

IS MALTA A TAX HAVEN?

**Implications for Europe during the
Maltese Presidency and beyond**

CREDITS

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EXECUTIVE SUMMARY

Having joined the European Union (EU) in 2004, Malta is about to assume the rotating Presidency for the first time between January and June 2017. Expectations from European citizens to deliver in the fight against tax evasion and avoidance, as well as money laundering, are high, given scandals in the past few years. **This leaves the upcoming Maltese Presidency with an important tax agenda to implement and move forward. The question is: is Malta best placed to achieve this?**

Malta's tax system offers a number of advantages for foreign multinationals and wealthy individuals. On paper, a company is subject to income tax in Malta at a flat rate of 35%. **In reality, Malta applies a full imputation system to relieve the economic double taxation otherwise arising on the taxation of dividends received by shareholders, which reduces the effective tax rate to just 5% for trading companies.** Shareholders can receive a tax refund of up to six-sevenths of their tax paid in Malta. This system is applicable to both resident and non-resident shareholders, which is why it is not considered a selective tax advantage according to European competition law. In addition, Malta appears to be an interesting place for companies to locate their intellectual property rights. Its low taxation on intellectual property income is considered by some to directly promote or prompt aggressive tax planning structures. This is combined with a lack of national anti-tax avoidance measures such as no interest-deduction-limitation rules, no controlled foreign companies rules or no rule to counter a mismatch in tax qualification of domestic partnership or company.

In addition, the Panama Papers, which were released in April 2016, revealed how Maltese Minister without Portfolio Konrad Mizzi (Energy Minister at the time of the revelations) and the Prime Minister's chief of staff Keith Schembri have offshore interests and were connected to the now famous law firm Mossack Fonseca. Former Nationalist Party Minister Ninu Zammit's name was also among the list of Maltese names found in the Panama Papers. **This possibly casts doubts on Malta's ability to push through EU anti-money laundering and tax reforms when it holds the European Presidency.**

Interestingly, the Maltese Presidency will have to supervise the screening of third country jurisdictions for the future EU blacklist of tax havens during its six-month mandate. Even if the screening process is going to be done for non-European countries only, this report has looked at whether Malta would pass the test itself. While Malta is likely to be compliant on the "tax transparency" and "implementation of the OECD Base Erosion and Profit Shifting agenda" criteria, it is the "fair taxation" criterion that would be problematic for Malta. Our analysis of the Maltese tax system shows the presence of preferential tax measures that could be regarded as harmful and facilitating offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the country. **Depending on the interpretation of the criteria by the EU and the listing process, Malta could - if EU countries were also screened - possibly end up in the future EU list of non-cooperative jurisdictions.**

In the past, as the European Commission promoted a number of initiatives to tackle tax avoidance, Malta rarely sided with the group of European countries supporting ambitious tax reforms. **While its Presidency priorities do not even mention the word "tax" and with important upcoming negotiations on a Common Consolidated Corporate Tax Base or a Public Country-by-Country Reporting, Malta simply cannot adopt a wait-and-see approach on European corporate tax reforms in the next six months.**



INTRODUCTION

The Republic of Malta, with around 450,000 inhabitants, is Europe's smallest and most densely populated country, lying at crossroads between Europe and Africa. Having joined the European Union (EU) in 2004, it is about to assume the rotating Presidency for the first time between January and June 2017. Expectations from European citizens to deliver in the fight against tax evasion and avoidance, as well as money laundering, are high, given scandals in the past few years. This leaves the upcoming Maltese Presidency with an important tax agenda to implement and move forward. The question is: is Malta best placed to achieve this?

In the 2015/2016 World Economic Forum's Global Competitiveness Index¹, Malta was ranked 48th out of 140 countries and in the top 40 on a number of indices, including the soundness of its banks (15), the transparency of government policy making (34), and the availability and affordability of its financial services industry (23).

GDP growth of 3% in each of the last three years², a stable banking system based on UK Company law and corporate legislation that conforms to EU company law and standards have attracted many multinationals to Malta. A success also built on Malta's favourable corporate tax system which makes Malta the European Union's number four facilitator of corporate tax avoidance, according to a study³ by the European Commission of the European Union member states' tax laws.

Malta's tax regime had to be modified before the country could officially join the European Union in 2004. Its "offshore regime" – created in 1988 to attract foreign multinationals – was revoked in 1994 as Malta embarked on the path towards EU membership. But some of its features continued to transitionally apply for another ten years. Offshore companies were usually statutorily exempted from any taxation in Malta (where they were registered) provided that they did not undertake business with Maltese residents or as long as their activities were carried out overseas and none of the

profits were repatriated. Offshore companies were at the centre of the Panama Papers scandals in 2016, often used as shell companies or smoke screens to avoid paying taxes or to launder dirty money.

Some aspects of the Maltese tax system were also considered non-compliant with European competition law, leading to illegal state aids to specific companies. In August 2003, a few months before Malta entered the EU, the European Commission indeed identified seven 'harmful' state-aid tax measures that it wanted the Maltese government to abolish. All measures identified were giving selective tax advantages to non-Maltese residents and "offshore" schemes⁴. The European Commission launched official state aid procedures in March 2006⁵, which led to a formal decision two months later by the Maltese government to abolish the state aid schemes as of 1st January 2007 and to gradually remove existing schemes until 31st December 2010⁶.

Whilst a number of distortive measures were therefore abolished, Malta introduced in 2007 a new generous refundable tax credit system applicable to foreign and domestic companies alike, therefore replacing a specific harmful regime by an even wider low tax scheme, only this time not harmful because applicable to both foreign and domestic companies (but still having negative impacts for other countries). Section 1 of this report analyses this new regime in detail.

Malta's favourable tax system is arguably one of the main reasons why Malta, with its company register of over 74,000 entities, keeps attracting foreign players and multinationals to its shores. Malta has served as a tax base for countless multinationals which channel their profits into Maltese subsidiaries. Many international companies – as shown in figure 1 below - have incorporated in Malta, possibly due to its tax rebate policies and accessibility to European Union (EU) trade agreements and markets, which has given Malta credibility within the world's major financial multilateral organisations.



Figure 1: Multinationals presence in Malta according to a 2014 presentation by Finance Malta⁷, the public-private initiative set up to promote Malta Financial services.

Financial Services	Advanced Manufacturing	Aviation
ICT and Shared Services	Tourism	Healthcare and Life Sciences

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Box 1. BASF's presence in Malta

A previous study by the Greens/EFA in the European Parliament on the aggressive tax planning of BASF, the largest chemical company in the world, identified Malta a location of choice for this group. According to this study, in a 2006 filing with the U.S. Securities and Exchange Commission, BASF disclosed the existence of a new Maltese subsidiary with €5.07 billion in assets.

At the end of 2011, BASF apparently transferred these assets to a new German subsidiary, BASF Finance Malta GmbH. This “German” company is managed entirely from a rented office at the Mayfair Business Centre in St. Julian's, Malta – and therefore eligible for Malta's preferential tax regime. BASF Finance Malta GmbH's assets consist entirely of loans to undisclosed BASF Group companies. This implies that the company's income consists of tax-deductible interest payments from BASF subsidiaries, which could facilitate profit shifting from higher-tax jurisdictions.

On the occasion of Malta's first EU Presidency, this report aims to examine the country's corporation tax system more closely and see whether it offers significant tax advantages, which – if Malta weren't in the EU – could mean it would be considered a tax haven. We will also

look at Malta's link with the Panama Papers and at previous positions taken by Malta at a European level on tax matters to assess whether they are likely to deliver on ongoing and urgently needed tax reforms recently proposed by the European Commission.

1. OVERVIEW OF MALTA'S CORPORATION TAX REGIME

Malta's tax system offers a number of advantages for foreign multinationals and wealthy individuals. A company is subject to income tax in Malta (under the Income Tax Act) at a flat rate of 35% and the amount of income subject to taxation in Malta will depend on whether the company is resident⁸ or not resident⁹ in Malta.

