made in two ways: (1) countries publicly listed by the FATF and (2) countries assessed as posing significant threats to the Union's financial system because of strategic deficiencies in their Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) regimes based on external sources of information. This listing process will not be addressed in this document.

[7] Whilst the original focus of the Council's Code of Conduct was on EU Member States, there was also a commitment to promote the adoption of its principles by third countries and in territories to which EU treaties do not apply. Thus, the Code of Conduct Group has conducted and overseen the screening process, whilst the Commission services have assisted the Group by carrying out the necessary preparatory work.

[8] See (Council of the EU, 2018 April 20) and (Council of the EU, 2017 December 5); and C(2018) 1756 on the new requirements against tax avoidance in EU legislation governing in particular financing and investment operations.

controlled-foreign-company rules, among others. However, by April 2018, the Council noted that most of the Member States had not yet applied any defensive measures to the EU listed countries (Council of the EU, 2018 April 20).

As a first step, the European Commission identified internally the third countries that should be prioritized for screening by the EU, a step that was finalized in September 2016.

A pre-assessment was done of 213 jurisdictions which excluded the 28 Member States, as the screening was only meant to be done on third countries, something that was criticized by Oxfam (2017) who had reproduced the criteria used by the European Commission and the Council and had come up with a list of 35 jurisdictions, and at least 4 Member States (Ireland, The Netherlands, Luxembourg and Malta); by the Tax Justice Network (TJN), who suggested at least 6 Member States should be included in the list (those listed by Oxfam plus Cyprus and the United Kingdom) (Lips, Cobham, 2017); but also by European Institutions such as the European Parliament (European Parliament, 2017, p. 28).

A scoreboard was made of all third country jurisdictions based on three data sets of indicators referring to: (1) the strength of economic ties with the EU, (2) the financial activity to determine if a jurisdiction had a disproportionately high level of financial services exports, or a disconnection between their financial activity and the real economy and (3) stability factors to see if the jurisdiction would be considered by tax avoiders as a safe place to place their money.[9]

Third country jurisdictions that already had a transparency agreement with the EU (Switzerland, Liechtenstein, Andorra, Monaco and San Marino) feature separately in the scoreboard, as well as the 48 least developed countries (LDCs) identified by the United Nations.

Once the most economically relevant jurisdictions were identified using the above-mentioned indicators, the Commission did a basic assessment of the potential risk level of these jurisdictions facilitating tax avoidance. The risk indicators used were:

> (1) Transparency and exchange of information: The jurisdictions' status with regard to the international transparency standards i.e. exchange of information on request and automatic exchange of information.
> (2) The existence of preferential tax regimes: The existence of potential preferential regimes, identified by the Commission on the basis of publicly available information (the International Bureau of Fiscal Documentation (IBDF), national websites etc.).
> (3) No corporate income tax (CIT) or a zero corporate tax rate: The existence of a tax system with no corporate income tax or a zero corporate tax rate.

These three risk indicators, which reflect the situation by July 2016, were then applied to the most relevant jurisdictions identified by the selection indicators, as well as to the five jurisdictions with transparency agreements with the EU. Among the list of 213 jurisdictions identified for their strong economic ties with the EU were Israel, Canada and the United States; and the United States of America and Israel were assessed for their potential risk in

[9] See https://ec.europa.eu/taxation_customs/sites/taxation/files/2016-09-15_scoreboard-methodology_en.pdf.

terms of transparency and exchange of information and the existence of preferential regimes in their territories.[10]

On the basis of the Scoreboard, EU Member States decided in January 2017 on 92 countries for screening[11] which were sent a communication on February 1, 2017 informing them that they had been screened and could possibly be included in the EU's list of tax havens. The criteria used for choosing the 92 jurisdictions has not been made public and the list itself was not made public until June 8 (Council of the EU, 2018 June 8), after the Council's Code of Conduct Group on Business Taxation (CoCG) agreed to make a move towards more transparency.[12]

By November 2016, the CoCG had agreed on the criteria to be used in the screening process. Member States' experts then allegedly assessed the 92 jurisdictions' tax systems using the agreed criteria.

