Tax blacklists: bureaucracy or hypocrisy?

By Hilary Spilkin, Managing Director, Liberian Corporate Registry, Washington DC, US

What was the real driving force behind the publication of the European Union Commission Blacklist of Non-Cooperative Jurisdictions? I refer to the publication of The Annex to the Communication from the Commission to the European Parliament and the Council on a Fair and Efficient Corporate Tax System in the European Union: 5 key Areas for Action, published in Brussels on 17 June 2015.

The Annex attached to the publication contained the names of 30 non-EU Member countries which were condemned and black-listed as non-cooperative tax havens. The decision to make this public has the potential for detrimental effects to each of these nations' economy and prosperity. To make matters worse, it would appear that the EU Commission's "selection process" was based on arbitrary factors and on the input of countries that in many cases have not met the criteria originally proposed by the Commission for creating the country blacklists in the first place.

Try as I might, I fail to see the benefit to the European Union (EU) countries of this name calling. What does it hope to accomplish?

As I read the multiple outrages and vitriolic anger spewing from several of those countries recently named in the Annex, I cannot help but feel that this is the work of a large powerful Union flexing its muscles and using its power against smaller economies without consideration of the consequences of their decree.

My analysis reveals that there can be no logical rationale behind this edict to justify its draconian implications. There is no clear advantage gained by the EU in any respect. On the contrary, this will have detrimental effects not only on the named countries but on the business communities of the European Union itself. An accurate analogy would be the big bully on the block pushing the other kids around, purely because it can. The outrage emanating from those named countries has already manifested in a plethora of published articles in industry journals and letters of complaint to the Organisation for Economic Co-operation and Development (OECD) and to the EU Commission itself, condemning the arbitrary edicts handed down.

The decision to publish this Blacklist was not based on logic or on any fundamental facts, and was possibly guided purely by an inflexible bureaucracy or a manipulative political agenda. Headlines since the publication lead me to wonder whether anyone on the Commission was actually thinking, and whether any standards and benchmarks were actually used in order to determine the criteria for being named. Examples of these headlines are:

"Tax Blacklist provokes offshore fury" (Financial Times)

"Bermuda Dumbfounded by EU Blacklist Inclusion" (Lowtax.net)

"For Pete's Sark! Guernsey demands removal from EU Blacklist" (the Guardian)

Confirmation of the feeling that this publication was based on arbitrary criteria comes in a statement by the Chief Minister of Guernsey, Jonathan Le Tocq which was published by the BBC a few days later, after Guernsey protested about being included on the list stating: "The European Commission has admitted there were 'inconsistencies' in information used to put Guernsey on a tax blacklist.", thus reinforcing the arbitrariness of the selection.

Does Guernsey have some big friends in the United Kingdom? The Commission said it would include Guernsey in talks about changes relating to how the Blacklist was compiled. It would be a great idea if the other 29 named countries were made privy to and included in this discussion. Commission spokeswoman Vanessa Mock said: "It appears there were different criteria for different countries so we are trying to co-ordinate that."

Really? At this stage? Are we to believe that this is so, after the condemnation?

The EU blacklist was established by compiling a list of countries that were included on at least ten member country 'tax haven' blacklists. This was according to a definition established by the Commission back in 2012 as a country which meets any one of the following:

- provides for tax measures which entail no or nominal taxes;
- grants tax advantages even without any real economic activity and substantial economic presence;
- is listed as a non-cooperative country and territory by The Financial Action Task Force (FATF);
- has not signed a Tax Information Exchange Agreement (TIEA) with the home Member State.

It is clear that the criteria applied is whether the country engages in practices which have the effect of creating distortions in the international balance of tax collection, of creating unfair tax competition and upsetting global stability or threatening global financial stability.

The Commission issued Recommendations in 2012 on measures to tackle aggressive tax planning and to encourage third countries to apply minimum standards of good governance in tax matters. The stated aim was to build a common approach to identifying and dealing with non-co-operative tax jurisdictions, which would create a strong EU stance against these (Non-EU) countries. The Commission then set up a Platform on Tax Good Governance to implement and monitor the Recommendations. The members then identified further measures to tackle aggressive tax planning and to strengthen the EU approach in tackling non-co-operative tax jurisdictions. The result of the Platform: the publication of the EU-wide list of third country non-co-operative tax jurisdictions, compiled from member States' independent national blacklists.

The stated aim behind the publication of the Blacklist, according to EU Economic Affairs Commissioner, Pierre Moscovici, is to "push non-co-operative non-EU jurisdictions to be more co-operative and adopt international standards".

The tax proposals contained in the Commission report are a response to what has become known as the "LuxLeaks" scandal and to expose the "sweetheart deals" with the well-known EU members, and which have saved some of the world's largest corporations, including Apple, IKEA, Pepsi, to name a few, "billions of dollars in taxes". Notably absent from the list are

those countries which are under investigation by the EU competition authorities following the scandals.

Let's turn our attention for a moment to the real reason behind national tax blacklists: they are used as a way for governments to safeguard their national tax revenues and to attempt to limit tax loss domestically by forbidding local businesses or citizens from entering into business and trade relations with specified countries. But the effect is to limit and constrain local businesses in the Union from doing business with whomever they choose and wherever economically advantageous. These blacklists are enforced by the EU public authorities in the blacklisting country and not by private enterprise. The whitelisting of certain countries would entail a brotherhood agreement among a group of States (here the EU). The group gets together and decides that it will not do business with those states that 'threaten' its revenue collecting mechanisms. The criteria used to determine the blacklist status in each EU member state are arbitrary and do not necessarily apply the same way to all the states in the group. What happened to Freedom of Enterprise? Is this a right that only members of the European Union have amongst themselves?