Malta applies a full imputation system¹⁰ to relieve the economic double taxation otherwise arising on the taxation of dividends received by shareholders from distributions made from the taxed retained earnings of companies. This full imputation system is augmented by a participation exemption regime and a refundable tax credit mechanism that would, depending on the non-Malta residence and/or domicile of the taxpayer, result in significantly reduced combined overall Malta effective tax rate of chargeable income or gains, even zero in certain circumstances, as further outlined below.

In January 2016 the European Commission published a "Study on Aggressive Tax Planning and Indicators"¹¹. In the study, the European Commission assessed the extent to which member states facilitate aggressive tax planning (i.e. tax avoidance) by drawing up a list of 33 characteristics that can be used to determine whether a country makes it extremely easy for companies to avoid tax.

Malta was identified as the fourth worst offender with 14 indicators out of 33 (behind Netherlands, 17, Belgium, 16, and Cyprus, 15), while Latvia, Luxembourg and Hungary share fifth place with 13 indicators each. The study of the Maltese tax system revealed a total of 14 aggressive tax planning indicators, two active indicators¹², five lack of anti-abuse indicators¹³ and seven passive indicators¹⁴. Malta's full list of indicators is included in Annex B.

1.1 CHARACTERISTIC N°1: A VERY GENEROUS REFUND SYSTEM FOR DIVIDENDS

The official statutory corporate tax rate in Malta is 35% but this standard rate is reduced to 5% only for trading companies, which receive a tax refund of six-sevenths of their tax paid in Malta¹⁵. This system is applicable to both resident and non-resident shareholders, which is why it is not a selective tax advantage, though it could possibly be considered a harmful regime according to the code of conduct on business taxation.

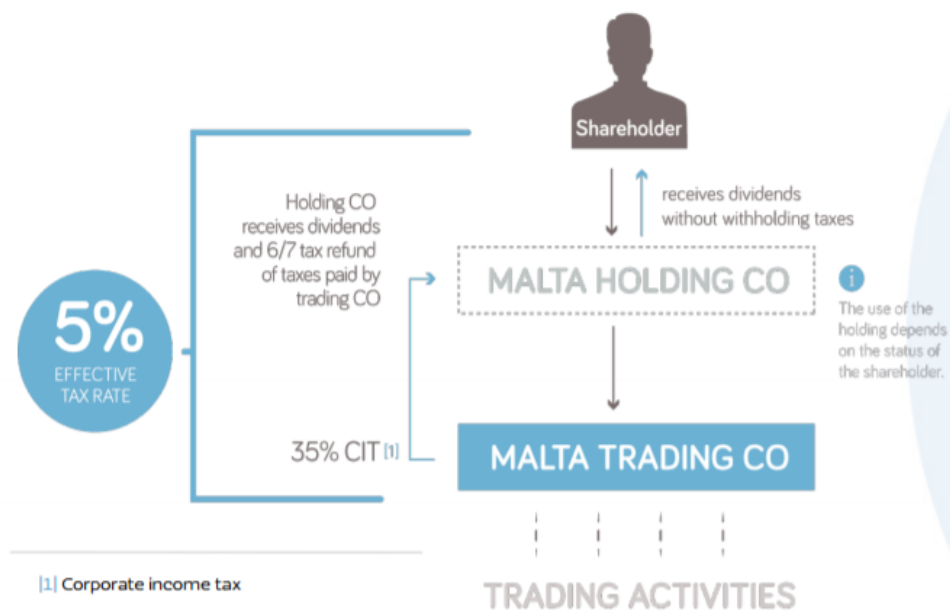
Malta's "full-imputation" tax system works as follows: corporate taxation paid by the company is available as a credit for the shareholders when a distribution of profits

takes place. In practice, when dividends are distributed to individuals/companies out of taxed profits, they carry an imputation credit on the tax that has already been paid by the company; and after refund to shareholders, the tax burden decreases to 5%, or 0% in certain circumstances.

Currently, Malta provides a refund of up to six-sevenths of tax paid on foreign-source income when that income is distributed to a foreign parent company (or a person) as a dividend. A summary of the tax refunds available in Malta are provided below in figure 2.

Figure 2: Malta's six-sevenths refund illustrated

Trading Operations



Source: Newco "Malta Tax Planning Opportunities" 2014 presentation

(<https://taxlinked.net/getattachment/m/NEWCO-Corporate-Services/Publications/Tax-Planning-Opportunities-through-Malta/Slides-webinar-Malta-Tax-Planning-Opportunities.pdf>)

In case the payment of a dividend is not eligible to the six-sevenths refund, the Maltese legislation foresees other tax credits. For example, a *five-sevenths refund* applies to distributions of profits when the dividend is distributed as passive interest or royalties, resulting in an effective tax rate of 10%. In addition, a *two-thirds refund* is possible where the six-sevenths and five-sevenths refunds cannot apply.

Here, the shareholder of a Maltese company claims a double taxation relief and can obtain a two-thirds refund on any type of income, including passive interest or royalties, resulting in a maximum effective tax payable of 6.25% (this may be further reduced depending on the company's expenses).

1.2 CHARACTERISTIC N°2: LOW TAXATION OF INTELLECTUAL PROPERTY (“IP”) INCOME

Tax breaks are always more efficient when they are used in combination. Thanks to a generous refund system (above) and low taxation on IP income (below), Malta appears to be an interesting place for companies to locate their intellectual property rights. Malta’s intellectual property tax regime is considered to directly promote or prompt aggressive tax planning structures.

Malta has a patent and copyright box regime, made suitable to attract mobile intellectual property income¹⁶. As of January 2010, companies receiving royalties and similar income derived from patented activities in Malta (in respect of inventions and copyrights, and since 2013 trademarks), are exempt from income tax in the country.¹⁷ The definition of “intellectual property” is very broad according to the Maltese legislation, which is applied no matter whether the R&D development was carried in Malta or not and irrespective of where the patent is registered in the world. In addition, if these untaxed profits are distributed to shareholders through dividends, the latter are also tax exempt. In other words, royalty income arising from such intellectual property rights is effectively taxed at the rate of 0%. Among the 12 European countries which offer IP or “patent box” regimes, Malta offers the lowest statutory tax rate (0% compared to the highest one in France, at 15%)¹⁸.

However, following the adoption of the OECD Base Erosion and Profit Shifting Action Plan in 2015 and the commitment by European member states to modify their patent box regimes, Malta has officially announced the closure of this scheme as of June 2016. Those who registered before this deadline can continue to enjoy a 0% tax rate but it will gradually be phased out by 2021.

Box 2. Patent Box

“Patent Box” is a preferential tax regime (i.e. reduced corporation tax rate) for intellectual property revenues. Since 2001 a number of European countries have introduced such regimes with the aim of attracting and promoting research and development activities.

However, Patent Boxes were identified in the OECD’s Base Erosion and Profit Shifting (BEPS) Action Plan as harmful tax practices, as a number of Patent Box regimes granted tax advantages without requiring any real economic activity being performed in the country and even if profits were not associated with individual patents.

Following the release of the OECD’s Action 5 final report “Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance” in October 2015, as of June 2016, Patent Box regimes must comply with the new “modified nexus approach”. The nexus approach is based on a substantial activity requirement (i.e. there must be a direct nexus between the income receiving benefits and the activity contributing to that income).

This approach seeks to ensure that preferential regimes for intellectual property require substantial economic activities to be undertaken in the jurisdiction in which a preferential regime exists, by requiring tax benefits to be connected directly to R&D expenditures.