> *Criteria 1*
>
> *1.1 Commitment to implement the automatic exchange of information, either by signing the Multilateral Competent Authority Agreement or through bilateral agreements.*
>
> *1.2 Membership of the Global Forum on transparency and exchange of information for tax purposes and satisfactory rating.*
>
> *1.3 Signatory and ratification of the OECD Multilateral Convention on Mutual Administrative Assistance or network of agreements covering all EU Member States.*
>
> *Criteria 2*
>
> *2.1 Existence of harmful tax regimes: commitment to amend or abolish the identified regimes by 2018.*
>
> *2.2 Existence of tax regimes that facilitate offshore structures, which attract profits without real economic activity: commitment to addressing the concerns relating to economic substance by 2018.*
>
> *Criteria 3*
>
> *3.1 Membership of the Inclusive Framework on BEPS or implementation of BEPS minimum standards: commitment to implement.*

Given that 2 out of the 3 criteria refer to the OECD, the blacklist process seems more an extortive means of getting developing countries to implement standards that they have not participated in setting, than a serious effort to tackle tax evasion and tax avoidance.

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[10] For the list of the 213 jurisdictions evaluated based on the economic indicators and the risk assessment, see https://ec.europa.eu/taxation_customs/sites/taxation/files/2016-09-15_scoreboard-indicators.pdf.

[11] See http://europa.eu/rapid/press-release_MEMO-17-5122_en.htm.

[12] On February 2018 the Ombudsman of the European Union wrote a report with recommendations on transparency to be implemented by the European institutions, and in particular, by the Council. See https://www.ombudsman.europa.eu/en/cases/recommendation.faces/en/89518/html.bookmark.

Based on these criteria, 20 jurisdictions were sent "comfort letters" after alleged commitments which were not made public and were cleared without any further explanation (Council of the EU, 2018 June 8).

Table 1 The EU's blind list: the 20 cleared jurisdictions and their risk assessment

	Country	Risk indicators		
		Transparency	Preferential CIT Regimes	No CIT/ Zero Rate
1	Australia			
2	Brazil	X	X	
3	Canada			
4	Chile		X	
5	China		X	
6	Colombia		X	
7	Costa Rica	X	X	
8	Georgia	X	X	
9	Iceland			
10	India		X	
11	Indonesia	X	X	
12	Israel	X	X	
13	Japan			
14	Monaco			X
15	Montserrat		X	
16	Norway			
17	Saudi Arabia	X		
18	Singapore	X	X	
19	South Africa		X	
20	United States	X	X	

Source: Prepared by the authors based on (Council of the EU, 2018 June 8) and https://ec.europa.eu/taxation_customs/sites/taxation/files/2016-09-15_scoreboard-indicators.pdf

64 out of the 92 jurisdictions were asked to address deficiencies and 8 countries affected by the hurricanes in September 2017 were given more time.

Once the screening process was complete, third countries that refused to cooperate or engage with the EU regarding tax good governance concerns were put on the EU list.

In December 5, 2017, the Council of the EU[13] adopted a list of 17 non-cooperative jurisdictions for tax purposes: American Samoa, Bahrain, Barbados, Grenada, Guam, Macau SAR, Marshall Islands, Mongolia, Namibia, Palau, Panama, Republic of Korea, Saint Lucia, Samoa, Trinidad and Tobago, Tunisia, and the United Arab Emirates. However, by January 2018, 8 countries had already been removed from the list (Council of the EU, 2018 January 12).

In March 2018, the list was re-assessed in order to evaluate the situation of the jurisdictions that had been put on hold due to them being at the center of the hurricanes (Anguilla, Antigua and Barbuda, Bahamas, British Virgin Islands, Dominica, Saint Kitts and Nevis, Turks and Caicos Islands, and the US Virgin Islands). This process concluded with the addition of 3 jurisdictions to the listed ones (Council of EU, 2018 March 8), at the same moment in which other 3 jurisdictions were removed from the list (Council of the EU, 2018 March 2).

By May 2018, 2 other jurisdictions were removed, leaving the list with 7 countries in it.

Between September and November 2018, 2 more countries were removed from the list[14], so the list was left with only 5 countries; and 4 countries were removed from the grey list then.[15]

Member States agreed not to list jurisdictions if they committed to address the deficiencies that were found during the screening process. This is the reason why Switzerland was not listed in the blacklist, as it had agreed to cooperate already in 2014, even when it is not at all clear if such commitment will ever be fulfilled, given the unsuccessful attempt to change the legislation given by the referendum of 2016. And it does not seem to matter whether Switzerland will create new harmful tax regimes when attempting to eliminate the 5 harmful tax regimes that had been identified by the Council[16].