Why have the Commission and its members singled out one lone country in Africa? This country, which, by the way, is still reeling from its recent bout with Ebola, happens to be home to the world's second largest commercial ship registry and the world's most commercially successful privately managed and operated maritime and corporate programme.

It is also interesting to note that most of the 10 countries that singled out Liberia as being non-cooperative, have no business with Liberia and many of them have not responded to requests from the Liberian government to enter into tax information exchange agreements. For that they are labelled non-cooperative.

To add insult to injury, the EU commission has not questioned the veracity of the label and the criteria used to determine whether they are in fact non-co-operative? Is it not incumbent upon the Commission, before they name names and cause economic harm to a country and hence its inhabitants, that they check the facts?

By his own admission, Pierre Moscovici, European Commissioner with responsibility for tax, said: "Our current approach to corporate taxation no longer fits today's reality. We are using outdated tools and unilateral measures to respond to the challenges of a digitalised, globalised economy."

And yet, in spite of this statement, the list is published, with all its damaging consequences to small, struggling countries like Liberia, and like the Polynesian island of Niue, with a population of less than 1,500 people who live in semi-subsistence - but does not include the EU Member tax avoidance hubs which are now under investigation. Can they really be understood to pose a global financial threat to the European Union members?

As Managing Director of the Liberian Corporate Registry, I can speak with authority on the reasons why the small West African democratic country of Liberia, should not be on this list.

Firstly, it causes no threat to any of the EU countries and their citizens because Liberia is not a banking or financial centre, and it is not a country well known for attracting foreign tourists with large suitcases of cash earned from illicit dealings to deposit into local banks. It can therefore not be considered a credible threat for causing global instability in the financial arena.

Secondly, it harbours no known terrorist activity, so is not a security threat to the global community.

Thirdly, Liberia does have an effective tax regime for Liberian citizens and entities with real commercial purpose and activity based on source, however, for non-resident entities with no real commercial purpose or activity within Liberia, there is no tax levied. On the contrary, by creating this distinction for tax collection between resident and non-resident, Liberia makes it possible for the country where the actual economic activity is centred (this is the OECD standard of principal place of management and control) to impose tax on earnings, despite the statutory seat of the entity.

Fourthly, Liberia is not listed as a "high-risk and non-cooperative jurisdiction" by the FATF as it has been deemed compliant with AML/CFT standards and does not pose a risk to the international financial system. In fact, Liberia is a founding member of the Inter-Governmental Action Group against Money Laundering in West Africa (GIABA), established by a decision of the Authority of Heads of State and Government of The Economic Community of West African States (ECOWAS) and an Associate Member of the FATF since 2010.

Finally, one of the reasons that the OECD insisted on the signing of Tax Information Exchange Agreements was so that countries which entered into these agreements with each other, would not place each other on their internal country blacklists. And yet, here this past week, we find both Portugal and Poland, both with which Liberia has entered into such agreements, are two of the ten countries responsible for blacklisting Liberia and hence being placed on this blacklist. I should note that to date, neither of these two countries has submitted information requests to Liberia. Surely one can only be labelled 'non-co-operative' if one has indeed not co-operated with an exchange of information request?

It must be noted that the OECD has sent a letter to the Global Forum members who are offended by the Blacklist in which it expresses concern since some of the countries on the list are "fully or largely compliant" with the international standards that Moscovici refers to. The email which was sent to all 126 members of the Global Forum on Transparency and Exchange of Information for Tax Purposes and which was signed both by the Director of the OECD Center for Tax Policy and Administration and by the Head of the Global Forum Secretariat and confirmed that the only "…agreeable assessment of countries as regards their cooperation is made by the Global Forum and that a number of countries identified in the EU exercise are either fully or largely compliant…" and further stated that it would "… stand ready to further clarify to the media the position of the affected jurisdictions with regard to their compliance with the OECD standards".

To date, Liberia has received a total of 57 requests for information from two countries with which it has entered into TIEAs, neither of which have listed Liberia on their blacklist, and Liberia has responded in all of these cases, with alacrity and with as much co-operation as it can possibly provide. It is interesting to note that the countries that accuse Liberia of being non-co-operative, have not even put Liberia to the test.

Liberia continues to strive, despite domestic difficulties, to take its place on the world stage and be recognised as a partner by first world countries. To that end, it signed on as a member of the Global Forum with the OECD and successfully accomplished its First Phase whitelisting in record time, despite numerous setbacks, faster than many wealthy first world countries. Following this, France removed Liberia from its blacklist of tax havens and the United States of America does not consider Liberia a jurisdiction of Prime Concern for Money Laundering (International Narcotics Control Strategy Report), a claim that many who are on the blacklist, cannot make.

The Director General of the South African Ministry of Finance argued in 2000 at the Global Forum that "We need to ensure that globalisation does not exacerbate poverty". I feel the EU Commission should take cognisance of this statement.

While I appreciate the necessity for tax compliance, it must not become so draconian that it stifles the freedom of legitimate commercial enterprise.