

Desktop Review: Analysis of the Pacific Islands Forum members included in the EU list of non-cooperative jurisdictions

June 2023

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Acronyms and abbreviations

ADB	Asian Development Bank
AEOI	Automatic Exchange of Information
AML	Anti-Money Laundering
APG	Asia/Pacific Group on Money Laundering
BEPS	Base Erosion and Profit Shifting
CFT	Combatting the Financing of Terrorism
CoCG	European Union's Code of Conduct Group
FDI	Foreign Direct Investment
EBRD	European Bank for Reconstruction and Development
EFSD	European Fund for Sustainable Development
EFSI	European Fund for Strategic Investments
EOI	Exchange of Information
EOIR	Exchange of information on request
EU	European Union
EU list	European Union's list of non-cooperative jurisdictions for tax purposes
FDI	Foreign Direct Investment
ICA	International Companies Act
ICT	Fiji's Information Communication Technology Regime
IP	Intellectual Property
ISM	Information Security Management
ITA	Income Tax Act
Global Forum	OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes
MI	Marshall Islands
MTI	World Bank's Macroeconomics, Trade and Investment Global Practice
Multilateral Convention	Multilateral Convention on Mutual Administrative Assistance in Tax Matters
Multilateral Instrument	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD	Organization for Economic Cooperation and Development
PIF	Pacific Islands Forum
WBG	World Bank Group

Tax Glossary

Automatic Exchange of Information	Systematic and periodic transmission of bulk taxpayer information by the source country to the residence country without countries having to request for it. The Global Forum monitors the automatic exchange of financial account information (known as the Common Reporting Standard). Financial institutions are required to report account information of non-residents to their tax authorities, who in turn automatically exchange this information with the tax authorities of the account holders' country of residence. This exchange is underpinned by ensuring that the information is kept confidential and properly safeguarded and requirements on information security management are placed on jurisdictions to ensure this.
Bearer shares	Shares in which ownership can be transferred from one holder to another without registration of the transaction by the issuing company; the share is entirely owned by the holder of the physical stock certificate.
Beneficial owner	The natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement. Reference to ultimate ownership or control and ultimate effective control refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.
BEPS	Base erosion and profit shifting refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity or to erode tax bases through deductible payments (such as interest or royalties). Although some of the schemes used are illegal, most are not. This undermines the fairness and integrity of tax systems because businesses that operate across borders can use BEPS to gain a competitive advantage over enterprises that operate at a domestic level.
BEPS minimum standards	BEPS Actions identified as a priority and subject to monitoring through peer review processes to ensure the effective implementation of the BEPS package (see definition of BEPS package).
BEPS Package	15 BEPS Actions that equip governments with the domestic and international instruments needed to tackle tax avoidance. These actions contain tools for countries to ensure that profits are taxed where economic activities generating the profits are performed and where value is created.
Country-by-country reporting	Country-by-Country Reporting is part of the OECD's BEPS Action Plan (Action 13). The country-by-country report is an annual report filed by multinational enterprises that breaks down key elements of the financial statements per jurisdiction in the group. A country-by-country report provides local tax authorities visibility to revenue, income, tax paid and accrued, employment, capital, retained earnings, tangible assets, and activities. Country-by-country reports are exchanged among jurisdictions using and AEOI framework.
Exchange of information	Information exchanged by tax administrations under an international legal agreement. Jurisdictions use this information for domestic purposes, e.g. tax audits, criminal prosecutions, etc. Information can be exchanged upon request, automatically or spontaneously.

Exchange of information on request	It provides a framework for tax authorities to request foreseeably relevant information from each other to progress on a tax investigation and/or enforce its tax laws. Successful implementation of the EOIR standard require three key elements: i) the transparency of banking and accounting records as well as beneficial ownership of entities and legal arrangements available within a jurisdiction; ii) access to this information by the tax administration; and iii) exchanging the information in a timely manner with relevant jurisdictions, based on international agreements in force.
Information Security Management	A set of governance arrangements, policies, procedures, practices and security controls. A security control is a specific measure to mitigate or eliminate a security risk: it could be a procedure, a hardware or software product, or other. The AEOI Standard contains requirements for a comprehensive ISM framework due to the sensitive nature, large volumes, and electronic means through which the information is exchanged. The ISM framework refers to the organisational structures and overarching information security principles, aimed at guiding tax administrations to achieve ISM objectives, following a risk-based approach. The ultimate accountability for the ISM framework should sit with the most senior officials within the tax administration.
Mutual agreement procedure	A means through which tax administrations consult to resolve disputes regarding the application of double tax conventions. This procedure, described and authorized by Article 25 of the OECD Model Tax Convention, can be used to eliminate double taxation that could arise from a transfer pricing adjustment.
Preferential Tax Regime	Special tax regimes that offers a lower tax rate and simpler tax compliance requirements to a target group, in comparison to the mainstream tax regime applicable to all taxpayers.
Tax avoidance	Any legal method used by a taxpayer to minimize the amount of tax due.
Tax evasion	Illegal arrangements where liability to tax is hidden or ignored, i.e. the taxpayer pays less tax than he is legally obligated to pay by hiding income or information from the tax authorities.
Tax treaty	A bilateral agreement made by two countries to resolve issues involving double taxation (including double non-taxation) and to prevent tax avoidance and evasion.
Tax ruling	A taxpayer-specific ruling (binding) issued by a tax authority, that interprets and applies the tax law to a specific set of facts.
Transfer Pricing	A transfer price is the price charged by a company for goods, services or intangible property to a subsidiary or other related company at an arm's length. The arm's length principle is an international standard which states that, where conditions between related enterprises are different from those between independent enterprises, profits which have accrued by reason of those conditions may be included in the profits of that enterprise and taxed accordingly Abusive transfer pricing occurs when income and expenses are improperly allocated for the purpose of reducing taxable income.
Treaty shopping	An analysis of tax treaty provisions to structure an international transaction or operation so as to take advantage of a particular tax treaty. The term is normally applied to a situation where a person not resident of either the treaty countries establishes an entity in one of the treaty countries in order to obtain treaty benefits.

Executive Summary

The European Union (EU) aims to promote fair and transparent taxation among its Member States and in other countries that could affect the EU. The EU's Code of Conduct Group (CoCG) evaluates countries against the EU tax good governance criteria, which relates to tax transparency, fair taxation and measures against base erosion and profit shifting (BEPS). The EU expects jurisdictions to implement the international standard on exchange of information (EOI), including on request and automatically, as well as to have a wide EOI network that covers all EU Member States. Jurisdictions should not have harmful preferential tax measures or facilitate offshore structures seeking to attract profits without real economic activity. Lastly, jurisdictions should commit to the G20/OECD BEPS minimum standards concerning harmful tax measures, treaty shopping, country-by-country reporting and dispute resolution. Jurisdictions that do not comply with these criteria are listed in the EU's list of non-cooperative jurisdictions for tax purposes.

There are currently five members of the Pacific Islands Forum (PIF) in the EU list of non-cooperative jurisdictions: Fiji, Marshall Islands, Palau, Samoa and Vanuatu. These countries have been involved in some way with the EU list since it was first published in 2017. This note contains a technical assessment, conducted independent from the EU and with publicly available information, on the compliance of these jurisdictions with the EU listing criteria.

This desktop review reveals that these five jurisdictions do not fully meet the EU listing criteria. The following table shows the areas where these jurisdictions should strengthen their tax systems to be able to comply with the requirements from the EU:

EU list – PIF jurisdictions listed as non-cooperative for tax purposes			
	Tax Transparency	Fair Taxation	Anti-BEPS measures
Fiji	X	X	X
Marshall Islands		X	
Palau	X		
Samoa		X	
Vanuatu	X	X	

A jurisdiction included in the EU list of non-cooperative jurisdictions has an opportunity to strengthen its international tax system to tackle tax fraud, avoidance and evasion, which will in turn result in increased domestic resource mobilization. The PIF members in the EU list can take a number of actions to improve their tax systems and implement the international tax standards. These actions include joining international forums, signing, and ratifying international instruments, make political commitments that will entail technical challenges, amend legislation and ensure effective implementation of the existing legal framework.

Implementing the international tax standards can be complex but in reality, what countries require is political will and technical assistance from international organizations with strong technical expertise. There is a lot of experience from international organizations working in the region on international tax topics, most notably the Asian Development Bank (ADB) and the World Bank. Both development banks offer technical assistance on the tax transparency standards monitored by the Global Forum on

Transparency and Exchange of Information (Global Forum) and on the BEPS minimum standards. The support that these development banks can give the PIF members included in the EU list will be very valuable considering that the listing process is dynamic, and the standards evolve at a rapid pace.