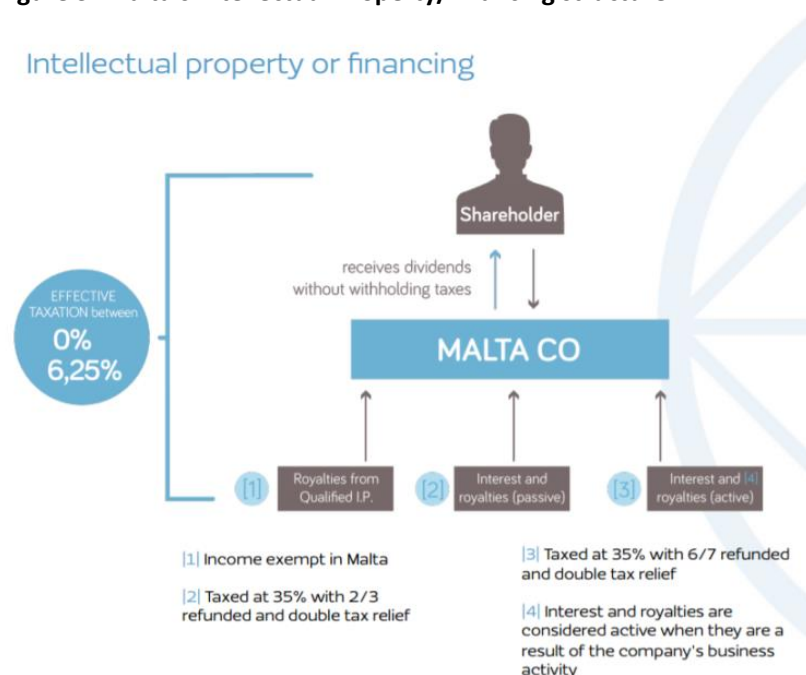
But, even with the modification of its patent box regime, Malta remains an attractive country which ensures low taxation of income associated with intellectual property assets. The country has an IP holding company regime, tailor-made to hold intellectual property rights and receiving fees generated from licensing rights. The IP companies derive income in the form of royalties. If these royalties are considered active – they are part of the companies’ business of licensing patents – these royalty payments will be subject to the six-sevenths refund mentioned above. The effective taxation in this case is around 5%. If these royalties are considered passive – they are not part of the IP companies’ trade business, or have already been taxed elsewhere at least 5% - they will be subject to a five-sevenths refund, providing an effective taxation of around 10% only.

Maltese tax law also offers an alternative taxation system in respect to foreign sourced income from intellectual property, the so called “Tax with Flat Rate Foreign Tax Credit (FRFTC)”. This is an additional form of tax break but this time only available to companies registered in Malta. The FRFTC is a credit of tax (25%) deemed to have been paid outside Malta which is calculated on the net foreign income received by the company in Malta.

convenient scheme for companies which do not pay any tax abroad on these foreign incomes or which do not wish to disclose from which country these foreign incomes come from. Indeed, Malta does not request any proof that such income has been taxed before (to receive the tax credit), it only requires a proof that the income is a foreign source income.

Finally, Malta is a member state of the European Union and as such applies the Interest and Royalty and the Parent-Subsidiary directives. Therefore, Malta (like all other EU member states) does not apply a withholding tax on outbound royalty and interest payments, leaving Malta for another European country. In addition, Malta has around 70 bilateral tax treaties with other countries, which also either abolish or reduce withholding tax in such payments¹⁹. An example of a tax structure taking advantage of Malta’s Intellectual Property and financing regime is presented in Figure 3 below:

Figure 3: Malta’s Intellectual Property/financing structure



Source: Newco “Malta Tax Planning Opportunities” 2014 presentation (<https://taxlinked.net/getattachment/m/NEWCO-Corporate-Services/Publications/Tax-Planning-Opportunities-through-Malta/Slides-webinar-Malta-Tax-Planning-Opportunities.pdf>)

1.3 CHARACTERISTIC N°3: LACK OF EFFICIENT ANTI-TAX AVOIDANCE RULES

A country can erode its neighbours' tax base by actively setting-up tax planning schemes, but also by not adopting the adequate anti-tax avoidance measures which prevent multinationals from shifting profits to low tax jurisdictions. Malta lacks a number of these anti-tax avoidance measures.

For example, it does not have general thin-capitalization or interest-deduction-limitation rules. Such measures aim to limit the amount that companies can claim as tax deduction on interest they pay (for loans they contracted). Without limits to the deduction of interest paid on corporate debt, companies are incentivised to contract intra-group loans, one of the main methods to shift profits to low tax jurisdictions.

Malta does not have Controlled Foreign Companies ("CFCs") rules. Such rules are designed to limit the artificial deferral of tax by using offshore entities (taxed at a lower level). Many countries do not tax shareholders on companies' income until this income is distributed as dividends. Therefore, many large companies stash their income in foreign subsidiaries in tax havens, where they are low taxed or escape taxation at all.

CFCs rules are anti-avoidance provisions designed to prevent diversion of profits to low tax territories. If income is diverted to a controlled foreign company (e.g. a subsidiary in a tax haven of a parent company located in a high tax country), CFCs rules ensure that the income of the subsidiary is also subject to the taxation in the country of the parent company, if the income is subject to a significantly lower level of taxation or no taxation in the subsidiary's country of residence.

In addition, Malta does not have a rule to counter a mismatch in tax qualification of domestic partnership, nor does it have a rule to counter a mismatch in tax qualification of a domestic company. This lack of hybrid mismatch rules allows large companies to exploit differences in the treatment of an entity or arrangement across two jurisdictions to produce double non-taxation, double deductions or deduction/not inclusion outcomes.

The absence of these efficient tax avoidance rules means Malta is effectively allowing multinationals to reduce any taxable profits in Malta. However, in July 2016, EU Member States adopted the Directive (EU) 2016/1164 known as the Anti-Tax Avoidance Directive, which laid down rules against tax avoidance practices that directly affect the functioning of the internal market. As a result, Malta will have to implement a number of anti-avoidance measures from 1 January 2019, including CFCs rules, interest limitation and a general anti-abuse rule. In addition, European Member States are currently negotiating new rules on hybrid mismatches involving non-European countries, which Malta hopes to conclude during its six-month Presidency.

Unfortunately, EU Member States watered down the Anti-Tax Avoidance Proposal from the European Commission²⁰ making the July agreement a major disappointment for the Greens in the European Parliament, falling short of the promise of its name in terms of dealing with the problem of tax avoidance. Indeed, Member States failed to properly address the limitation of interest deduction for intra-group loans, namely by creating a loophole in exempting any loan until 2019 and by allowing countries to apply their own rule until 2024 instead. CFC rules were also seriously weakened, not even matching OECD BEPS recommendations. Despite some important provisions on exit taxation and a general abuse clause, this agreement felt like another major missed opportunity.

