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Article : What happens in Paris stays in Paris?

The EU "outlaw" Blacklist: does it have any legal basis and any legal consequence?

23rd June, 2015.

As the shock of this singularly noxious press release dated 17th June, 2015 subsides, it is perhaps worth visiting the parallel universes of the OECD Treaty and the European Union Treaty dispositions.

Let us start with the OECD.

As one of the jewels of the French diplomatic crown, as also of the intentionally expanding influence of the French Minefi, its seat or *siège* is in Paris in the 16ème arrondissement.

That has the convenience for France of its Parliament obtaining reports from M Pascal Saint Amans on the Organisation's progress in matter of Tax evasion and avoidance. The French Parliamentary Commission offers encouragement, and therefore indirect guidance in his efforts at the Organisation. He regularly appears before the French Parliamentary Commissions and reports in the style of a member of the French tax administration, from whence he hails.

What is sometimes also forgotten in the media is that the Chair of the International Forum on tax cooperation was constituted under the Chairmanship of François d'Aubert, so there is little doubt that the French had decided to ensure full obedience from the Forum to its notions of international standards and compliance. When in the 16ème arrondissement, do as those from the 16ème do. It is a well known quip that the City of Paris always does the opposite the 16ème, and vice versa, saving here where the 16ème is apparently under Bercy's intimate control.

As detailed analysis of its constitutional Treaty shows, although it has legal personality, its objects do not include the production of legally binding documents. It is no more than a basis of cooperation between participating states.

This has curiously enough been confirmed by the French Conseil d'Etat in a recent ruling upon whether the reports and recommendations of one of its committees, the GAFI, could provide a legal basis of a mandatory nature to require the French Bar to introduce money laundering reporting provisions over and above those recognised by the Barreau itself.

[Conseil d'État, 6ème et 1ère sous-sections réunies, 23/07/2010, 309993 Aff Michaud](#) (Patrick A)

Les recommandations du groupe d'action financière sur le blanchiment de capitaux (GAFI) **sont dépourvues d'effets juridiques dans l'ordre juridique interne**, dès lors que ces

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.../...

actes, émanant d'un organisme de coordination intergouvernementale, n'ont pas le caractère de convention internationale.

In other words, so long as the recommendations of the OECD, or its various Fora do not take the form and substance of an international convention, ratified by France, under the French Constitution, in a similar manner to the British unwritten constitution, they have no legally mandatory effect. That of course does not mean that France cannot pass positive legislation implementing these recommendations in domestic statutory form.

Coming back to the EU Blacklist, the EU, here the Commission; has not been able to find any legal basis in the Treaties to enable it to issue such a Blacklist, which perhaps leaves it a feeling a little toothless. It is therefore impossible to start a discussion on as to the validity of a disposition that not only cannot produce any Treaty justification, but also where there is in fact none. It is and remains up to the Member States to decide who they wish to blacklist, not up to the Commission, nor its Commissioner to validate or invalidate such measures.

Hence the reasoning behind it being no more than a press release, consolidating the Member States' individual blacklists, without any degree of normalisation, and without any objective validity. It is uncertain and therefore cannot have a legal basis. It is therefore within the remit of general international law, and can constitute a basis for an action against the Commission, the Commissioner responsible, and its staff for damages

I cite a comment from Etudes Fiscales Internationales , a French tax forum which may be consulted at www.etudes-fiscales-internationales.com.

"Pascal Saint-Amans, le directeur du centre de politique et d'administration fiscales de l'OCDE, s'emploie à ramener le calme : « *Il ne peut s'agir d'une véritable liste car cela minerait les efforts et le travail de transparence entrepris par de nombreuses juridictions* ».
« *S'il doit y avoir une liste noire, il faut qu'elle soit établie sur la base de critères objectifs*, poursuit M. Saint-Amans. *C'est d'ailleurs ce que nous dirons au prochain sommet des chefs d'Etat et de gouvernement du G20, en novembre.* »

Attention ,Seule la commission a des pouvoirs régaliens , l'OCDE n'ayant que des pouvoirs de recommandations"

Pascal Saint -Amans, the Director of the Centre for Tax Policy and Administration of the OECD attempted to restore calm: "It cannot be a real list because that would undermine the effort and work on transparency done by numerous jurisdictions."

"If there has to be a blacklist, it needs to be drawn up on the basis of objective criteria", M Saint Amans went on. "That is what we will say at the next summit of Heads of State and Governments of the G20 in November."

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.../...

Why not call in the Bank of International Settlements whilst at it. G7 and G20 are their appellations, and if this carries on, there will be a need for that Bank to intervene to compensate the economic chaos that this sottish initiative is creating.

The issue here is that the EU Blacklist has not even the legal force of a recommendation: it is however, and I quote : the “[first pan-EU list](#) of third-country non-co-operative tax jurisdictions” Having no legal force or validity, it is therefore defamatory to the extent that it is incorrect.