1. Introduction

The Pacific Islands Forum (PIF) has requested a desktop review on the state of play concerning Forum members included in the European Union's list of non-cooperative jurisdictions for tax purposes (EU list). During a PIF Economic Ministers meeting in 2022, the Ministers raised concern on the inclusion of Fiji, Palau, Samoa and Vanuatu in the EU list.¹ The Ministers consider that being in this list has detrimental and disproportionate impact on the small islands' economies, which in turn impacts the ability to attract foreign direct investment (FDI) and access international financial services.

The European Union's (EU) Code of Conduct Group (CoCG) consists of high-level taxation experts of EU Member States responsible for monitoring potentially harmful tax measures in the EU Member States. The CoCG has an international dimension, which aims at promoting fair and transparent taxation in countries that could affect the EU. For this reason, the CoCG carries out technical work based on a set of established criteria, to determine if a jurisdiction should be included or not in the EU list.

The EU list was first published in 2017. The list is published as Annex I of the EU Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes. Annex II of these Council conclusions contains what is known as the state of play, which refers to jurisdictions that have taken commitments to implement the EU's international standards of tax good governance. Fiji, Marshall Islands, Palau, Samoa and Vanuatu have been involved in some way with the EU list since its it was first published.

The PIF has requested that an independent assessment be conducted by the World Bank Group (WBG) on the technical issues affecting the PIF members, with the aim to improve the implementation of the international standards more generally in the region, and also to better understand their technical assistance needs.

Section 2 of this note contains the assessment of Fiji, Marshall Islands, Palau, Samoa and Vanuatu against the EU tax good governance criteria. This section clearly identifies the situation of each country in respect of the criteria considered not met by the EU Council. The assessment was carried out only with public sources.

Section 3 contains the main actions that each country will need to complete to strengthen its international tax system based on the issues identified in section 2. These actions can all be completed with technical assistance from the WBG. The WBG has strong expertise in the implementation of the tax transparency standards and the BEPS minimum standards within the Macroeconomics, Trade and Investment (MTI) Global Practice. In addition, WBG works closely with other international organizations providing support on these topics in case there is potential interest from the country requesting assistance.

Lastly, section 4 outlines the potential consequences faced by PIF countries for being in the EU list, however, this impact does not include quantification of FDI losses, as it is out of scope of this desktop review.

¹ At this meeting, Marshall Islands was not yet included in annex I of the EU list.

2. Technical aspects from the EU listing criteria affecting PIF members

The CoCG evaluates countries against the EU's tax good governance criteria which relates to tax transparency, fair taxation and anti-base erosion and profit shifting (BEPS) measures. According to these criteria, in order to be considered cooperative for tax purposes by the EU, a jurisdiction should:

- a) implement the international standards on exchange of information (EOI) and have a wide exchange network that covers all EU Member States;
- b) not have harmful preferential tax measures or facilitate offshore structures or arrangements to attract profit without real economic activity; and
- c) implement the BEPS minimum standards of the Organization for Economic Cooperation and Development (OECD).

TABLE 1. Specific elements required under each criterion:

Transparency	<ul style="list-style-type: none"> • Jurisdictions should exchange financial account data with all EU members through automatic exchange of tax information. The CoCG takes into account the work of the Global Forum, asking jurisdictions to address the determination made by the Global Forum when these are negative. In the future, the CoCG will take into account the peer review ratings on AEOI published by the Global Forum. • Jurisdictions should be able to exchange information on request in compliance with OECD standards. The CoCG will look at the Global Forum's peer reviews and list a jurisdiction that has been assigned with a rating of "partially compliant" or "non-compliant". • Be a party of the OECD Multilateral Convention on Mutual Administrative Assistance (Multilateral Convention) in Tax Matters or have a network of exchange arrangements in place that covers all EU member States. • The CoCG is in the process of establishing a criterion on the implementation of the beneficial ownership requirement.
Fair taxation	<ul style="list-style-type: none"> • Jurisdictions should not have harmful preferential tax measures. The CoCG screens potentially harmful regimes and tax features of general application against a number of criteria (e.g., ring-fencing, economic substance) to verify if they result in unfair tax competition that affects the business location of companies. • Jurisdictions should not facilitate offshore structures or arrangements seeking to attract profits without any real economic activity. This criterion concerns jurisdictions that have no or very low corporate income tax. A jurisdiction with a zero or very low tax rate should ensure that there are requirements relating to economic substance (e.g. minimum number of employees, operating expenditures, etc.) and that they can exchange information.
Anti-BEPS measures	<ul style="list-style-type: none"> • Jurisdictions should commit to the OECD anti-BEPS standards concerning harmful tax measures, treaty shopping, country-by-country reporting and

dispute resolution. Jurisdictions are required to become members of the G20/OECD Inclusive Framework on BEPS or implement the BEPS minimum standards.

- Jurisdictions should have in place arrangements to exchange country-by-country reports with all EU member States, and receive positive assessments in the peer reviews on the implementation of the standard.
-

Each of the specific criterion in the table above is related somehow to administrative assistance and international cooperation. The Multilateral Convention on Mutual Administrative Assistance in Tax Matters² (Multilateral Convention) facilitates international cooperation through various forms of administrative cooperation for the assessment and collection of taxes between participating jurisdictions. These types of cooperation range from EOI (on request, automatic and spontaneous) to the recovery of foreign taxes through assistance in collection and service of documents. There are currently 147 jurisdictions participating in the Multilateral Convention, covering all of the EU member States.

BOX 1. How to become a Party to the Multilateral Convention?

1. Request to be invited: written request addressed to the OECD Secretary-General through diplomatic channels. Must be accompanied with a confidentiality questionnaire to demonstrate that the applicant country meets the minimum requirements.
2. Decision of the Parties to Invite: taken by consensus by the Parties of the Multilateral Convention, considering the confidentiality rules and whether the country is a member of the Global Forum.
3. Invitation to become a Party: formal letter of invitation to sign the Multilateral Convention.
4. Signature: arrangements are made with the Depositaries of the Multilateral Convention.
5. Ratification: completion of the country's domestic procedures for ratification, acceptance, or approval.
6. Deposit: instrument of ratification, acceptance or approval must be deposited with one of the Depositaries.

The following subsections will analyze in detail how each of the listing criteria applies to the PIF jurisdictions currently included in the list.

² <https://www.oecd.org/tax/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters-9789264115606-en.htm>

Fiji

Fiji was listed under Annex II of the conclusions adopted by the Ecofin Council in December 2017 after committing to i) amend/abolish by end of 2018 the preferential tax regimes regarded as potentially harmful by the EU Council, and ii) becoming a member by the end of 2019, of the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) and the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework).

However, Fiji was included in the EU list of non-cooperative jurisdictions in March 2019 for not amending the preferential tax regimes by the end of 2018 deadline. Fiji's commitment to become member of the Global Forum and the Inclusive Framework continued to be monitored. These commitments were not met by the end of 2019 deadline either.

Fiji continues to be in the EU list of non-cooperative jurisdictions. The most recent list, published in February 2023, states that "Fiji is not a member of the Global Forum, has not signed and ratified the OECD Multilateral Convention on Mutual Administrative Assistance as amended, has harmful preferential tax regimes (Exporting Companies, Income Communication Technology (ICT) Incentive, Concessionary rate of tax for regional or global headquarters), has not become a member of the Inclusive Framework nor implemented the BEPS minimum standards, and has not resolved these issues yet."³

Global Forum membership

Members of the Global Forum commit to implement the standards on transparency and EOI, which include exchange of information on request (EOIR) and automatic exchange of information (AEOI). Members commit to participating and contributing to the peer review process. The peer review process is the mechanism used to monitor the implementation of the EOI standards. Lastly, members pay an annual membership fee. Becoming a member of the Global Forum also carries a number of benefits, such as increasing international visibility as a reliable location to do business, expand the country's EOI network, obtain technical assistance from the Global Secretariat, etc. EOI is a powerful tool against tax evasion in its various forms, including illicit financial flows. The implementation of the EOI standards result in increased mobilization of domestic resources.

As mentioned above, if Fiji becomes a member of the Global Forum, it will be peer reviewed on the implementation of the EOIR standard. For the EU Council to consider that Fiji meets the tax transparency criteria, Fiji should obtain at least a "Largely Compliant" on its EOIR review. To achieve such rating, the jurisdictions must have certain information available (e.g. beneficial ownership, banking, accounting), ensure that such information is accessible to the tax administration and be able to exchange this information with its treaty partners.