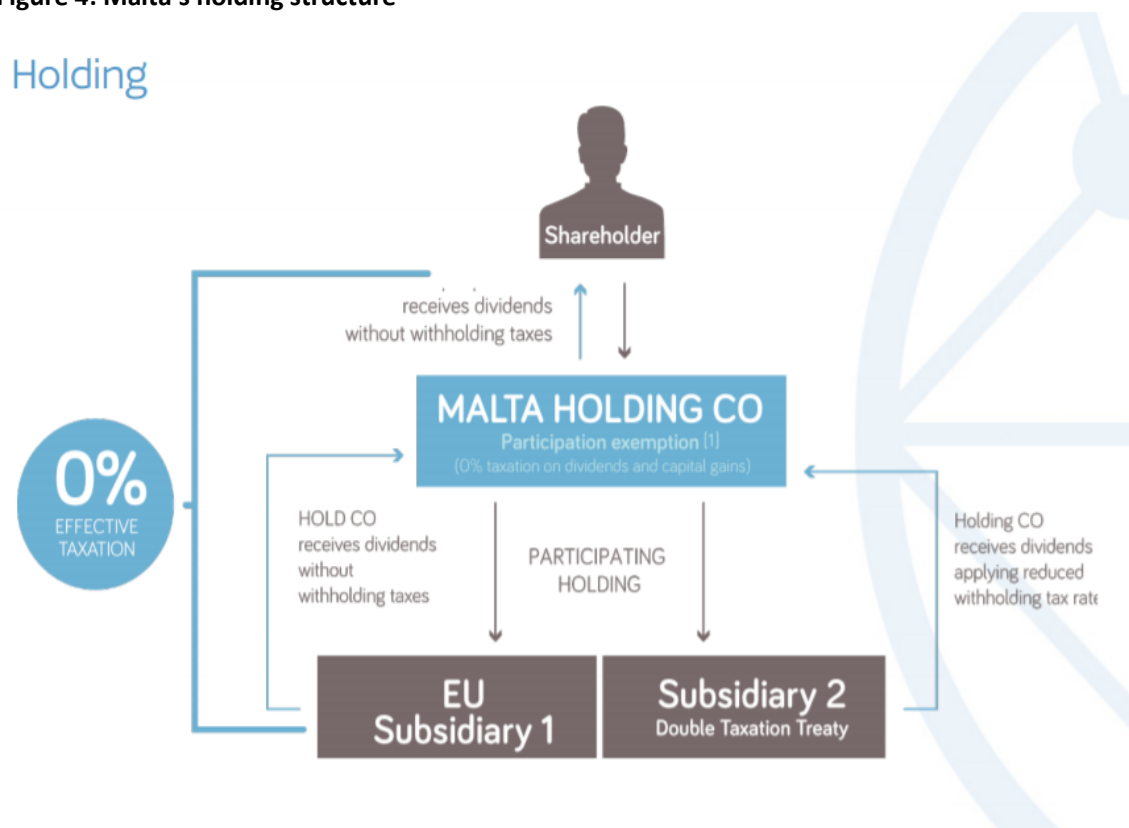
1.4 CHARACTERISTIC N°4: NO TAXATION FOR HOLDING STRUCTURES

Malta is one of the few European countries²¹ which applies a participation exemption regime. Such regimes aim to avoid double taxation on the same income and therefore usually exempt a shareholder in a company from taxation on dividends received and on potential capital gains arising from the sale of shares. There is therefore no withholding tax on payments of dividends between associated companies of different states. It makes Malta an attractive country for holding company structures, which coupled with a wide network of double tax treaties, enhances further its attractiveness from a tax perspective.

The Maltese participation exemption regime applies if the distributing company is incorporated in the EU, or if the distributing company derives no more than 50% of its income from passive income (i.e. interest or royalties).

All income coming from a company that qualifies as a “participatory holding” company also qualifies for a full refund of the taxes paid by the company, when distributions are paid back to the company’s shareholders. Furthermore, provided certain conditions are satisfied, income can be exempted from being taxed, as shown in Figure 4 below.

Figure 4: Malta’s holding structure



Source: Newco “Malta Tax Planning Opportunities” 2014 presentation
(<https://taxlinked.net/getattachment/m/NEWCO-Corporate-Services/Publications/Tax-Planning-Opportunities-through-Malta/Slides-webinar-Malta-Tax-Planning-Opportunities.pdf>)

1.5 COST OF THE REFUND SYSTEM FOR MALTA

The system of tax refunds comes with a cost. A 2016 study by MaltaToday²² into Malta's corporation tax receipts show that in each of the last three years Malta only collected €200 million in tax receipts through its tax refunds system, though the estimated tax charge was anything between €3.5 to €4 billion.

In 2015, Malta's tax authorities collected €247 million in revenues on estimated tax refunds of €4 billion. Malta's GDP in 2015 was €8.7bn²³. A table summarising the discrepancy between the tax paid by multinationals in Malta and the estimated tax charge before the tax refunds are paid over the last 10 years is presented in Figure 5 below.

Figure 5: 2006-2015 Estimated tax charge

	YEAR	INTERNATIONAL TAX RECEIPTS €	ESTIMATED TAX CHARGE €	TAX GAP €
1	2015	247,929,222	4,214,796,774	3,966,867,552
2	2014	227,920,994	3,874,656,898	3,646,735,904
3	2013	211,742,764	3,599,626,988	3,387,884,224
4	2012	166,641,036	2,832,897,612	2,666,256,576
5	2011	140,000,000	2,380,000,000	2,240,000,000
6	2010	120,000,000	2,040,000,000	1,920,000,000
7	2009	131,000,000	2,227,000,000	2,096,000,000
8	2008	87,000,000	1,479,000,000	1,392,000,000
9	2007	42,406,000	720,902,000	678,496,000
10	2006	23,920,000	406,640,000	382,720,000

Whilst Malta is clearly benefitting from the local presence of multinationals, it is clear that it comes at a cost to other countries which are subject to profit shifting to Maltese entities. Malta Today estimates that between 2012 and 2015, close to €14 billion in tax could have been paid in other countries but was wiped clean

thanks to Malta's full imputation tax system. Malta is known to have a strong economic system and has not implemented many austerity policies while other European countries such as Spain, Portugal and Greece have been dragged into severe fiscal adjustment measures, at a strong cost for their citizens.

2. PANAMA PAPERS: THE MALTA CONNECTION

The Panama Papers²⁴, which were released in April 2016, was a special investigation into the leaked documents of Panamanian law firm Mossack Fonseca.

2.1 BRIEF RECAP ON WHO IS INVOLVED IN THE PANAMA PAPERS IN MALTA

Former Maltese energy minister Konrad Mizzi and the prime minister's chief of staff Keith Schembri were revealed by the Panama Papers to have offshore interests and this has cast doubts on Malta's ability to push through EU anti-money laundering laws when it holds the European Presidency.

In July 2013, four months after Konrad Mizzi joined the Maltese government, Nexia BT, an accounting firm in Malta, bought several Panamanian companies from the Panamanian law firm Mossack Fonseca, including Hearnville Inc²⁵²⁶. In June 2015, Konrad Mizzi established a trust in New Zealand to be the shareholder of Hearnville Inc. The beneficiaries of the trust fund were listed as Konrad Mizzi's wife and two children.

A law firm representing Konrad Mizzi²⁷ said the Panama Company Hearnville Inc. was acquired "to hold a London property" owned with his wife. The company, which the law firm said has no assets nor bank accounts, was owned by a family trust under an arrangement recommended by professional advisers. The trust was registered in New Zealand, where the law firm noted trustees "are obliged to declare relevant information to the New Zealand tax authorities, who in turn will share this information with the Maltese tax authorities." The firm also said Mizzi "declared his interest in the Company and the Trust in his 2015 Ministerial Declaration of Assets at the first available opportunity." Konrad Mizzi has asked Malta's tax authorities to audit his financial affairs and has said that he will close Hearnville Inc once it is complete. As of today, the outcome of the audit has still not been revealed. It looks like the final audit report could be published in time for the official visit of the European Parliament Inquiry Committee on the Panama papers, on 20th of February 2016²⁸.

Keith Schembri, the Maltese Prime Minister's chief of staff, established a similar financial setup at the same time and through the same intermediaries. He acquired Tillgate Inc, a Panama company, on July 2, 2015 to settle it into Haast Trust, a New Zealand trust, for estate planning purposes²⁹.

Konrad Mizzi was stripped of his energy and health portfolios in April 2016, but continues to take an active role in the government's energy initiatives and has even taken part in the EU energy ministers meetings in Brussels. He is officially a Minister without Portfolio within the Maltese government but still deals de facto with all energy issues and contracts. Prime Minister Joseph Muscat also retained Mr Schembri and insisted he still has full trust in him.

Former Nationalist Party (PN) Minister Ninu Zammit's name was also among the list of Maltese names found in the Panama Papers. His company, Fiveolive Services Inc³⁰, was incorporated by Mossack Fonseca on 23 February 2005 in the British Virgin Islands, through which he held a bank account with HSBC Private Bank Suisse, and was struck off on November 2015, a few months after the Swiss Leaks³¹ revealed his secret Swiss bank account under the name of Nester trade Inc. His tax affairs were regularised after he applied for an amnesty offered by the Maltese government.