The list of jurisdictions that had made commitments (the “grey list”) had 63 names in it by November 2018. These commitments had to be made at high political level (e.g. Minister of Finance), and give a clear domestic timeline for implementing the changes.

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[13] https://ec.europa.eu/taxation_customs/tax-common-eu-list_en

[14] https://www.consilium.europa.eu/en/press/press-releases/2018/11/06/taxation-namibia-removed-from-eu-list-of-non-cooperative-jurisdictions/

[15] https://www.consilium.europa.eu/en/press/press-releases/2018/10/02/taxation-liechtenstein-and-peru-meet-commitments-palau-removed-from-list-of-uncooperative-jurisdictions/

[16] Watch the TAX3 Hearing on the Relation with Switzerland in tax matters held last October 1, 2018: http://www.europarl.europa.eu/ep-live/en/committees/video?event=20181001-2030-COMMITTEE-TAX3

However, being in the grey list does not have any consequences, except the risk of falling into the blacklist.

Recently, the Council published its revision of the EU list of non-cooperative jurisdictions for tax purposes (Council of the EU, 2019 March 12). Comparing the new information with the previous one results in the following changes:

- Jurisdictions added to the list: 10 jurisdictions (Aruba, Barbados, Belize, Bermuda, Dominica, Fiji, Marshall Islands, Oman, United Arab Emirates, and Vanuatu) were added to the 5 jurisdictions that were already listed (American Samoa, Guam, Samoa, Trinidad and Tobago and US Virgin Islands)[17]. Those jurisdictions were on the grey list, and had committed to implementing the agreed commitments before December 2018, but apparently were not able to fulfill them.
- Jurisdictions removed from the qrey list: Bahrain, Faroe Islands, Greenland, Grenada, Guernsey, Hong Kong SAR China, Isle of Man, Jamaica, Jersey, Labuan Island, Macau, Malaysia, New Caledonia, Panama, Qatar, South Korea, St. Vincent & Grenadines, Taiwan, Tunisia, Turks & Caicos, and Uruguay.
- Jurisdictions granted more time that continue to be on the grey list but have not made it on the blacklist even when they did not fulfill their commitments by 2018: Anguilla, Australia[18], Bahamas, British Virgin Islands, Cayman Islands, Cook Islands, Costa Rica, Maldives, Morocco, Niue and Switzerland.

Member States who had lists in place before this process began, had much more comprehensive ones. That is probably the reason why Member States that already had a list in place have replied to a request of information from the Council regarding the application of defensive measures (Council of the EU, 2018 April 20), that they would be using both lists. However, in time they may be pressured to agree to implement what still risks to be an empty list in a near future.

[17] Rumours in Brussels say that these jurisdictions were listed due to the pressure of Oxfam (2019), and that the Council is already planning to remove such jurisdictions from the list in May 2019.
[18] Australia and Costa Rica were among the 20 initially cleared jurisdictions which had been sent comfort letters, as depicted in Table 1, but have been added to the grey list in March 2019.

V. LISTS AND MORE LISTS - FLUID ENTRY, EASY EXIT

Multilateral and national efforts to draw up blacklists of tax havens, often with white and grey lists alongside, have had a checkered past. As discussed in the previous sections, multilateral bodies like the OECD and EU have failed to apply strong and clear criteria for identifying tax havens for naming, shaming and applying sanctions. This is evident from the manner in which countries designated as a tax haven under one list have escaped from another.

Blacklists of non-cooperative jurisdictions have been drawn up in the past for purposes other than tax evasion. The FATF drew up a first list of “Non-Cooperative Countries or Territories” (NCCTs), identifying offshore and onshore centers which are vulnerable to being used by money launderers and terrorism financers in two rounds of review, with 15 entrants in 2000 and 8 in 2001. However, after an initial negative reaction to this list, most jurisdictions became ready to cooperate by making the required legislative changes. According to some, these proved to be either not enforced or unenforceable (Palan et al., 2010). As of October 2006 there were no NCCTs. From then onwards, the criteria applied has been of high risk and non-cooperative jurisdictions.