From publicly available sources, it is possible to conclude that Fiji will need to address various issues in order to obtain a satisfactory rating by the Global Forum. The 2016 report⁴ from the Asia/Pacific Group (APG) on Money Laundering assessed Fiji's anti-money laundering and counter-terrorist financing system and concluded the following:

³ <https://data.consilium.europa.eu/doc/document/ST-6375-2023-INIT/en/pdf>

⁴ <https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-fiji-2016.html>

- There are no requirements for legal entities to keep beneficial ownership information. The Companies Act only requires the collection and recording of the direct owner of shares.
- The Companies Act allows the issuance of a share warrants to bearer. In addition to these warrants, the Companies Act does not prohibit the issuance of bearer shares, which means that companies in Fiji may issue them. There are no mechanisms to guarantee the transparency of beneficial ownership for bearer instruments.
- The Companies Act permits nominee directors and nominee shareholders, and there are no legal provisions requiring disclosure to the company or to the Registrar of the identity of the nominator of shares or directors.
- There is no requirement in Fiji law (common law or statute law) for trustees of express trusts to obtain and hold adequate, accurate and current information on the identity of settlors, trustees, protectors (if any) and beneficiaries of trusts, including any natural person who exercises ultimate effective control over a trust. According, beneficial ownership for trusts is not available in Fiji.

Some progress has been recognized by the APG concerning beneficial ownership. On 15 January 2020 the Companies (Budget Amendment) Act 23⁵ came into effect. Fiji reported that Section 251(8) of the Companies Act 2015 requires companies to maintain current information relating to shares held non-beneficially. This Act requires non-listed companies to indicate any shares that a member does not hold beneficially and to include the name of the beneficial owner of the share. Section 7 of Companies (Budget Amendment) Act 2019 and section 82 of the Companies Act 2015 require companies to maintain information on the beneficial owners of shares in their register of members. Section 81 of the Companies Act provides that companies must set up and maintain the register, including beneficial ownership information. Despite APG acknowledging the progress, it has not led to any changes in ratings.

Fiji will have to review and most likely amend its legislation to ensure that all legal and beneficial ownership information of entities and arrangements is available, and kept for a minimum period of five years, even in cases where the entity or arrangement has ceased to exist.

It seems from provisions in the Tax Administration Act that the competent authority has enough powers to obtain information from any person as the Chief Executive Officer of the Tax Administration requires. From publicly available sources it was not possible to conclude if Fiji has bank secrecy for tax purposes, or if Fiji is in a position to exchange information without regard to whether the requested jurisdiction needs the information for its own tax purposes.

The EOIR standard requires that a jurisdiction provide for effective EOI with all relevant partners. Fiji has 11 treaties providing for EOI, but some of these treaties are old and do not comply with the actual EOIR standard. This issue can be addressed by signing and ratifying the Multilateral Convention.

AEOI implementation

In order to implement the OECD's AEOI standard, Fiji will need to take a number of steps to ensure that financial institutions in Fiji collect and report the necessary information, and that their tax administration has the capacity to receive this information and exchange it with its partners.

The main requirements for a country to implement AEOI of financial account information are:

⁵ <https://www.parliament.gov.fj/wp-content/uploads/2019/07/Act-23-Companies-Budget-Amendment.pdf>

1. Enacting domestic legislation to require financial institutions to report the information to the tax administration, including provisions for the effective implementation, i.e. sanctions and similar measures.
2. Having an international legal framework in place to be able to exchange information with the country's interested appropriate partners.
3. Having an appropriate information security management (ISM) framework to ensure the confidentiality of the information exchanged. The ISM system includes human resource controls, physical and logical access, appropriate IT security systems, protection levels of the information, managing risk and business continuity and incident monitoring.

Once Fiji starts exchanging information automatically, the Global Forum will carry out a peer review on the implementation of the AEOI standard. This review covers the legal framework and the effectiveness in practice. In 2023, the Global Forum launched a more robust review process on the effectiveness of AEOI in practice. This review process will result in a rating of compliant, largely compliant, partially compliant, and non-compliant. The EU Council will use these ratings in assessing their criteria when adopting conclusions on the list of non-cooperative jurisdictions.

Signing and ratifying the Multilateral Convention

Fiji's EOI network is composed of 11 partners, which means that Fiji is not in a position to exchange information with all EU member States.

Preferential regimes

There are three preferential regimes that the EU Council considers potentially harmful in Fiji: i) exporting companies regime; ii) information communication technology (ICT); and concessionary rate of tax regional or global headquarters. The legal provisions that give rise to these preferential regimes are contained in Fiji's Income Tax Act (ITA).⁶

The exporting companies regime is regulated through section 25 (8) of the ITA. The provision provides for a deduction for a person exporting goods or services. The deduction is currently set at 60% of the export income⁷ (90% for agriculture, forestry and fisheries sectors). By applying only to export, it is clear that this regime is ring-fenced from the domestic market to avoid affecting the national tax base. In addition, there are no substance requirements for companies using this benefit.

The ICT regime is regulated through Part 9 of the ITA. The income of an ICT operator that obtains a license after 1 January 2009 is exempt from corporate income tax for a period of 13 years from the date of issue of the license. ICT business includes many forms of geographically mobile activities⁸, which increases the risk of tax avoidance and evasion. The expenses incurred by an ICT start-up involved in application design or software development and accredited ICT training institutions qualify for a 150% deduction. A 250%

⁶ <https://www.frcs.org.fj/wp-content/uploads/2019/10/Income-Tax-Act.pdf>

⁷ Export income means chargeable income derived by a taxpayer from business of exporting goods and services but exclude re-exports.

⁸ ICT business means services provided by a person which are Information Communications Technology enabled such as software development, call centres, customer contact centres, engineering and design, research and development, animation and content creation, distance learning, market research, travel services, finance and accounting services, human resource services, legal services, compliance and risk services or other administration services, but does not include an internet café or any retail or wholesale of information technology products or the repair, sale or service of any such products.

deduction is allowed for research and development expenses incurred in the ICT industry. Effective 1 August 2021, new ICT infrastructure investment incentives are available with income tax exemption for up to 20 years depending on the level of capital investment and other conditions. From public information dated 2018⁹, this regime seems to have ring-fencing features for those operating in Kalabu, having to export at least 60% of its total services. There were also insufficient economic substance requirements, with an obligation to employ at least 50 employees during any 6 months within the income year. More recent public information does not seem to include requirements on minimum exports and minimum employees. However, it was not possible to determine if there were legal amendments to remove this. From the information contained in the ITA, there does not seem to be sufficient economic substance requirement for ICT operators, making the regime potentially harmful under the EU criteria.

Furthermore, the ICT regime also offers benefits to income from intellectual property (IP). The EU CoCG draws on the work of the OECD's Forum on Harmful Tax Practices for IP regimes. Accordingly, in order to consider that the ICT regime has enough economic substance, it will have to comply with the nexus approach detailed in the 2015 BEPS Action 5 report.¹⁰ The nexus approach requires a link between the income benefiting from the IP regime and the extent to which the taxpayer has undertaken the underlying activities that generated the IP. In implementing the nexus approach, jurisdictions will need to include a formula in its legislation, comprised of two elements: a first part which determines the amount of eligible income which can benefit from a lower tax rate, and a second part which is a consequence for the non-eligible income which is then taxed at the normal (higher) tax rate.

The concessionary rate of tax regional or global headquarters was a ring-fenced regime, where a reduced tax rate was provided for income derived by regional or global headquarters from the provision of qualifying services as prescribed to its offices, associated companies and other persons, outside of Fiji. The 2022 – 2023 Fijian National Budget provides that the concessionary tax rate together with the 150% deduction for capital expenditures of headquarters relocating to Fiji, ceases to apply from the year 2023. Accordingly, the global or regional headquarters will be subject to the general corporate tax rate of 20% starting from the 2023 tax year.

BEPS Implementation

To become a member of the Inclusive Framework on BEPS, Fiji would need to commit to the BEPS package and pay an annual membership fee.

Business operates internationally, so governments must act together to tackle BEPS and restore trust in domestic and international tax systems. The OECD estimates that BEPS practices cost countries 100-240 billion USD in lost revenue annually, which is the equivalent to 4-10% of the global corporate income tax revenue.

Working together within OECD/G20 Inclusive Framework on BEPS, over 135 countries and jurisdictions are collaborating on the implementation of 15 actions to tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment. Through these 15 actions,

⁹ <https://www.frcs.org.fj/wp-content/uploads/2018/02/80.Talk-Tax-Housing-Development-and-ICT-Incentives-FS.pdf>

¹⁰ <https://www.oecd.org/tax/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance-action-5-2015-final-report-9789264241190-en.htm>

countries now have the tools to ensure that profits are taxed where economic activities generating the profits are performed and where value is created. These tools also give businesses greater certainty by reducing disputes over the application of international tax rules and standardizing compliance requirements.

Four of the BEPS actions were identified by the Inclusive Framework members as a priority, resulting in minimum standards. The Inclusive Framework agreed that these actions would be monitored through a peer review process. The BEPS minimum standards are as follows:

- Action 5: address harmful tax practices, including rules on preferential regimes and transparency through the international exchange of tax rulings;
- Action 6: prevent tax treaty shopping through anti-abuse provisions and clarifying the purpose of tax conventions (not only prevent double taxation but also double non-taxation);
- Action 13: exchange of key transfer pricing data on the operations of multinational enterprises through country-by-country reports, which allow for more effective risk assessment by tax administrations; and
- Action 14: improve the effectiveness of cross-border tax dispute resolution between tax administrations through mutual agreement procedures (MAP).