Following the Panama Papers revelations, the Maltese Financial Intelligence Analysis Unit (FIAU), a government body responsible for fighting money laundering and antiterrorism activities, started an investigation on the Panama Papers leaks. In April 2016, the FIAU turned its findings over to the then Police Commissioner Michael

Cassar. Maltese law stipulates that the police commissioner has the final say as to whether or not to prosecute in cases relating to money laundering, and to take action on reports by the FIAU. Shortly afterwards, Michael Cassar took holiday leave and resigned on his return citing health issues.

In June 2016, the Maltese police force told the Maltese newspaper Malta Independent³² that it was not investigating any of the Panama Papers' leaks because it saw no reasonable suspicion of any crime having been committed. In August 2016, Manfred Galdes, the director of FIAU resigned from his post.

Manfred Galdes refused to explain³³ whether his resignation was linked to the investigation or not, citing that he was prohibited by law from making any comments related to the FIAU investigations. He also refused to comment on the reasons for his resignation, saying that he was going back into private practice as a lawyer. Michael Cassar, similarly, refused to comment. As for the Maltese government, it insists that Manfred Galdes had provided no reason for his resignation and

that it had never interfered with the work of the FIAU or with the investigation.

Malta's beneficial ownership rules are very lax. The identity of the beneficial owners of a Maltese company may remain confidential if a trustee company authorised by the Malta Financial Services Authority is engaged to act as shareholder on behalf of the underlying beneficial shareholders. This confidentiality is maintained as long as the company and its beneficial owners are not involved in any money laundering activity. Nominee services, which allow the identity of the beneficial owners to be kept off public record, are also available so that real owners of a company can have their beneficial ownership hidden by a nominee.

Mossack Fonseca, the company subject to the leak, had established a local company in Malta, Mossack Fonseca & CO (Malta) Limited in 2013, which is also identified in the Panama Papers. Whilst the data available on the corporate structures identified by the Panama Papers is limited, this points to Malta as a location of choice for tax planning opportunities.

2.2 HOW THE MALTESE TAX REFUNDS SYSTEM BECOMES AN OPPORTUNITY: ILLUSTRATION WITH PANAMA PAPERS EXAMPLES

The data and the work carried out by the International Consortium of Investigative Journalists provides an interesting insight into the role of Maltese entities. According to our own compilation of ICIJ's data, we noticed that 45 intermediaries (banks or accounting firms) identified in the Panama Papers are located in Malta.

One of the Maltese companies identified in the database is Engineering Concept Ltd. This entity was incorporated in 2013 and owns a UK company, Maplevale International Limited. Engineering Concept Limited is owned by a company resident in Luxembourg, Alteus Holding S.A. as outlined in Figure 6 below.

Figure 6: Engineering Concept Ltd group structure³⁴



There is no detail in the database of the full group structure but there is a real risk that this partial structure could have benefitted from Malta's favourable tax regime.

Any income received by Engineering Concept Limited from Maplevale International Limited is likely to be subject to full taxation in Malta, but through Malta's tax refund system, when dividends are distributed by Engineering Concept Ltd to Alteus Holdings S.A. out of taxed profits, it is possible that they could carry an imputation credit on the tax that has already been paid

by the company; and after refund to shareholders, the tax burden could be as low as 5%, or 0% in certain circumstances, as outlined in the previous section.

Similar tax benefits could be available to Fortown Corporation Ltd, another Maltese company identified in the Panama Papers, which is owned by Riverside Capital SARL (a company registered in Luxembourg), as Riverside Capital SARL could claim a refund of six-sevenths of the tax paid by Fortown Corporation Limited pertaining to those profits distributed to Riverside Capital SARL by way of dividends, as outlined in Figure 7.

Figure 7: Fortown Corp Ltd³⁵



The above two structures show a connection between Malta and Luxembourg, a country that is ranked just below Malta when it comes to aggressive tax planning and indicators.

This data shows how individuals and multinationals do not use Malta in isolation to avoid taxation or to achieve anonymity, but often they use Malta in combination with a number of other secrecy jurisdictions or tax havens in order to achieve these goals.

3. EU TAX HAVEN BLACKLIST: WILL MALTA PASS THE TEST?

The Council of the European Union is in the process of drawing up a blacklist of non-cooperative jurisdictions (tax havens) across the world (“EU list of non-

cooperative jurisdictions”), which is part of the EU's campaign to clamp down on tax evasion and avoidance and promote fairer taxation, within the EU and globally.

3.1 METHODOLOGY OF THE FUTURE EUROPEAN BLACKLIST OF NON-COOPERATIVE JURISDICTIONS

The first blacklist published by the European Commission came out in June 2015³⁶. Not only were EU Member States excluded from the list, but also countries well known for their offshore activities such as Switzerland or the USA were not included. The methodology chosen³⁷ made sure that only small and far away countries would end up on the list.

In early 2016, the Commission started a new process for identifying and listing tax havens which resulted in a scoreboard presented in September 2016³⁸, ranking non-European countries according to the importance of their economic ties with the EU and their performance against three risk criteria: tax transparency standards, harmful and/or preferential tax regimes and zero or no corporate taxation.

On the basis of the scoreboard results, Member States decided on the final criteria to be used in 2017 to formally screen non-European countries. The screening of third countries' tax good governance standards will be carried out by the Commission together with the Council's Code of Conduct Group on business taxation (representing the Member States). There will be a dialogue process with the countries in question during the first half of 2017, to allow them to react to any concerns raised or discuss deeper cooperation with the EU on tax matters. Once the screening process is complete, third countries that refused to cooperate or engage with the EU regarding tax good governance

concerns would be put on the EU list. Such a list is expected by end of 2017 at the latest.

Thus, on November 8, 2016³⁹, the Council of Member States released its revised criteria and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes. The criteria look at three different but interrelated characteristics as summarised below:

- 1) **Tax transparency:** the first criterion looks at the right to tax and financial information exchange between jurisdictions and assistance in tax matters between tax authorities.
- 2) **Fair taxation:** the second criterion looks at the presence of preferential tax measures that could be regarded as harmful and whether a jurisdiction facilitates offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdictions.
- 3) **Implementation of anti-BEPS measures:** the last criterion looks at whether the jurisdiction has committed by the end of 2017 to the agreed OECD anti-BEPS minimum standards and their consistent implementation.

More detail on the three criteria is presented in Annex C to this report⁴⁰. The revised list of criteria presented on November 8, 2016, omitted an earlier additional test that looked at the level of taxation (“level of taxation: does the country have no corporate taxation or

a zero-rate on corporate tax?”), a move which was supported by, amongst other countries, Malta.

In the end, when the Council reviewed the Commission’s scoreboard between September and December 2016, it

decided to weaken the transparency criterion and to drop the risk criterion on zero or no corporate taxation, thereby considerably weakening the framework’s effectiveness.

3.2 WOULD MALTA PASS THE TEST?

Even if the screening process is going to be done for non-European countries only, it is interesting to consider how Malta would fare against these three criteria.

With all EU countries committing to introduce Automatic Exchange of Information in 2017 (or in the case of Austria by 2018)⁴¹, Malta is likely to be considered compliant from a tax transparency perspective although it remains to be seen in practice how effective the exchange of information will be.

As Malta was also part of the negotiations of the OECD-developed multilateral instrument (MLI) that will implement a series of tax treaty measures by transposing the results from the OECD/G20 Base Erosion and Profit Shifting Project into more than 2,000 tax treaties worldwide, it is likely that Malta will implement the anti-BEPS measure and therefore be compliant with the third criterion.

It is the second criterion that would prove tricky for Malta. The second criterion looks at the presence of preferential tax measures that could be regarded as harmful and whether a jurisdiction facilitates offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdictions.

In the previous section we have identified that Malta already offers a number of preferential tax measures that could be regarded as harmful. The definition of a harmful arrangement is based on the Resolution of the Council and Representatives of the Governments of the Member States meeting with the Council of December 1, 1997⁴², and reported below:

“tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code.