In 2015, in the light of the furor created by the revelations in the Panama Papers, the G20 highlighted the importance of the work of FATF in combating tax evasion, corruption and other activities generating illicit financial flows (FATF, 2015). The work of the OECD’s Global Forum on Transparency builds on the FATF work for the definition of “beneficial ownership” with reference to the exchange of information on request (EOIR). The work of publicly listing high risk and non-cooperative jurisdictions by the FATF has served as a basis for a similar list for countering money laundering and terrorist finance by the European Commission (Remeur, 2018). Today, FATF’s list is reduced to the Democratic People’s Republic of Korea and Iran; as well as 9 other jurisdictions that are recommended for closely monitoring the implementation of action plans: Afghanistan, Bosnia and Herzegovina, Guyana, Iraq, Lao People’s Democratic Republic, Syria, Uganda, Vanuatu, Yemen.[19]

The Financial Stability Forum (FSF), formed in the aftermath of the Asian financial crisis, had also drawn up its own blacklist of 42 jurisdictions, through a three tier classification of OFCs. The purpose was to improve their regulatory standards. The IMF initiated a process for evaluation and had reviewed 41 territories by 2005. In a 2007 paper the IMF provided a new definition of OFCs as jurisdictions whose financial service sector was disproportionately large compared to its domestic economy[20]. A statistical method to distinguish OFCs from non OFCs was elaborated to identify 22 OFC jurisdictions (Zorome, 2007).

The OECD and the FATF had started their ‘list making’ exercise in 2000 and kept at it through the years with varying periodicity. The IMF and FSF climbed the bandwagon between 2005 and 2007, followed by the EU in 2015 and 2017, the latter having inspired list

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[19] Powerful countries lobbied successfully to get their former colonies out of the list. Also, the FATF never listed the industrialized countries known for their involvement in money laundering (e.g. the United Kingdom, the US, Germany, Japan and China), contrary to listing processes such as that of the US Bureau of International Narcotics & Law Enforcement Affairs (INCSR) (Palan et al., 2010).

[20] See https://www.imf.org/external/NP/ofca/OFCA.aspx

making in the NGO sector as well. The principal countries which have found mention in lists of various hues, and in discussions around tax havens/OFCs, are shown in the Table below. Black and grey lists of various multilateral bodies such as OECD, FATF, IMF/FSF and EU are included along with one from Oxfam as a representative of the social/NGO sector. The list of the Tax Justice Network (TJN) is not discussed separately, although the Financial Secrecy Index developed by TJN – based on scores for banking secrecy, capacity to create offshore structures and barriers to cooperation and information exchange - represents an in-depth tool for identifying secrecy jurisdictions.

Table 2 Countries that have found mention in lists in various hues

No	Country	OECD list 2000	FATF list 2000	IMF/FSF list 2007	OECD Black /Grey[1] list 2009	EU list of Non-coop jurisdiction 2015	EU Black/Grey[2] list by March 2019	Oxfam's list 2017 based on EU criteria
1	Albania	No	No	No	No	No	Yes[2]	No
2	American Samoa	No	No	No	No	No	Yes	No
3	Andorra	Yes	No	No	Yes [1]	Yes	No	No
4	Anguilla	Yes	No	No	Yes[1]	Yes	Yes[2]	Yes
5	Antigua & Barbuda	Yes	No	No	Yes[1]	Yes	Yes[2]	Yes
6	Armenia	No	No	No	No	No	Yes[2]	No
7	Australia	No	No	No	No	No	Yes[2]	No
8	Aruba	Yes	No	No	Yes[1]	No	Yes	Yes
9	Austria	No	No	No	Yes[1]	No	No	No
10	Bahamas	Yes	Yes	Yes	Yes[1]	Yes	Yes[2]	Yes
11	Bahrain	Yes	No	Yes	Yes[1]	No	No	Yes
12	Barbados	Yes	No	Yes	No	Yes	Yes	No
13	Belgium	No	No	No	Yes[1]	No	No	No
14	Belize	Yes	No	No	Yes[1]	Yes	Yes	No
15	Bermuda	Yes[3]	No	Yes	Yes[1]	Yes	Yes	Yes
16	Bosnia & Herzegovina	No	No	No	No	No	Yes[2]	Yes
17	Botswana	No	No	No	No	No	Yes[2]	No
18	British Virgin Islands	Yes	No	No	Yes[1]	Yes	Yes[2]	Yes
19	Brunei	No	No	No	Yes[1]	Yes	No	No
20	Cabo Verde	No	No	No	No	No	Yes[2]	No
21	Cayman Islands	Yes[3]	Yes	Yes	Yes[1]	Yes	Yes[2]	Yes
22	Chile	No	No	No	Yes[1]	No	No	No
23	Cook Islands	Yes	Yes	No	Yes[1]	Yes	Yes[2]	Yes