To implement the BEPS minimum standards, Fiji should:

- BEPS Action 5: amend or abolish the potentially harmful features of its preferential tax regimes, including those identified by the EU and discussed above;
- BEPS Action 6: Fiji signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting¹¹ (Multilateral Instrument) on 7 June 2017. If Fiji ratifies the Multilateral Instrument, it would be sufficient to implement the minimum standards to counter treaty abuse and to improve dispute resolution mechanisms.
- BEPS Action 13: enact legislation related to country-by-country reporting¹² and sign the Multilateral Convention. This is a type of AEOI, which means that the ISM framework should be in place for reciprocal exchanges.
- BEPS Action 14: there is no public information on Fiji's experience concerning MAP. In general, countries are required to implement MAP guidance to provide more clarity to taxpayers and also to streamline their processes to resolve MAP cases in a timely matter.

Marshall Islands

Marshall Islands (MI) has a long history of being listed and de-listed in the EU list. MI was included in the first list published in 2017 for facilitating offshore structures and arrangements aimed at attracting profits without real economic substance. MI was de-listed shortly after, when they undertook a high-level commitment to address this issue. In March 2019, MI was listed again for not having addressed the real economic activity issue. The EU Council also included a reference to a supplementary review EOIR. In

¹¹ <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>

¹² There is model legislation available in the Country-by-Country Reporting Implementation Package published by the OECD: <https://www.oecd.org/ctp/transfer-pricing/beps-action-13-country-by-country-reporting-implementation-package.pdf>

October 2019, MI was again removed from the list after introducing amendments to the Economic Substance Regulations¹³ and obtaining a satisfactory rating of Largely Compliant in its review on EOIR.¹⁴

Through the Economic Substance Regulations, MI introduced an economic substance test to for relevant entities deriving income from relevant activities in relation to that relevant activity. This test is met if i) the relevant entity is directed and managed in MI; ii) it has an adequate number of qualified employees, adequate physical presence and adequate amount of expenditures in MI; and iii) it carries out core income generating activity in relation to the relevant activity in MI. In addition, relevant entities are required to file an annual report on economic substance. Failure to file this report will result in a fine of USD 10,000.

Relevant entities that fail to meet the economic substance test for a financial period are subject to a fine not exceeding USD 50,000 for each financial period, revocation of its formation documents and dissolution or both.

MI has included an EOI provision, where for those entities that have failed to meet the economic substance test, the Registrar will share information to i) the competent authority of the EU Member State in which the parent company, ultimate parent company and ultimate beneficial owners of the relevant entity resides, and ii) the competent authority of the jurisdiction in which the relevant entity is organized.

In February 2023, MI was again listed for facilitating offshore structures and arrangements aimed at attracting profits without real economic substance by failing to take all necessary actions to ensure the effective implementation of substance requirements. This time the deficiency identified by the EU Council refers to the implementation of the legal framework rather than the non-existence of it, as was the case from 2017 to early 2019. This means that MI was unable to demonstrate the compliance actions and related statistics to the enforcement of the Economic Substance Regulations, including the provision on EOI to other competent authorities.

Palau

Palau was included in the EU list for the first time in December 2017 when the EU Council determined that Palau was facilitating offshore structures and arrangements aimed at attracting profits without real economic substance (criterion 2.2.).

At that time, Palau was also asked to commit to the following:

- Implement the OECD's AEOI standard;
- Become a member of the OECD's Global Forum;
- Sign the OECD's Multilateral Convention; and
- Implement to country-by-country reporting in accordance to BEPS Action 13 if and when this becomes relevant.

Palau committed to the above through letter dated 1 December 2017 signed by the Minister of State of the time, Ms Faustina K Rehuher-Marugg. The EU Council acknowledged these commitments and agreed to monitoring them.

¹³ <https://www.register-iri.com/corporate/legal/economic-substance-regulations-2018/>

¹⁴ <https://www.oecd.org/ctp/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-marshall-islands-2019-second-round-89b5f984-en.htm>

Palau was de-listed on December 2018 following clarifications provided by them to the EU Council on criterion 2.2, and also considering the commitments made at a high political level in December 2017. At the same time, the EU Council agreed to include Palau in Annex II of the EU list to monitor these commitments, with a deadline of 31 December 2019.

Palau became the 160th member of the OECD's Global Forum in January 2020¹⁵ but has not yet implemented AEOI or signed and ratified the Multilateral Convention. Accordingly, Palau was added back to the EU list in February 2020. There have not been any changes since February 2020 and Palau continues to be in the EU list for not having implemented AEOI or signed and ratified the Multilateral Convention.

Exchange of information on request

As a member of the Global Forum, Palau has committed to implement the EOIR and AEOI standards. The implementation of both standards will be monitored by the Global Forum through a peer review mechanism.

Concerning the EU listing process, for a jurisdiction to be compliant with the tax transparency criteria, the jurisdiction should possess at least a "Largely Compliant" rating by the Global Forum with respect to the standard on EOIR. To achieve such rating, the jurisdictions must have certain information available (e.g. beneficial ownership, banking, accounting), ensure that the information is accessible to the tax administration and be able to exchange this information with its treaty partners.

Palau is scheduled to start its EOIR review on the third quarter of 2024.¹⁶ In accordance with the Global Forum methodology¹⁷, "the practical implementation of the standard will be assessed over a three year period ending on the last day of the quarter, two quarters prior to the launch date of the review." Since Palau's review is scheduled to be launched on the third quarter of 2024, its review period will run from 1 April 2021 to 30 March 2024. This means that the review period has begun, and Palau should start to take measures to implement the EOIR standard in order to ensure that a "Largely Compliant" rating can be obtained.

The rating will be published by the Global Forum in the second or third quarter of 2025,¹⁸ and this result will be considered by the EU Commission.

From publicly available sources, it is possible to conclude that Palau will need to address various issues in order to obtain a satisfactory rating by the Global Forum. The first formal assessment of Money Laundering/Terrorism Financing risks completed by Palau in 2017¹⁹ concluded the following:

- In regard to corporations for profit and foreign corporation doing business in Palau, there is no legal requirement to maintain updated legal ownership information at the Public Registrar or for the entity to maintain a shareholders register.

¹⁵ <https://www.oecd.org/tax/exchange-of-tax-information/viet-nam-and-palau-join-the-global-forum-on-tax-transparency.htm>

¹⁶ <https://www.oecd.org/tax/transparency/documents/schedule-of-reviews.pdf>

¹⁷ <https://www.oecd.org/tax/transparency/global-forum-handbook-2016.pdf>

¹⁸ The exact date for the Global Forum to publish ratings will depend on when the meetings of the Peer Review Group are scheduled.

¹⁹ <https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-palau-2018.html>

- Palau relies on AML legislation for the availability of beneficial ownership²⁰ information of legal entities. There is no requirement in Palau to maintain beneficial ownership information beyond the legal ownership of shares. Palau would not be in a position to exchange adequate, accurate and current beneficial ownership information with an EOI partner.
- For legal arrangements, Palau relies on U.S. common law. However, there are no clear requirements for trustees to ensure that beneficial ownership information²¹ is available to their competent authorities in respect of express trusts.
- For both legal persons and arrangements, there does not seem to be minimum retention periods, enforcement measures or adequate supervision.

Palau will have to amend its legislation to ensure that all legal and beneficial ownership information of entities and arrangements is available, and kept for a minimum period of five years, even in cases where the entity or arrangement has ceased to exist.

In addition to the above on the availability of information, it does not seem that Palau has broad enough powers to obtain information in accordance to the EOIR standard. The EOIR standard requires that competent authorities have the power to obtain and provide ownership, accounting and financial information, even when held by third parties (i.e. not in possession of the tax administration or the taxpayer). In addition, information should be obtained whether or not it relates to a taxpayer that is currently under examination by the requested jurisdiction.

The Revenue and Taxation Title of the Palauan National Code²², establishes the following:

- the Director has “the power to inspect and examine the records, books of account, bank statements, and any other pertinent data of any person for the purpose of enabling him to obtain the information necessary to enforce the provisions of this division” (section 1801(d))
- “the Director may make available to the properly authorized tax officials of any state, information contained in tax returns or any audit of a taxpayer, provided such state grants a like privilege to the national government” (section 1801).

Lastly, the EOIR standard requires that a jurisdiction provide for effective EOI with all relevant partners. Palau does not have a wide treaty network to be able to effectively exchange information with relevant partners. As stated above, this can be addressed by signing and ratifying the Multilateral Convention.