Such a level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor.

When assessing whether such measures are harmful, account should be taken of, inter alia:

- 1. Whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or*
- 2. Whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or*
- 3. Whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or*
- 4. 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, or*
- 5. Whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.”*

It is clear from our analysis in Section 2 that it is not necessary for Maltese subsidiaries or branches or foreign multinationals to have real economic activity and substantial economic presence within Malta to benefit from Malta’s tax incentives, particularly with respect to royalty income and the tax refunds system.

In relation to the second criteria, the “Common EU approach to listing third country jurisdictions: follow up work” stated that *“Member States generally agree that the absence of a corporate tax system, zero or almost zero rate of taxation does not automatically mean that a jurisdiction encourages offshore activities. However, there is evidence that jurisdictions that facilitate offshore structures or arrangements typically have no or very low corporate income tax and that they capture large amounts of global financial flows.”*

Malta with its de facto 5% corporate tax rate could be qualified as a low corporate income tax country. Member States remain sovereign when it comes to decide on their corporate taxation rate and the lowest one is currently applied in Bulgaria (10%). This could be interpreted as any country having a corporate tax rate below 10% would be assimilated to a low corporate tax rate jurisdiction.

The “Common EU approach to listing third country jurisdictions: follow up work” further states that *“an appropriate substance test should be designed to evaluate the extent to which profits attracted to a given jurisdiction which apply no CIT, zero or almost zero nominal corporate tax rate are coupled with a sufficient degree of substantial economic activity taking place in that country”*.

The document suggests that the “substance test” could look at the five criteria listed below. Whilst the initial substance criteria could appear to be arbitrary, it is worthwhile to consider how Malta would fare against some of these criteria.

1. The existence of legal provisions in the jurisdictions permitting the setting up of offshore structures and arrangements;

- Section 1 above in this report highlighted some of the legal provisions in the Maltese legislation

allowing for the creation of offshore structures, allowing for very low taxation in the end.

2. The number of offshore structures and arrangements, including international banks and trusts per number of inhabitants;

- According to a January 2014 presentation by Finance Malta⁴³, in 2013 581 funds were domiciled in Malta, 66 insurance operators, 137 trustees, 26 fund administration companies, 6 custodians and 70 fund managers, 29 credit institutions and 24 financial institutions. A presentation by TMF Group⁴⁴ also showed that in 2013 there was one registered company for each six people, as shown in Figure 8 below.

3. The share of financial services in the total GDP;

- According to a 2014 Rabobank report⁴⁵, Malta hosts a very large offshore banking sector, whose assets account for 789% of GDP where international banks (62% of total number of banks) are 100% internationally-financed, serve only international clients and are foreign owned.; 2) core domestic banks (28%), run a traditional prudent deposit-based model that shields them from market volatility and focus on retail (Bank of Valetta and HSBC hold 90% of this market); 3) non-core domestic banks (10%), have limited links to the local economy, focus on corporates and non-interest banking activities and have foreign ownership.

4. The share of assets held by foreign companies and

5. The number of employees in the offshore sector.

- A January 2014 presentation by Finance Malta⁴⁶ on Malta’s Financial Services Industry also outlined how the Financial Services Industry employed 10,000 people out of a total Maltese population of 425,000 in 2013.

Figure 8: Companies registration in Malta 2009-2013

	Dec-09	Dec-10	Dec-11	Dec-12	Dec-13
New Registrations	2,678	3,130	3,458	4,016	4,540
Companies on the register	48,520	51,650	55,150	59,098	63,605

The level of Foreign Direct Investment (“FDI”) in the financial sector is also disproportionate to the other industries and for the size of the country, as outlined

in Figure 9 below.⁴⁷ FDI towards Finance and Insurance activities always represented at least 95% of total Foreign Direct Investments in the country during the 2012-2014 period.

Figure 9: Malta FDI data

Table 2. Foreign Direct Investment flows in Malta: Economic activity

	€000						
Economic Activity	2012	2013	2014	2012 Q1-Q2	2013 Q1-Q2	2014 Q1-Q2	2015 Q1-Q2
	Inward FDI			Inward FDI			
Manufacturing	-78,026	101,800	50,946	-79,335	62,083	20,829	11,855
Transportation, Accommodation and Real Estate Activities	48,277	47,001	29,890	12,375	19,596	2,557	6,257
Financial and Insurance Activities	11,127,984	8,841,569	8,292,289	5,412,637	4,955,943	2,143,374	5,146,272
Information and Communication	676	4,390	10,371	1,376	-3,331	-2,312	32,838
Professional, Scientific and Technical Activities	-8,534	11,351	9,274	-5,135	5,642	5,066	4,238
Other Activities	-45,306	80,488	84,009	-22,359	41,581	40,387	43,272
Total	11,045,071	9,086,600	8,476,781	5,319,559	5,081,514	2,209,901	5,244,732

Notes:

1. Figures may not add up due to rounding.
2. Increase in assets and decrease in liabilities are denoted as negative (Debit flows).
3. Decrease in assets and increase in liabilities are denoted as positive (Credit flows).

Based on the above information, it would appear that Malta would struggle to meet the fair taxation test and it could be categorised as an offshore jurisdiction,

as it provides financial services to non-residents on a scale that is incommensurate with the size and financing of its domestic economy.

4. MALTA'S ROLE IN EU NEGOTIATIONS ON FAIR TAXATION AND TRANSPARENCY

The fight against tax avoidance is one of the key priorities of the European Commission, as corporate tax avoidance in Europe is estimated to cost EU countries €50-70 billion a year in lost tax revenues⁴⁸. Malta is now

assuming the rotating Presidency of the European Union until June 2017 and has an important tax fairness agenda to deliver on, despite this not being mentioned in its Presidency priorities⁴⁹. What are we to expect from Malta as a neutral broker in the upcoming negotiations?

4.1 PREVIOUS MALTESE POSITIONS ON EU CORPORATE TAX REFORMS

As the European Commission recently promoted a number of initiatives to tackle tax avoidance (such as the anti-tax avoidance directive, the study on structures of aggressive tax planning and Indicators, EU list of non-cooperative tax jurisdictions), Malta's favourable corporation tax regime has recently come under further scrutiny and criticism.

Some EU Member States representatives voiced their dissent for Malta's favourable corporation tax regime. Last September, Austrian chancellor Christian Kern criticised EU states with low tax regimes such as Malta as they lack solidarity towards the rest of the European economy. However, the Maltese government has strenuously defended its policies over the last year. In September 2016, Maltese Finance Minister Edward Scicluna argued⁵⁰ that a sovereign state is entitled to its own tax system and his country's full imputation system would survive efforts by the EU to clamp down on tax avoidance, with only some changes to close loopholes.

When in June 2016 the European Parliament voted on the 'Rules against certain tax avoidance practices' report (the report was passed through the European Parliament with 486 voting in favour, 88 against and 103 abstentions) the majority of Malta's MEPs voted against the report, effectively bidding to protect Malta's tax regime.

In a statement ahead of the vote against the report, MEP and former Maltese Prime Minister Alfred Sant said that moves towards tax harmonisation undermined the competitiveness of the small peripheral economies of the European Union⁵¹. Dr Sant said that the control of taxation policy was the only real tool left by which small EU member states could retain flexibility for competitive purposes.

In October 2016 Malta was also amongst a small group of EU countries who took aim at proposals to use low tax rates as a criterion to determine whether nations are blacklisted on the 2017 "EU list of non-cooperative tax jurisdictions"⁵² (as outlined in Section 3 of this report). As European Taxation Commissioner Pierre Moscovici was pushing for the EU to go well beyond the OECD "transparency criteria" approach for screening countries and include "fair taxation" criteria such as rates and preferential regimes for the EU to "protect its tax base", Wendy Borg, a spokeswoman for Malta, said that tax rates are sacrosanct: *"Whilst Malta supports anti-avoidance rules to address BEPS to ensure that profits are not artificially shifted to other jurisdictions, as far as corporate tax rates are concerned, we believe that no jurisdiction should ever be challenged about its general tax rate or be required to justify the tax rate that it chooses to adopt"*.