24	Costa Rica	No	No	No	Yes	No	Yes[2]	No
25	Curaçao	No	No	No	No	No	Yes[2]	Yes
26	Cyprus	Yes[3]	No	Yes	No	No	No	No
27	Dominica	Yes	Yes	No	Yes[1]	No	Yes	No
28	Faroe Island	No	No	No	No	No	No	Yes
29	Fiji	No	No	No	No	No	Yes	No
30	Gibraltar	Yes	No	No	Yes[1]	No	No	No
31	Greenland	No	No	No	No	No	No	Yes
32	Grenada	Yes	No	No	Yes[1]	Yes	No	No
33	Guam	No	No	No	No	No	Yes	Yes
34	Guatemala	No	Yes	No	Yes[1]	No	No	No
35	Guernsey	Yes	No	Yes	No	Yes	No	No
36	Hong Kong, SAR China	No	No	Yes	No	Yes	No	Yes
37	Hungary	No	Yes	No	No	No	No	No
38	Indonesia	No	Yes	No	No	No	No	No
39	Ireland	No	No	Yes	No	No	No	No
40	Isle of man	Yes	No	Yes	No	No	No	No
41	Israel	No	Yes	No	No	No	No	No
42	Jersey	Yes	No	Yes	No	No	No	Yes
43	Jordan	No	No	No	No	No	Yes[2]	No
44	Latvia	No	No	Yes	No	No	No	No
45	Lebanon	No	Yes	No	No	No	No	No
46	Liberia	Yes	No	No	Yes[1]	Yes	No	No
47	Liechtenstein	Yes	Yes	No	Yes[1]	Yes	No	No
48	Luxembourg	No	No	Yes	Yes[1]	No	No	No
49	Malaysia	No	No	No	Yes	No	No	No
50	Maldives	Yes	No	No	No	Yes	Yes[2]	No
51	Malta	Yes[3]	No	Yes	No	No	No	No
52	Marshall Islands	Yes	Yes	No	Yes[1]	Yes	Yes	Yes
53	Mauritius	Yes[3]	No	Yes	No	Yes	Yes[2]	Yes
54	Monaco	Yes	No	No	Yes[1]	Yes	No	No
55	Mongolia	No	No	No	No	No	Yes[2]	No
56	Montenegro	No	No	No	No	No	Yes[2]	Yes
57	Montserrat	Yes	No	No	Yes[1]	Yes	No	No
58	Morocco	No	No	No	No	No	Yes[2]	No
59	Myanmar	No	Yes	No	No	No	No	No
60	Namibia	No	No	No	No	No	Yes[2]	No
61	Nauru	Yes	Yes	No	No	Yes	Yes[2]	Yes
62	Netherland Antilles	Yes	No	Yes	Yes[1]	No	No	No
63	New Caledonia	No	No	No	No	No	No	Yes

64	Nigeria	No	Yes	No	No	No	No	No
65	Niue	Yes	Yes	No	Yes[1]	Yes	Yes[2]	Yes
66	North Macedonia	No	No	No	No	No	Yes[2]	Yes
67	Oman	No	No	No	No	No	Yes	Yes
68	Palau	No	No	No	No	No	Yes[2]	Yes
69	Panama	Yes	Yes	Yes	Yes[1]	Yes	No	No
70	Philippines	No	Yes	No	Yes	No	No	No
71	Russia	No	Yes	No	No	No	No	No
72	Samoa	Yes	No	No	Yes[1]	No	Yes	No
73	San Marino	Yes[3]	No	No	Yes[1]	No	No	No
74	Serbia	No	No	No	No	No	Yes[2]	Yes
75	Seychelles	Yes	No	No	No	Yes	Yes[2]	No
76	Singapore	No	No	Yes	Yes[1]	No	No	Yes
77	St Lucia	Yes	No	No	Yes[1]	No	Yes[2]	No
78	St.Kitts & Nevis	Yes	Yes	No	Yes[1]	Yes	Yes[2]	No
79	St.Vincent & Grenadines	Yes	Yes	No	Yes[1]	Yes	No	No
80	Swaziland	No	No	No	No	No	Yes[2]	No
81	Switzerland	No	No	Yes	Yes[1]	No	Yes[2]	Yes
82	Taiwan	No	No	No	No	No	No	Yes
83	Thailand	No	No	No	No	No	Yes[2]	No
84	Tonga	Yes	No	No	No	No	No	No
85	Trinidad & Tobago	No	No	No	No	No	Yes	Yes
86	Turkey	No	No	No	No	No	Yes[2]	No
87	Turks & Caicos	Yes	No	No	Yes[1]	Yes	No	No
88	United Arab Emirates	No	No	No	No	No	Yes	Yes
89	United Kingdom	No	No	Yes	No	No	No	No
90	Uruguay	No	No	Yes	Yes	No	No	No
91	US Virgin Islands	Yes	No	Yes	No	Yes[1]	Yes	Yes
92	Vanuatu	No	No	Yes	Yes[1]	Yes	Yes	Yes
93	Vietnam	No	No	No	No	No	Yes[2]	No