AEOI implementation

In order to implement the OECD’s AEOI standard, Palau will need to take a number of steps to ensure that financial institutions in Palau collect and report the necessary information, and that their tax administration has the capacity to receive this information and exchange it with its partners.

The main requirements for a country to implement AEOI of financial account information:

²⁰ FATF defines the term “beneficial owner” as the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement. Reference to ultimate ownership or control and ultimate effective control refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.

²¹ Beneficial ownership information includes information on the identity of the settlor, trustee(s), protector (if any), all of the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust

²² <https://palaulegal.org/palau-national-code/titles-40-42/title-40-revenue-and-taxation/>

4. Enacting domestic legislation to require financial institutions to report the information to the tax administration, including provisions for the effective implementation, i.e. sanctions and similar measures.
5. Having an international legal framework in place to be able to exchange information with the country's interested appropriate partners.
6. Having an appropriate ISM framework to ensure the confidentiality of the information exchanged. The ISM system includes human resource controls, physical and logical access, appropriate IT security systems, protection levels of the information, managing risk and business continuity and incident monitoring.

Signing and ratifying the Multilateral Convention

Palau is not a party to any double tax treaties and does not have any tax information agreement in place. This means that Palau is not in a position to exchange tax information with all EU member States.

Samoa

Samoa was included in the first EU list of non-cooperative jurisdictions in December 2017. Samoa continues to be in this list, and it has never been removed.

Samoa is in the list for having a harmful preferential tax regime, known by the EU as the Offshore Business regime. The EU Council established in its Resolution of 1 December 1997 on a code of conduct for business taxation²³, that 5 factors have to be taken into account to determine if measures are harmful: i) whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents; ii) whether advantages are ring-fenced²⁴ from the domestic market, so they do not affect the national tax base; iii) whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages; iv) whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD; and v) whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.

Samoa's Offshore Business regime is found in the International Companies Act²⁵ (ICA) of 1998, as amended in 2009. The ICA is ring-fenced, and it lacks economic substance. Section 2²⁶ of the ICA establishes a restriction on membership interest in an international company, denying the possibility for citizens, residents and persons domiciled in Samoa to become shareholders or guarantee members of an international company. In addition, section 249 of the ICA sets out the exemptions and privileges of

²³ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.1998.002.01.0002.01.ENG&toc=OJ%3AC%3A1998%3A002%3ATOC

²⁴ Ring-fencing focuses on the legal or administrative barriers to participation in the domestic economy.

²⁵ <https://www.sifa.ws/assets/Uploads/International-Companies-Act-1998.pdf>

²⁶ No natural person who is a citizen or resident of or domiciled in Samoa and no company incorporated or registered under the Companies Act 2001 except a trustee company may either individually or with another person or persons and whether directly or indirectly and whether in consequence of any trust or similar arrangement or otherwise, be or become a shareholder in or guarantee member of an international company under this Act or foreign company that has the centre of its administrative management in Samoa unless that foreign company is registered under the Companies Act 2001.

international companies, clearly stating that income is exempt from taxes except when the income is derived from carrying business in Samoa.

In regard to economic substance, the ICA is silent about substance requirements. However, there is a provision²⁷ that prohibits against carrying on business when the international company has no members. Notwithstanding, the provision refers to liability over debts and it also establishes a sanction but only after six months of having carried out business without members. It is clear that there are no substance requirements to ensure that the benefits are granted to a core income generating activity that has adequate number of employees and expenditures.

Vanuatu

Vanuatu was listed under Annex II in December 2017 for concerns relating to economic substance. Vanuatu's commitment was to address these deficiencies by the end of 2018. Vanuatu did not meet its commitment and was included in the EU list of non-cooperative jurisdictions in March 2019. Vanuatu continues to be in the list but since the EU Council carries out constant monitoring to ensure that jurisdictions do not backtrack on its commitments and reforms, Vanuatu is now listed under two criteria. According to the EU list, Vanuatu continues to facilitate offshore structures and arrangements aimed at attracting profits without real economic substance. And more recently, after receiving a partially compliant rating in its EOIR review in 2019, Vanuatu is now waiting for a supplementary review by the Global Forum to improve its EOIR rating.

Preferential regime

The absence of corporate tax, as is the case for Vanuatu, is not regarded by the EU Council as potentially harmful *per se*. To determine if the tax system is potentially harmful, the five factors identified in the Resolution of 1 December 1997 on a code of conduct for business taxation should be applied by analogy to assess whether the criterion on fair taxation is met.²⁸ These are the same factors indicated above under the analysis of Samoa: ring-fencing, economic substance, agreed international tax principles and transparency.

The ICA²⁹ in Vanuatu provides the possibility to establish an international company. In accordance with section 10 of the ICA, international companies cannot carry business³⁰ in Vanuatu. This meets the ring-fencing criteria in its broad form since it is not possible to apply the analyses to tax benefits as it would be the case with a preferential tax regime. In addition, the ICA fails to establish substance requirements for these companies established in Vanuatu and conducting business abroad. It seems that it is even possible

²⁷ Prohibition against carrying on business when no members – (1) Subject to subsection (2), if at any time an international company has no members and carries on business for more than 6 months while it has no members, an officer, servant, employee or agent of that company during the time that it so carries on business after those 6 months who know that the company has no members is liable, and if more than one, jointly and severally, for the payment of the whole of the debts of the company contracted during the time that it so carried on business after those 6 months, and the company and the officer, servant, employee or agent commit an offence if the company so carries on business after those 6 months; so long as debentures of the kind referred to in section 57(1)(d) or 57(3) are issued and not redeemed the company, is taken, for the purposes of this section, to have 1 member.

²⁸ <https://data.consilium.europa.eu/doc/document/ST-6325-2017-INIT/en/pdf>

²⁹ Laws of the Republic of Vanuatu, Chapter 222.

³⁰ International companies are not allowed to carry on banking business, trust business, insurance business or company management business.

to have a functioning international company in Vanuatu with at least one member.³¹ There are no provisions on minimum employees, initial investment, minimum expenditures, accounting reporting, etc.

Exchange of information

On the implementation of EOIR, Vanuatu underwent the OECD's Global Forum peer review in 2019.³² The review identified a number of deficiencies that led to a rating of partially compliant. A rating of partially compliant or non-compliant is not considered satisfactory by the EU Council.

The main deficiencies identified in the 2019 report are as follows:

- Vanuatu is unable to ensure that beneficial ownership information of all legal entities is available. Requirements were introduced for new domestic companies and partnerships to identify and report beneficial ownership information, but there is no requirement to report changes to this information for local companies. In addition, no requirement exist for domestic companies that existed before the introduction of the beneficial ownership requirement.
- There is no clear definition of beneficial ownership applicable to trusts, and it is therefore not clear how is this concept implemented in practice. This is also applicable for banking information, i.e. the beneficial ownership information of account holders.
- Under the laws of Vanuatu, it is not mandatory to keep the beneficial ownership information of the beneficiaries in a foundation. This is also applicable for banking information, i.e. the beneficial ownership information of account holders.
- In practice, there seems to be deficiencies in the quality of the beneficial ownership information kept by AML obliged professionals. The Global Forum peer review report identified limited supervision on the international companies' obligation to keep beneficial ownership information.
- Sanctions on the reporting obligations of beneficial ownership were not consistently applied by all relevant authorities in cases of non-compliance.
- Vanuatu introduced a Record Keeping Order in March 2017. It is not clear who is responsible to keep records if an entity ceases to exist. Accordingly, it is not clear who would be subject to sanctions in these cases. In addition, there has been no supervision by Vanuatu authorities to ensure that the Record Keeping Order is effectively implemented.
- There are no express provisions in the Right to Information Act that would enable the competent authority to refuse to provide treaty protected information to the public. Accordingly, Vanuatu cannot ensure that the relevant confidentiality rules can be observed in all cases.

According to the Global Forum's methodology for EOIR peer reviews, "in order to qualify for an EOIR supplementary review, the assessed jurisdiction must be able to demonstrate that it has taken actions that are likely to result in an upgrade in the rating of an essential element to "compliant" or in an upgrade in its overall rating, as assessed against the 2016 Terms of Reference." Taking into account the current ratings for Vanuatu, it is possible to anticipate an upgrade in its overall rating. This means that Vanuatu has already addressed a significant number of the deficiencies listed above. There is no public information from the supplementary review as it is currently ongoing. The EU Council will require that the overall

³¹ Section 10 of the International Companies Act indicates in its section (1)(g) that an international company "shall not at any time have less than one member."

³² https://www.oecd-ilibrary.org/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-vanuatu-2019-second-round_dd70b774-en

rating of largely compliant or compliant be published by the Global Forum before making any changes to the EU list of non-cooperative jurisdictions.