Malta also supported the weakening of the compliance test for the inclusion in the EU list of non-cooperative

jurisdictions⁵³. This list is based on the OECD approach where a country or jurisdiction would receive a passing grade if it complies with two out of three “transparency” criteria. However the European Commission with the support of the Slovakian presidency has called for the EU to insist on compliance with all three of the transparency criteria. Approximately 20 EU countries supported the Slovakian presidency’s position. However, Malta again was amongst a small number of countries (together with the United Kingdom, Ireland, Sweden, Austria and the Netherlands) which opposed the move.

As a result, the Slovakian presidency proposed a transitional period until December 31, 2019, during which a non-EU jurisdiction could be regarded as compliant on tax transparency if they commit to only two out of the three transparency criteria, whilst also indicating that a later decision could be made to move to the “three out of three” requirement.

At the end of December 2016, the Council adopted its position on the revision of the Fourth Anti-Money Laundering Directive, following the proposal of the European Commission published in July 2016 as a direct consequence of the Panama Papers revelations⁵⁴. One of the crucial innovations from the European Commission was to recommend the creation of public registries in Member States where information on beneficial owners

of companies and trusts would be available to the public. This was a long-awaited request from the European Parliament. The final outcome from the Council can therefore be considered disappointing when we know that EU governments only agreed to create such registers but to make the information available only to those who can demonstrate a legitimate interest to get it. This is restating the Member States’ position of 2013, as if the Panama Papers revelations didn’t change anything. Such watering-down of upcoming EU anti-money rules was in line with the Maltese position, according to the Prime Minister’s spokesperson⁵⁵.

Finally, in December 2016 again, Malta was among a minority of European Member States criticising the legal base of the European Commission’s proposal for greater transparency on large companies’ activities and tax payments (also known as public country-by-country reporting). Supporting other countries like Sweden or Germany, Malta supported the opinion of the Council legal service to discuss such transparency proposal under article 115 of the Lisbon Treaty. A possible change of legal base would not be harmless: in such case, the European Parliament would lose its co-legislator role (to be only consulted) and the proposal would have to be adopted unanimously in the Council, making it a much harder task if only one of the 28 Member States could veto the entire reform.

4.2 TAX FILES UNDER THE MALTESE PRESIDENCY

This repeated lack of ambition for tax reforms from Malta is especially worrying now that Malta will hold the Presidency for six months and has a huge tax agenda ahead.

One of the key negotiations which will take place between the Council and the European Parliament in the next few months is related to the long-awaited proposal for public transparency of large companies’ activities. The so-called public country-by-country reporting is a long-standing request of the European Greens and of the European Parliament, especially after its investigations into the Luxleaks scandal. The European Commission

finally presented a proposal in April 2016, which even if not entirely satisfactory is a step ahead⁵⁶. As mentioned above, Malta is one of the countries contesting the legal base chosen by the European Commission for this important tax reform.

In addition, Malta will very likely have to deal during its Presidency with the Parliament-Council negotiations on the no less important revision of the Anti-Money Laundering Directive. While the issue of public registries of beneficial owners will no doubt be a matter for harsh negotiations, other aspects such as the proper and efficient enforcement of existing anti-money laundering

provisions and application of real dissuasive sanctions are key aspects of the reform. Greens believe it is about time to be tough on money laundering crimes⁵⁷.

Another important tax reform which Malta will have to start discussing with the other 27 Member States is the issue of a common and consolidated corporate tax base. As shown by many tax scandals over the past years, some EU Member States grant specific advantages to some big companies in order to attract them, but don't always care whether real economic activity is taking place in their country to grant a tax privilege. This is why the European Commission has re-launched a five-year old proposal to harmonise corporate tax base in the European Union⁵⁸. However, despite nice rhetoric from our EU governments that they want to fight corporate tax avoidance, some are less keen to take real action. Czech Republic⁵⁹ and Luxembourg⁶⁰ have already announced that they do not support the objective of a 'consolidated' corporate tax base, de facto killing the possibility of such reform in a realistic timeframe, as taxation files have to be unanimously adopted by the 28 Member States of the Union.

Another important tax process mentioned above is the screening of third-country jurisdictions in order to establish the future European blacklist of tax havens. Criteria were agreed last year during the Slovak

Presidency but the actual screening will be carried by the Commission and the Member States mostly during the Maltese Presidency. We however regret the level of secrecy around the decision about which countries should be screened and we fear the same level of secrecy will be applied during the screening itself. This bares the risk of shady deals to end up with a non-relevant - as almost empty - European blacklist.

Malta will also be in charge of finalising the discussion on the Anti-Tax Avoidance Directive 2 regarding the issue of hybrid mismatches between European and third countries. While the negotiations progressed during the Slovak Presidency to have some anti-avoidance measures in place for this case, Member States didn't unanimously agree on possibly exempting the financial sector from implementing this rule, nor did they find consensus on the timeline for this Directive implementation.

The fight against tax evasion and tax avoidance is among the top priorities of European citizens, who expect their elected leaders to deliver on crucial reforms. Member States - and the Council Presidency - therefore have an important role to play to deliver on long-awaited promises. The Maltese Presidency simply cannot adopt a wait-and-see position in the next six months.

5. RECOMMENDATIONS

In light of all the expressed above, and in order to support progressive tax reform at the European level, we ask the Maltese Presidency:

- 1** **Ensure that fair taxation reforms are a priority of its six-month heading of the Council of the European Union.** Scandals like the OffshoreLeaks, the LuxLeaks or the Panama Papers have demonstrated the need to deeply reform corporate tax rules and the added-value of acting at the European Union level. Malta should commit to do its utmost to deliver ambitious tax and anti-money laundering reforms in the interest of European citizens, not multinationals and money-launderers.
- 2** **Reopen discussions in the Council on the revision of the Anti-Money Laundering Directive.** The compromised approach adopted in December 2016 falls short of any conclusion drowned after the Panama Papers revelations. Issues relating to public registries of beneficial owners of trusts and companies, proper enforcement (and capacity to enforce) anti-money laundering rules, as well as dissuasive sanctions should be re-examined.
- 3** **Reopen discussions in the Council on the state of play for a public country by country proposal.** The compromised text⁶¹ adopted at the end of December contains several major caveats, which go contrary to the initial spirit of the reform. For example, large companies subject to the obligation to disclose their information could be exempted to do so if it would be seriously prejudicial to their commercial position. Such vague wording opens the door to discretion as to what constitutes information prejudicial to economic interests. Public transparency is an important first step in the path for fairer taxation but Member States keep on watering down this essential reform.
- 4** **Commit to a transparent and honest screening of all relevant third countries for the future European blacklist of tax havens.** As shown in this report, Malta raises some concerns as to whether it would itself meet the criteria applied to external jurisdictions which analyse whether they behave like tax havens. Therefore, the minimum for the new Presidency is to ensure a transparent and honest screening process of countries. Outcomes of the negotiations in the Council Code of Conduct Working Group should be made public for everyone to understand why some countries will be screened in 2017 and others not. This is even more important since the allegations that Luxembourg (and other countries) blocked key tax reforms in the past in the Code of Conduct Group on business taxation⁶².

5

Commit to serious negotiations on the Commission proposal for a Common and Consolidated Corporate Tax Base in Europe. European Greens welcomed the re-launch of this proposal by the European Commission in October 2016 and urge EU governments to start discussing a common position. The way we currently tax companies, treating subsidiaries from the same company as if they are completely independent entities, does not reflect the reality of their operations. Implementing a common and consolidated corporate tax base would be a crucial step towards ending tax avoidance by global corporations in Europe. However, this approach would be much more effective if it was combined with a minimum corporate tax rate across Europe, bringing an end to the race to the bottom on rates.