Note: The shaded cells denote most mentioned jurisdictions in the lists, with different colours indicating the number of mentions.

Note 1- Grey list- OECD 2009
Note 2- Grey List – EU March 2019
Note 3- Gave advance commitment, although satisfied blacklist criteria

The data above shows that, as expected, there is some alignment between the lists drawn in 2000 for tax purposes by the OECD and for anti-money laundering objectives by the FATF. 11 countries are common between the two lists, with all, except Nauru, continuing into the OECD list of 2009. The criterion of "beneficial owner", which is central to the FATF listing process, has increasingly become central to the discussion around tax evasion using legal entities such as companies, trusts, foundations etc. It would, therefore, be in the fitness of things to include countries with public registers of beneficial ownership in future white lists and use their absence as one of the criterion to identify the 'blacklist' members.

It is also evident from the list of countries in Table 2 that there are only 2 countries - Bahamas and Cayman Islands – which have appeared across all the seven lists mentioned, either in a black or grey avatar. It is this universal acknowledgement of their status as tax havens that causes concern when their treatment in "lists" is done with opacity. For instance, when Bahamas was moved out of the EU blacklist into its grey list with low tax transparency standards, within two months of being included in the blacklist in the first place, the raised eyebrows were but natural (EU, 2019).

Bermuda, Cook Islands, Marshall Islands and Niue make the grade in six lists, overlapping in all but one case with the FATF list, certifying to their "impeccable" credentials as tax havens with civil and criminal illegalities built in. However, Bermuda along with other British Overseas Territories like the British Virgin Islands and Cayman Islands, renowned for their secrecy laws and their low or null levels of taxation, made the cut only in the grey list of EU until March 2019, when Bermuda was finally blacklisted by the EU. The International Consortium of Investigative Journalists had noted this gap in the blacklist with concern. The gap is especially conspicuous in the background of the revelations from the Panama Papers which had implicated these jurisdictions decisively (ICIJ, 2017).

Panama, strangely, is not found in the Oxfam list (Oxfam 2017) but was in the EU's grey list until March 2019, even though the former was stated to be built on the EU criteria. 9 jurisdictions occur in five of the lists with three of them i.e. Nauru, Panama, and St. Kitts & Nevis, overlapping with the FATF list as well. 8 countries figure in common in at least four lists. Such presence of jurisdictions across black and grey lists, drawn up at different points of time, by different multilateral or NGO bodies, with varying shifts and emphases in the criteria deployed, is an indicator to their consistently problematic tax haven features. It raises the question whether such entrenched identities can really be shaken through mere naming and shaming in blacklists.

The landscape of tax havens is evidently a shifting one, varying not just with difference of criteria employed but also with new countries entering the arena, diminishing their regulatory rigour to attract transborder capital of all colours. This, clearly, keeps the challenge of base erosion and illicit financial flows kicking and alive in spite of decades of list making. Out of 93 jurisdictions listed in Table 2, 25 are new to 'lists', having found their way into the EU list, either black or grey, in 2017. It is interesting that only 10 of these new entrants could be predicted in the civil society list even when the same criteria were applied in the Oxfam report (2017) published in November 2017.

The anecdotal evidence of the entry and exit of some of the new 'characters' from the blacklist 'stage' is a pointer to the lack of credibility that often assails the non- transparent process of list making. Tunisia was one of the 17 countries blacklisted by EU for its harmful preferential tax regimes and failure to commit to their removal by 31st December 2018 (Council of the EU, 2017 December 5). Six weeks later, it was removed from the blacklist and moved to the grey list without explanation, and by March 2019 it had been eliminated from the grey list as well. The original inclusion on a list with notorious tax havens like Panama - also removed from all EU lists in 2019 - had sparked anger and surprise in the fledgling democracy with rumors that Europeans were attempting to weaken Tunisia's hand ahead of trade negotiations with EU (Akkad, 2018).