3. Main actions for PIF members to strengthen their international tax framework

A jurisdiction included in the EU list of non-cooperative jurisdictions has an opportunity to strengthen its international tax framework to tackle tax fraud, avoidance and evasion. This will most likely result in increased domestic resource mobilization. For some jurisdictions, being included in this list has created unprecedented momentum to pass tax reforms and also to be recognized internationally as cooperative and as a supporter of tax good governance, through the implementation of the international standards

As it was shown in section 1, most of the PIF members included in the EU list of non-cooperative jurisdictions will have to amend their existing legislation and enact new legislation to implement the international tax standards. Enhancing administrative practices may also be required for effective implementation of these standards. There is a lot of experience from international organizations working in the region on international tax topics, most notably the Asian Development Bank (ADB) and the World Bank, that can be beneficial for these countries. Both development banks offer technical assistance on the tax transparency standards monitored by the Global Forum and on the BEPS minimum standards. In fact, ADB and World Bank have already jointly provided technical assistance to some PIF members wanting to enhance their international tax framework. The Global Forum Secretariat (on tax transparency), the OECD Secretariat (on BEPS minimum standards), and the EU Commission also offer assistance.

This section lists the actions that the PIF members that are currently included in the EU list of non-cooperative jurisdictions can take to improve their international tax frameworks, specifically the technical issues discussed under section 2.

Fiji

1. Become a member of the Global Forum.

Fiji will need to send a written letter to the Chair of the Global Forum requesting to join and committing to implement the EOIR and AEOI standards.

2. Request to be invited to sign the Multilateral Convention.

The Multilateral Convention enables a country to acquire a big number of EOI partners through one international instrument, instead of having to negotiate in a bilateral manner with many different countries. The Multilateral Convention will serve as the international legal framework for AEOI and EOIR.

Fiji will need to prepare a letter, which can be based OECD's Global Forum template, available in Annex A of the Toolkit for Becoming a Party to the Convention on Mutual Administrative Assistance in Tax Matters.³³ The letter should be accompanied by the questionnaire on tax

³³ https://www.oecd.org/tax/transparency/documents/MAAC-toolkit_en.pdf

confidentiality for countries that request to become a Party to the Multilateral Convention.³⁴ The Global Forum has prepared an annotated questionnaire for countries to understand what is expected from them when filling out the questionnaire, available in Annex B of the aforementioned toolkit.

See Box 1 on the process to become a Party to the Multilateral Convention. The World Bank, the ADB and the Global Forum often provide assistance throughout this process.

3. Ratify the Multilateral Convention.

The EU Council of Finance Ministers will only recognize the Multilateral Convention after ratified.

4. Amend or abolish the existing regimes with harmful features.

Fiji can decide to amend the legislation to remove the harmful features (ring-fencing and lack of real economic substance) from the exporting companies' regime and the ICT regime (through the nexus approach or by excluding benefits for income derived from IP). In this case, Fiji will need to decide if there will be a grandfathering period before the benefits cease to apply. The grandfathering period has to be reasonable.³⁵

Alternatively, Fiji can decide to abolish the preferential tax regimes. In this case, grandfathering provisions may also apply.

5. Inform the EU Council that the concessionary rate of tax regional or global headquarters regime was abolished.

Fiji should approach the EU Secretariat and inform them that the concessionary rate of tax regional or global headquarters regime ceased to apply starting 2023.

6. Conduct an EOIR pre-assessment.

As a member of the Global Forum, Fiji will have to undergo a peer review on the implementation of EOIR. As part of the technical assistance offer, the World Bank, ADB and the Global Forum Secretariat can conduct a mock EOIR assessment. This exercise will allow Fiji to understand the shortcomings in its legislations and practices to prepare for their EOIR review.

7. Conduct a preliminary assessment on its ISM framework.

³⁴ https://www.oecd.org/ctp/exchange-of-tax-information/Questionnaire%20on%20Tax%20Confidentiality%20for%20Countries%20that%20Request%20to%20Become%20Party%20to%20the%20Amended%20Convention%20on%20Mutual%20Administrative%20Assistance_2014.pdf

³⁵ There is no specific guidance issued by the EU Code of Conduct Group on grandfathering of preferential regimes with potentially harmful features. The EU Commission has advised that they would often follow OECD guidelines, which range between 1 – 2 years. See Annex B of the 2017 Progress Report on Preferential Regimes – Harmful Tax Practices: <https://www.oecd-ilibrary.org/docserver/9789264283954-en.pdf?expires=1685943825&id=id&accname=ocid195787&checksum=00F2FB26C1CDED773C262940D60A343B>

Information confidentiality and security is essential to the relationship between tax administrations and taxpayers around the world. It also underpins EOI in tax matters between governments. Extensive ISM requirements are the main reason why the international community agreed to exchange financial account information widely.

An understanding of a country's ISM framework is the first step to determine a realistic action plan to implement AEOI. The preliminary assessment will focus on i) the legal framework to ensure confidentiality and proper use of the exchanged information; ii) the overall ISM system (human resource controls, physical and logical access, appropriate IT security, protection levels of the information, managing risk and business continuity and incident monitoring); and iii) enforcement provisions and processes to address confidentiality breaches.

The Global Forum has published the Confidentiality and Information Security Management Toolkit.³⁶ It provides detailed guidance on implementing the building blocks of a legal and ISM framework that adheres to internationally recognized standards or best practices, including practical examples.

The World Bank provides assistance on ISM, which includes carrying out the preliminary assessment and supporting the country in putting together an action plan to address the shortcomings identified in the assessment. The action plan may also include every step needed to implement the AEOI standard (e.g. enacting legislation, international legal framework), including country-by-country reporting. The World Bank is also available to assist throughout the implementation of the action plan.

Having a strong ISM framework is beneficial not only for EOI but also for domestic purposes. It is highly recommended that all countries measure their confidentiality practices against the international standards. If a country is not able to guarantee that the confidentiality of exchanged information is preserved (through a review by the Global Forum), this country will not receive information from its partners.

Some countries have opted for a non-reciprocal approach, i.e., they will send information but not receive. A non-reciprocal approach would not require to fully comply with the confidentiality/ISM requirements.

8. Commit to AEOI with a specific date.

The ISM preliminary assessment will be key to determine when can Fiji be ready to start exchanging information. Fiji will then be able to set a potential date for first exchanges under the AEOI standard.

9. Become a member of the OECD/G20 Inclusive Framework on BEPS.

³⁶ <https://www.oecd.org/tax/transparency/documents/confidentiality-and-information-security-management-toolkit.htm>

Fiji will need to send a written letter to the Chair of the Inclusive Framework on BEPS requesting to join and committing to implement BEPS package, including monitoring of the BEPS minimum standards through the peer review processes.

10. Ratify the Multilateral Instrument

The Multilateral Instrument was signed by Fiji in 2017 and it should be sufficient to comply with BEPS Action 6 on preventing treaty abuse.

Marshall Islands

1. Effectively implement the Economic Substance Regulations.

MI should put together an implementation plan to put in practice the economic substance requirement introduced in 2019. The first step can be putting in practice the EOI provision, by sharing the information of the entities that have evidently failed to meet the economic substance test with the relevant competent authorities. The plan should also include compliance actions to enforce the Economic Substance Regulations. MI authorities should keep statistics on the number of compliance actions, sanctions applied, information exchanged for not meeting the economic substance test, etc.

2. Monitor AEOI implementation.

MI has undergone a peer review process on AEOI implementation, comprised of a legal assessment and also on the effectiveness in practice. In 2023, the Global Forum launched a more robust review process on the effectiveness of AEOI in practice. This review process will result in a rating of compliant, largely compliant, partially compliant, or non-compliant. The EU Council will use these rating in assessing their criteria when adopting conclusions on the list of non-cooperative jurisdictions.

MI should ensure that the shortcomings identified in the latest peer review from 2022³⁷ be addressed to upgrade the current rating of partially compliant. The 2022 report determined that while the MI is on track with respect to exchanging the information in an effective and timely manner, there are significant issues with respect to ensuring that Reporting Financial Institutions correctly conduct the due diligence and reporting procedures.

Palau

1. Request to be invited to sign the Multilateral Convention.

The Multilateral Convention enables a country to acquire a big number of EOI partners through one international instrument, instead of having to negotiate in a bilateral manner with many different countries. The Multilateral Convention will serve as the international legal framework for AEOI and EOIR.

³⁷ <https://www.oecd-ilibrary.org/docserver/31d1e9c6-en.pdf?expires=1685945530&id=id&accname=ocid195787&checksum=E51CBE9806AD335A03F2FF2B2A0B6702>

Palau will need to prepare a letter, which can be based on the OECD's Global Forum template, available in Annex A of the Toolkit for Becoming a Party to the Convention on Mutual Administrative Assistance in Tax Matters.³⁸ The letter should be accompanied by the questionnaire on tax confidentiality for countries that request to become a Party to the Multilateral Convention.³⁹ The Global Forum has prepared an annotated questionnaire for countries to understand what is expected from them when filling out the questionnaire, available in Annex B of the aforementioned toolkit.