Incorrect it was. I will leave other jurisdictions than Guernsey to comment as they feel appropriate, As I practice in the neighbouring Island of Jersey, I feel it appropriate to take up cudgels and sharper instruments on behalf of a fellow Channel Island, as the two Bailiwicks are frequently bundled together in international misunderstanding of their millennia old constitutional position in relation to the outside world, including the Duchy of Normandy, of which these non continental appendages remain the last part attached to the British and Commonwealth Crown as peculiars. They are dependencies enjoying centuries old legal protection and privileges.

Why Incorrect? At least two reasons for Guernsey, alone.

The list is based upon which jurisdictions score 10 or more listings from the combined Member States of the EU, including recent additions such as Croatia, whose administrations frankly are still operating on an ex-soviet model, and have no interest, ability or for that matter intention of modifying their lists.

Whilst purporting to be based upon the position at 31st December, 2014, Mr Moscovici decided, effet de prince, that he would not require his services, Tax_UD to bring it up to date as the number of listings at the date of its publication, neither to offer any form of modification except on an annual basis. I say annual because it is to be updated at least once a year, French and Brussels speak for no more than once.

Firstly, the Island's considerable efforts to not only comply with but exceed international requirements, which not even Moscovici can deny, had enabled Italy to remove its blacklisting in April 2015, two months prior to the EU list being released. I find it impossible to believe that Tax_UD could have been unaware of this, it is delinquent. It is therefore of the utmost disproportionate bad faith that this delisting was not recognised at the date of the publication of the List on 17th June, 2015 over two months later.

Secondly and worse, given even the OECD's recognition that any such list had to be prepared on objective principles, a Polish blacklisting of Sark was included to bring Guernsey's tally up to

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.../...

10, from the 9, including Italy's blacklisting. That cannot have been innocent, but deliberate, and as factually false, defamatory

Sark is not and never has been part of the fiscal or legal jurisdiction of Guernsey.

Neither are Herm, Jethou or Brecquo, each one of the five islands along with the larger Alderney comprising the Bailiwick of Guernsey. It is a Bailiwick of independent jurisdictions

Sark has no income tax to avoid, 600 of inhabitants, and no corporate register, there is no such thing as a Company incorporated in Sark.

What is more, as admitted in effect by the Tax_UD, the Polish blacklisting upon which it was relying related not to corporation tax, the assumed object of the Prussian blacklist, but to the issue of the presence of Sark resident directors on the boards of certain companies outside Sark which were non-compliant: the so-called "Sark Lark". A little like the US attempting to blacklist France for the presence of its nationals or residents on the boards of companies run for the benefit of Russian oligarchs

This is curious. Did Mr Moscovici and his minions consider whether they should also blacklist the federal jurisdiction of the United States for the likes of Delaware and other non-cooperative federalised jurisdictions? The Channel Islands are recognised as part of the European Union, under the arrangements of the Act of Accession of the United Kingdom in 1972, and subsequently confirmed by Commissioner Prodi as having that status in a written reply of 2003.

That Tax_UD plead ignorance of this is beyond disingenuous, as they had to negotiate the introduction of the Savings Directive into European states and territories outside the Union, being Switzerland, Liechtenstein, Monaco, Andorra, and lastly but not least San Marin. Jersey Guernsey and the Isle of Man negotiated separately, but within the scope of their specific status within the Union, acting under delegated powers from the United Kingdom.

We therefore are witnesses to the spectacle of a European Institution, supposedly still, although palpably less so the objective Guardian of the Treaties issuing a defamatory list with no legal basis to do so under its own constitution, and escaping on the basis that it is not subject to any law or legal responsibility whatsoever

No wonder Pascal Saint-Amans's pique, who has battled with considerable success on behalf of his real employers, the French administration, to shepherd offshore jurisdictions into a shearing fold, without actually appearing to be doing so.

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The EU "outlaw" Blacklist: does it have any legal basis and any legal consequence?

Date: 23rd June, 2015

.../...

All that has been put into question by Pierre Moscovici's pique at being told clearly that he had no right to blacklist Jersey in 2010 under article 251 code général des impôts, as his ministerial powers did not permit it, as the Island was part of the European Communities.

He has evidently decided that if he lacks the power to do so, he will invent one notwithstanding, with whatever comes to hand, preferably without putting his own responsibility on the line.

It is instructive to read the Map, if you can get it to function, and see to what it applies. The blue patches in the Caribbean represent France. It would be interesting to see what particular issue Guadeloupe and Saint Martin make of this, benefiting as they do from substantial fiscal advantages from the continental French system. Note also that Saint Pierre et Miquelon has a couple of European blacklistings and, incidentally according to Wikipedia a French Prefet.

The real shame is that Pascal Saint Amans' efforts at not appearing to be a bully, but attempting to shepherd by agreement and understanding, has failed to impress Moscovici's need to avenge the ghost of Napoleonic monetarism by conquest long past.

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Peter Harris

Barrister in overseas practice

LLB. (Hons.) Dip. ICEI (Amsterdam)

Revenue Bar Association, Mediator

E: peter.harris@overseaschambers.com

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