It appears that Brussels refused to accept Tunisia's letter committing to reforms since it arrived *several hours* too late. The shroud over the detail of most 'listing' exercises for tax havens clearly mars the credibility of the process. Without knowing why countries have got off the list it is not possible for civil society to hold elected officials to account. According to Elena Gaita of Transparency International EU "This ever decreasing list of tax havens will soon be so short it will be able to fit on a post-it. It's time for the EU to publish how it chooses which countries go on the list and why" (quoted in Reuters, 2018). [21]

For any process of blacklisting to appear legitimate and credible it is imperative that the criteria should be objective and transparently applied, without giving in to political compulsions. Unfortunately, the lists of uncooperative jurisdictions drawn up by the OECD or the EU have remained besmirched by political pressures and opaque processes mortgaged to big and powerful countries. Vested interests have clearly won the day when powerful countries such as the US, UK and China were able to keep themselves out of black/ grey lists even when they satisfied the criteria for identification.

The US, the biggest financial center in the world, has not committed to the Common Reporting Standards (CRS) of the OECD in respect of automatic exchange of information. Yet the OECD in 2016, and the EU in 2017, conveniently framed their criteria to ensure that the US faces no censure. The blatantly one-sided Inter Governmental Agreements (IGA) signed by the US under the Foreign Account Tax Compliance Act (FATCA) are touted as its compliance with norms of automatic exchange of information. In reality, no information is currently shared about securities accounts, accounts owned by entities and beneficial ownership details (Sheppard 2017). Yet the OECD has accepted this "class of its own" position of the US in a footnote (to the list of jurisdictions committed to the CRS) with no apparent move by the US towards fully reciprocal exchange.

The EU, similarly, has not included the US in its blacklist even after the tax reforms passed in December 2017 created a patent box kind of regime for foreign derived intangible income. This is in violation of EU's criterion 3 dealing with implementation of anti BEPS minimum standards. The credibility and legitimacy of the OECD and EU lists, accordingly, have suffered. However, some storm clouds are now seen on the horizon as the EU, the only

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[21] The Council announced that it can only publish the letters received from the jurisdictions listed in the grey and black lists if the jurisdictions in question authorize such publication, reason for which some letters were either not published or published 1 year later (Council of the EU, 2018 June 8). The available letters of commitment can be found here http://www.consilium.europa.eu/register/en/content/out?typ=SET&i=ADV&RESULTSET=1&DOC_TITLE=&CONTENTS=&DOC_ID=6972%2F18&DOS_INTERINST=&DOC_SUBJECT=&DOC_SUBTYPE=&DOC_DATE=&document_date_from_date=&document_date_from_date_submit=&document_date_to_date=&document_date_to_date_submit=&MEET_DATE=&meeting_date_from_date=&meeting_date_from_date_submit=&meeting_date_to_date=&meeting_date_to_date_submit=&DOC_LANCD=EN&ROWSPP=25&NRROWS=500&ORDERBY=DOC_DATE+DESC.

group capable of taking on the US, has put the US on notice to sign up to the CRS by 2019 or face blacklisting (Carnegie 2018).

The national black lists, in contrast, have shown more spine and consistency, often, as in the case of Brazil, not shying away from including US entities. In the case of Ecuador, the blacklist has been recently amended to include Hong Kong, although OECD went to enormous lengths to ignore its own criteria and keep China's Special Areas unnamed in a footnote in its 2009 list. The national blacklists have also retained the core criterion of low/zero tax rates, even as OECD dumped it to avoid antagonizing many of its own powerful members. This simple criterion is definitively at the heart of the beguiling attraction that tax havens hold for tax evaders/ avoiders. It is also significant that national blacklists clearly spell out the consequences of being included in the list with sanctions like higher withholding taxes, CFC norms, disallowance of deductions etc. The blacklist by OECD only threatened sanctions and then quickly retreated whereas the EU has specified a full range of defensive measures with a range of options that will be left on the Member States to decide[22]. It is difficult, therefore, not to question the seriousness of intent and consistency of purpose of the OECD and EU in the blacklists that they drew up.

[22] See Council of the EU (2017 December 5 and 2018 June 8).