See Box 1 on the process to become a Party to the Multilateral Convention. The World Bank, the ADB and the Global Forum often provide assistance throughout this process.

2. Ratify the Multilateral Convention.

The EU Council of Finance Ministers will only recognize the Multilateral Convention after ratified.

3. Conduct an EOIR pre-assessment.

It is advisable to conduct a preliminary assessment of the EOIR implementation in preparation for the peer review. Palau's peer review is scheduled to begin in the third quarter of 2024. The review period has begun, and Palau should take any measures to address the existing shortcomings in its legislation and practices so that it can be reflected in the review.

4. Conduct a preliminary assessment on its ISM framework.

Information confidentiality and security is essential to the relationship between tax administrations and taxpayers around the world. It also underpins EOI in tax matters between governments. Extensive ISM requirements are the main reason why the international community agreed to exchange financial account information widely.

An understanding of a country's ISM framework is the first step to determine a realistic action plan to implement AEOI. The preliminary assessment will focus on i) the legal framework to ensure confidentiality and proper use of the exchanged information; ii) the overall ISM system (human resource controls, physical and logical access, appropriate IT security, protection levels of the information, managing risk and business continuity and incident monitoring); and iii) enforcement provisions and processes to address confidentiality breaches.

The Global Forum has published the Confidentiality and Information Security Management Toolkit.⁴⁰ It provides detailed guidance on implementing the building blocks of a legal and ISM framework that adheres to internationally recognized standards or best practices, including practical examples.

³⁸ https://www.oecd.org/tax/transparency/documents/MAAC-toolkit_en.pdf

³⁹ https://www.oecd.org/ctp/exchange-of-tax-information/Questionnaire%20on%20Tax%20Confidentiality%20for%20Countries%20that%20Request%20to%20Become%20Party%20to%20the%20Amended%20Convention%20on%20Mutual%20Administrative%20Assistance_2014.pdf

⁴⁰ <https://www.oecd.org/tax/transparency/documents/confidentiality-and-information-security-management-toolkit.htm>

The World Bank provides assistance on ISM, which includes carrying out the preliminary assessment and supporting the country in putting together an action plan to address the shortcomings identified in the assessment. The action plan may also include every step needed to implement the AEOI standard (e.g. enacting legislation, international legal framework) , including country-by country reporting. The World Bank is also available to assist throughout the implementation of the action plan.

Having a strong ISM framework is beneficial not only for EOI but also for domestic purposes. It is highly recommended that all countries measure their confidentiality practices against the international standards. If a country is not able to guarantee that the confidentiality of exchanged information is preserved (through a review by the Global Forum), this country will not receive information from its partners.

Some countries have opted for a non-reciprocal approach, i.e. they will send information but not receive. A non-reciprocal approach would not require to fully comply with the confidentiality/ISM requirements.

5. Commit to AEOI with a specific date.

The ISM preliminary assessment will be key to determine when can Palau be ready to start exchanging information. Palau will then be able to set a date for first exchanges under the AEOI standard.

Samoa

1. Amend or abolish the Offshore Business regime.

Samoa can decide to amend the legislation to remove the harmful features (ring-fencing and lack of real economic substance) from the Offshore Business regime. In this case, Samoa will need to decide if there will be a grandfathering period before the benefits cease to apply. The grandfathering period has to be reasonable.⁴¹

Alternatively, Samoa can decide to abolish the preferential tax regime. In this case, grandfathering provisions may also apply.

2. Monitor AEOI implementation.

Samoa has undergone a peer review process on AEOI implementation, comprised of a legal assessment and on the effectiveness in practice. In 2023, the Global Forum launched a more

⁴¹ There is no specific guidance issues by the EU Code of Conduct Group on grandfathering of preferential regimes with potentially harmful features. The EU Commission has advised that they would often follow OECD guidelines, which range between 1 – 2 years. See Annex B of the 2017 Progress Report on Preferential Regimes – Harmful Tax Practices: <https://www.oecd-ilibrary.org/docserver/9789264283954-en.pdf?expires=1685943825&id=id&accname=ocid195787&checksum=00F2FB26C1CDED773C262940D60A343B>

robust review process on the effectiveness of AEOI in practice. This review process will result in a rating of compliant, largely compliant, partially compliant, and non-compliant. The EU Council will use these rating in assessing their criteria when adopting conclusions on the list of non-cooperative jurisdictions.

Samoa should address the recommendations from latest peer review from 2022⁴². The peer review determined that Samoa has legislation in place, requiring Reporting Financial Institutions to conduct the due diligence and reporting procedures and its international legal framework to exchange the information with all of Samoa's Interested Appropriate Partners. On the effectiveness of AEOI in practice, Samoa's implementation is on track. This includes ensuring Reporting Financial Institutions correctly conduct the due diligence and reporting procedures and exchanging the information in an effective and timely manner. Samoa should continue its implementation process accordingly, to ensure its ongoing effectiveness and avoid a negative rating.

Vanuatu

1. Continue cooperating in the supplementary peer review on EOIR.

Vanuatu should continue to work closely with the Global Forum to obtain recognition of the improvements implemented since its last EOIR review and upgrade its overall rating.

2. Amend or abolish the potentially harmful regime.

Vanuatu can decide to amend the ICA for international companies to be able to carry out business in Vanuatu. Appropriate economic substance requirements will also be needed for those companies, as well as sanctions and a struck-off procedure for companies that fail to comply with the obligations.

Alternatively, Vanuatu can decide to abolish the international. In this case, grandfathering provisions may also apply.

3. Monitor AEOI implementation.

Vanuatu has undergone a peer review process on AEOI implementation, comprised of a legal assessment and also on the effectiveness in practice. In 2023, the Global Forum launched a more robust review process on the effectiveness of AEOI in practice. This review process will result in a rating of compliant, largely compliant, partially compliant, and non-compliant. The EU Council will use these rating in assessing their criteria when adopting conclusions on the list of non-cooperative jurisdictions.

⁴² <https://www.oecd-ilibrary.org/docserver/db9eca26-en.pdf?expires=1685946802&id=id&accname=ocid195787&checksum=6586B5ABE27463B4EC27EA8178214786>

Vanuatu should ensure that the shortcomings identified in the latest peer review from 2022⁴³ be addressed to upgrade the current rating of non-compliant. The peer review determined that Vanuatu has legislation in place, requiring Reporting Financial Institutions to conduct the due diligence and reporting procedures and its international legal framework to exchange the information with all of Vanuatu's Interested Appropriate Partners. On the effectiveness of AEOI in practice, Vanuatu's implementation is non-compliant. There are fundamental issues with respect to ensuring that Reporting Financial Institutions correctly conduct the due diligence and reporting procedures.

4. Potential impact for PIF countries in the EU list

There are a number of negative consequences for countries included in the EU list of non-cooperative jurisdictions, that could be tax-related or not. There is often pressure from the international community and business on jurisdictions to take the necessary measures to be excluded from the list.

This section refers to the potential impact faced by countries included in the EU list of non-cooperative jurisdictions. However, as it is out of scope of this desk review, this section is not intended to estimate the loss in FDI by Fiji, Marshall Islands, Palau, Samoa and Vanuatu as a result of being included in the list.

Reputational risk

Being listed as a non-cooperative jurisdiction can severely damage the reputation of a jurisdiction. It signals to the international community that the jurisdiction is not fully committed to the international tax standards and willing to cooperate in the fight against evasion, avoidance, illicit financial flows, corruption and terrorism. This can lead to a loss of trust from investors, businesses, and international partners, potentially impacting economic growth and FDI.

It can also have an impact on the financial system. "High risk" countries have lost large shares of active Correspondent Banking Relationships. High risk is defined as being designated as deficient in more than one of Anti Money Laundering (AML) /Combating the Financing of Terrorism (CFT) compliance, sanction countries or tax havens/offshore centres⁴⁴.

Tax consequences

In December 2017, the EU Member States agreed to apply appropriate administrative measure in the tax area.⁴⁵ This provides a coordinated action among EU Member States, and also prevents using the

⁴³ <https://www.oecd-ilibrary.org/docserver/edb78c24-en.pdf?expires=1685947320&id=id&accname=ocid195787&checksum=A84E080E500881E374213FEEE64D08AF>

⁴⁴ Rice, T., von Peter, G. and Boar, C. 2020. On the global retreat of correspondent banks, in BIS Quarterly Review March 2020, https://www.bis.org/publ/qtrpdf/r_qt2003g.pdf

⁴⁵ <https://data.consilium.europa.eu/doc/document/ST-15429-2017-INIT/en/pdf>

legislation, policies and administrative practices of listed jurisdictions for aggressive tax planning, evasion or abuse.

To ensure coordinated action, Member States agreed to apply appropriate administrative measures that aim to prevent using the legislation, policies and administrative practices of listed jurisdictions for aggressive tax planning, evasion or abuse. The tax administrative measures include:

- Reinforced monitoring of certain transactions;
- Increased audit risk for taxpayers benefitting from the regimes at stake; and
- Increased audit risks for taxpayers using structures or arrangements involving these jurisdictions.

In 2017, the Council also recommended several types of defensive measure of a legislative nature in the tax area. Further guidelines were approved in 2019.⁴⁶ In principle, every EU member should apply at least one legislative measure. Whichever measure chosen; the EU Member State should ensure that the measure has the effect of encouraging a positive change leading to the removal of jurisdictions from the list. The Member State could also apply a reversal of the burden of proof and special documentation requirements to reinforce the effect of any of the defensive measures, without prejudice to provisions of national law that allow the taxpayer to provide counterevidence.

The tax defensive measures of legislative measures that can be applied by EU member countries are the following:

- Non-deductibility of costs: deny deduction of costs and payments that otherwise would be deductible for the taxpayer when these costs and payments are treated as directed to entities or persons in listed jurisdictions.
- Controlled Foreign Company (CFC) rules: include in the tax base of the taxpayer the income of an entity resident or a permanent establishment situated in a listed jurisdiction. This measure has to be applied in accordance with the rules in articles 7⁴⁷ and 8⁴⁸ of the Anti-Tax Avoidance Directive (EU) 2016/1164.
- Withholding tax: apply withholding tax at a higher rate for example on payments such as interest, royalties, service fee or remuneration, when these payments are treated as received in listed jurisdictions.
- Limitation of participation exemption on profit distribution: Member States, which have rules that permit excluding or deducting dividends or other profits received from foreign subsidiaries (e.g. holdings), could deny or limit such participation exemptions if the dividends or other profits are treated as received from a listed jurisdiction.

Non-tax consequences

The EU list of non-cooperative jurisdictions has a wider impact than tax matters. The EU Council has invited EU institutions and member states to take the EU list into account in foreign policy aspects, development cooperation and economic relations with third countries.

⁴⁶ <https://data.consilium.europa.eu/doc/document/ST-14115-2019-INIT/en/pdf>

⁴⁷ <https://www.legislation.gov.uk/eudr/2016/1164/article/7>

⁴⁸ <https://www.legislation.gov.uk/eudr/2016/1164/article/8>

One example of development cooperation is the Regulation (EU) 2017/1601 of the European Parliament and of the Council of 26 September 2017⁴⁹, establishing the European Fund for Sustainable Development (EFSD), the EFSD Guarantee and the EFSD Guarantee Fund.⁵⁰

There are more examples as the one for EFSD. Several EU instruments prohibit the possibility to channel funding through entities in listed countries, including:

- European Fund for Strategic Investments (EFSI),⁵¹
- External Lending Mandate;⁵²
- General framework for securitization.⁵³

Development banks, such as the ADB, the European Bank for Reconstruction and Development (EBRD), the Inter-American Development Bank and the World Bank (including the International Finance Corporation), refer to the results from the EU listing exercise when granting loans to the private sector or similar operations.

Implementation costs

Jurisdictions should assess if implementation comes at a greater cost than the effects of being listed on the EU list of non-cooperative jurisdictions. Many of the PIF members included have been listed for several years. They should have more information to make the assessment of whether it is worth the effort and associated costs. However, it is important to note that the implementation of the international standards will be beneficial for any tax administration and tax system, applicable even for jurisdictions with no or only nominal tax rate.

5. Conclusion and recommendations

The EU listing process is a dynamic exercise that builds on tax good governance standards that evolve at a rapid pace. Small jurisdictions with limited capacities such as the PIF members examined in this paper, struggle to keep up with the international tax developments. These standards are in many cases unknown to these countries, and this makes it more difficult to quickly adopt to the changing rules and practices.

The main technical issues affecting Fiji, Marshall Islands, Palau, Samoa and Vanuatu relate to tax transparency and preferential regimes. Marshall Islands, Samoa and Vanuatu have made a lot of progress in implementing the tax transparency standards. It is now a matter of monitoring the processes in place. For Fiji and Palau, the journey on tax transparency seems longer, but Fiji already has some experience

⁴⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32017R1601>

⁵⁰ Article 22 of Regulation (EU) 2017/1601 contains a link to the EU list of non-cooperative jurisdictions: “In addition, the eligible counterparts shall not enter into new or renewed operations with entities incorporated or established in jurisdictions listed under the relevant Union policy on non-cooperative jurisdictions, or that are identified as high risk third countries pursuant to Article 9(2) of Directive (EU) 2015/849 of the European Parliament and of the Council (13), or that do not effectively comply with Union or internationally agreed tax standards on transparency and exchange of information.”

⁵¹ <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32017R2396>

⁵² <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32018D0412>

⁵³ <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32017R2402>

with EOI from 11 tax treaties in place. Palau has recently joined the Global Forum and is making progress supported by international organizations. Most developing countries have not yet implemented AEOI; often regarded as more complex given the IT infrastructure required. However, there is a lot of progress on AEOI within the PIF members. Marshall Islands, Samoa and Vanuatu started AEOI exchanges in 2018 and they should monitor the effectiveness in practice of the AEOI standard to continue benefitting from it and also to ensure a positive rating. Otherwise, a negative rating will be reflected in the listing exercise.

The preferential regimes or offshore structures aimed at attracting profit without real economic activity in Fiji, Marshall Islands, Samoa and Vanuatu were established many years ago without an intent to promote harmful tax competition. Recent changes in Fiji and Marshall Islands seem to be in the direction of removing harmful tax features and tax competition. The EU is not asking that countries abolish preferential tax regimes completely, it is a matter of eliminating what makes them harmful. The suggestion is to follow this path and contribute with a strengthened tax system in the fight against tax avoidance and tax evasion, illicit financial flows, corruption, and terrorism.

Implementing these standards can be complex but in reality, what countries require is political will and technical assistance from international organizations with strong technical expertise. For the latter, there are many possibilities with international organizations working in the region, most notably ADB and the World Bank. The World Bank provides for technical assistance for developing countries in strengthening their international tax systems, which will include tax transparency, fair taxation and BEPS. The World Bank works in coordination with ADB, the Global Forum Secretariat and the OECD Secretariat to assist countries in this region with a good track-record on driving change.

The next EU list of non-cooperative jurisdictions will be published in October 2023. The timelines to fully implement changes that will enable robust, transparent, and fair systems will depend on the specific issues for each of the PIF members. It is unlikely that all technical issues affecting each of the jurisdictions will be resolved by October 2023. As evidenced in section 3, addressing these specific issues may take up several months and even years to develop and the pace and rapidness with which these are addressed will also depend on other factors than only technical, such as the political will and the assistance from development agencies.

Annex 1 – Relevant information on the EU list of non-cooperative jurisdictions

1. What is the EU list of non-cooperative jurisdictions?

In November 2016 the EU Council mandated the CoCG to carry out preparatory work to establish a list of non-cooperative jurisdictions for tax purposes. The CoCG initially screened 92 jurisdictions on the basis of their economic ties with the EU, the institutional stability and on the importance of the country's financial sector.

To be considered cooperative for tax purposes, jurisdictions are screened on a number of criteria established by the EU Council. The criteria has been designed to evolve over time, and related to tax transparency (exchange of information), fair taxation (harmful tax measures) and implementation of BEPS measures (minimum standards).

According to the EU, the list “is not to name and shame countries, but to encourage positive change in their tax legislation and practices through cooperation.”

The list is published as an annex (annex I) of the conclusions adopted by the ECOFIN Council. Jurisdictions that do not yet comply with all international tax standards but have committed to implementing reforms are included in a state of play document (annex II).

Jurisdictions are removed from the list when they meet all their commitments and when they comply with the international standards as defined in the listing criteria.

2. Which countries are currently included in the EU list of non-cooperative jurisdictions?

The EU list of non-cooperative jurisdictions (annex I) was last updated on 14 February 2023, and includes the following jurisdictions: American Samoa, Anguilla, Bahamas, British Virgin Islands, Costa Rica, Fiji, Guam, Marshall Islands, Palau, Panama, Russia, Samoa, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands and Vanuatu.

The following jurisdictions have made commitments and are currently included in the state of play document (annex II): Albania, Armenia, Aruba, Belize, Botswana, Curacao, Dominica, Eswatini, Hong Kong, Israel, Jordan, Malaysia, Montserrat, Qatar, Seychelles, Thailand, Turkey and Vietnam.

3. When is the list updated?

The list has been regularly updated and revised since it was first established in 2017.

The list is updated twice per year when the Economic and Financial Affairs Council meets. However, jurisdictions that are included in annex I or annex II can report progress at any point in time.

The last revision of the list took place 14 February 2023. The next revision will be in October 2023. To be removed from the list, a jurisdiction must fully implement the standards and fulfill its commitments.