VI. CONCLUSION

A blacklist represents a tool or strategy to force compliant behavior. In the case of tax havens, however, the very process and criteria used to define and identify them by multilateral organizations such as OECD and the EU have been assailed by realpolitik pressures, subjectivity, vested interests and opacity. Thereby, the tool has been effectively blunted. All discussions of tax havens include mention of low or zero tax rates, favorable regulations for foreigners and companies, secrecy facilitators that exempt revelation of beneficial owners or rigorous maintenance of accounting records and a reluctance to share and exchange information with other countries. In the opinion of the authors, the criteria for drawing up black, grey or white lists of jurisdictions do not require much beyond these traits. However, as discussed in this paper, a comprehensive definition, with appropriate weights for these factors taken in unison, has eluded the list makers due to lack of political will. The sincerity of purpose behind blacklisting of tax havens, therefore, has remained questionable in the various list-making activities, whose eventual resolutions give them the image of being capers. The national blacklists, by contrast, with sovereign interests dictating their contours, have mostly remained grounded in firm and comprehensive criteria, upholding the regulatory requirement to stop tax base erosion.

Some believe that the power of labeling and defining tax havens that international organizations possess, when moved towards actual blacklisting, causes enormous reputational damage for OFCs, leading to economic damage (Sharman, 2004). Empirical data, however, does not support this premise, suggesting instead that even in the days when the OECD had prescribed signing of 12 TIEAs as evidence of good conduct, the tax evaders merely shifted their deposits to havens not covered by a treaty instead of repatriating it home (Johannesen & Zucman, 2014; Kudrle 2009). The emergence of newer tax havens, as seen in the latest EU list, is a further pointer to the heavily defended and nebulous world of hidden profits and wealth, which is unlikely to disappear merely through public shaming or threat of sanctions. The fact that EU Member States, some of which are tax havens themselves, will decide the possible tax defensive measures to apply out of the Council's list of choices while comprehensive sanction by the EU will be limited to preventing its external development and investment funds being routed through the "non cooperative" countries (Council of the EU, 2017 December 5), reinforces the toothlessness built into the design of such blacklisting exercise.

Unsurprisingly, the impact of compromised blacklists from the stables of OECD and EU has been anemic, in contrast with the robust consequences visited upon violators of the national blacklists. National listing processes have been used effectively in cross border transactions to apply enhanced anti-avoidance measures in the form of enhanced documentation requirements, the automatic application of withholding taxes, or specific limitations for thin capitalization; in as much as they are allowed for by the network of tax treaties to which a specific country has committed. The latter is not a minor detail, as in order to avoid being listed by the OECD, some jurisdictions, e.g. The Netherlands, have signed as many as 89 tax treaties[23], and thus have fallen out of most of the national lists around the world. However, some countries, e.g. Brazil and Ecuador, have made an adaptation effort after such events and introduced other criteria like the existence of preferential tax regimes

[23] See https://www.world.tax/countries/netherlands/netherlands-double-tax-treaties.php.

and reduced nominal corporate tax rates, in order to keep their listing process useful and relevant.

The national blacklists of Brazil, Mexico and Ecuador discussed earlier have exemplified the effectiveness of this tool when simple and clear criteria are used for definition of tax havens and the threat of sanctions is backed with sovereign teeth. Even the single Indian usage of the tool against Cyprus for messaging to other ‘troublesome’ jurisdictions was an exercise in creativity. It lends credence to the conclusion that blacklisting is a compelling instrument against global tax shenanigans when national stakes are involved rather than in multilateral forums where it, more often than not, becomes an apparatus of realpolitik and jockeying in power games between countries.

The global approach to tackling the menace of tax havens has, so far, proceeded on an assumption of the existential inevitability of these “predatory tax structures” that undermine the sovereignty of other states and debilitate their tax base (Tollan, 2016, p. 243). Such an approach, considered adaptive to an existing reality, ignores the possibility of sovereign nations raising the normative bar for fair and equitable international coexistence by imagining a world without secrecy jurisdictions. Such imagination and its translation into reality would be possible through a representative and democratic forum such as the United Nations (UN).

A UN listing process could have more credibility and receptiveness from developing countries, if it were made possible. However, due to its highly political characteristics, it could also risk having to rely on commitments. In order for it to be effective, the criteria to be used for the listing processes would have to be transparent, objective and reliant on effective practices, or else it will end up in toothless effort.

A proposal for an international convention on financial transparency has already been moved by the Independent Norwegian Commission on Tax Havens and its contours have started to be debated (Tollan, 2016). There is an urgent need to take this idea forward, ignoring naysayers who may consider it utopian.

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