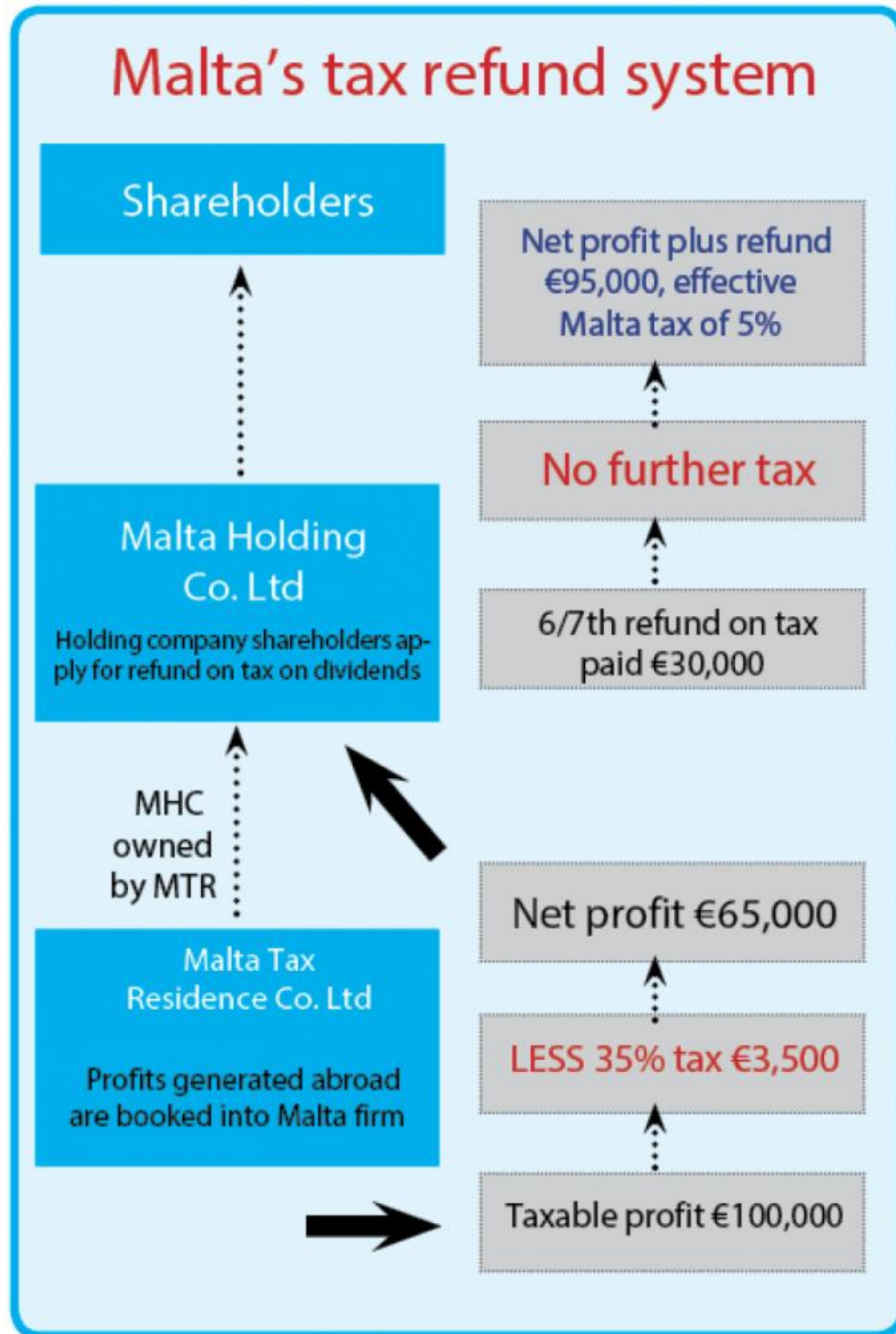
6

Find an agreement on the Anti-Tax Avoidance Directive's provisions related to hybrid mismatches with third countries. Malta should not give in to pressure from other Member States - like UK or the Netherlands - to water down the proposals. Such anti-avoidance measures should apply to all sectors, including the financial sector, and as soon as possible.

7

Start a thorough and independent analysis of the spillover effects of the Maltese tax legislation on other European countries and possibly non-EU countries. As mentioned in this report, between 2012 and 2015, close to €14 billion in tax could have been paid in other countries but was wiped clean thanks to Malta's full imputation tax system. Greater European solidarity is expected from the country currently holding the Presidency of the European Union.

ANNEX 1:
Explanation on the Maltese tax refund system



ANNEX 2:

Summary of the European Commission analysis of the Maltese tax system (January 2016)

Table 29: Malta: Overview

Indicators identified	Details
Active indicators	7 (No deemed income from interest-free loan) 17 (IP regime)
Lack of anti-abuse indicators	9 (Tax deduction of interest does not link to the tax treatment in the creditor MS) 12 (No thin-capitalization rules or similar) 24 (No CFC rules) 26 (No rule to counter a mismatch in tax qualification of domestic partnership) 27 (No rule to counter a mismatch in tax qualification of a domestic company)
Passive indicators	1 (Too generous tax-exemption of dividends received) 2 (No withholding tax on dividends) 8 (Tax deduction for intra-group interest costs) 18 (No or low taxation of capital gains upon transfer of IP) 19 (Tax deduction for intra-group royalty costs) 23 (Group taxation with acquisition holding company allowed) 25 (Tax qualification of foreign partnership does not follow that of the other state)
Set of combined indicators	1+2 (Generous dividend tax exemption regarding inbound and outbound payments) 8+9+12 (Interest deduction in combination with absence of linking rule and absence of interest-deduction-limitation rules)

ANNEX 3:

Criteria adopted by European Member States to screen third countries possibly ending up on the future European blacklist of tax havens (November 2016)

Tax transparency criterion

Criteria that a jurisdiction should fulfil in order to be considered compliant on tax transparency:

- 1.1. Initial criterion with respect to the OECD Automatic Exchange of Information (AEOI) standard (the Common Reporting Standard – CRS): the jurisdiction, should have committed to and started the legislative process to implement effectively the CRS, with first exchanges in 2018 (with respect to the year 2017) at the latest and have arrangements in place to be able to exchange information with all Member States, by the end of 2017, either by signing the Multilateral Competent Authority Agreement (MCAA) or through bilateral agreements;

Future criterion with respect to the CRS as from 2018: the jurisdiction, should possess at least a “Largely Compliant” rating by the Global Forum with respect to the AEOI CRS, and

- 1.2. the jurisdiction should possess at least a “Largely Compliant” rating by the Global Forum with respect to the OECD Exchange of Information on Request (EOIR) standard, with due regard to the fast track procedure, and

(for sovereign states) the jurisdiction should have either:

- i) ratified, agreed to ratify, be in the process of ratifying, or committed to the entry into force, within a reasonable time frame, of the OECD Multilateral Convention on Mutual Administrative Assistance (MCMAA) in Tax Matters, as amended, or
- ii) a network of exchange arrangements in force by 31 December 2018 which is sufficiently broad to cover all Member States, effectively allowing both EOIR and AEOI;

(for non-sovereign jurisdictions) the jurisdiction should either:

- i) participate in the MCMAA, as amended, which is either already in force or expected to enter into force for them within a reasonable timeframe, or
- ii) have a network of exchange arrangements in force, or have taken the necessary steps to bring such exchange agreements into force within a reasonable timeframe, which is sufficiently broad to cover all Member States, allowing both EOIR and AEOI

- 1.3. Future criterion: in view of the initiative for future global exchange of beneficial ownership information, the aspect of beneficial ownership will be incorporated at a later stage as a fourth transparency criterion for screening.

Until 30 June 2019, the following exception should apply:

A jurisdiction could be regarded as compliant on tax transparency, if it fulfils at least two of the criteria 1.1, 1.2 or 1.3.

This exception does not apply to the jurisdictions which are rated "Non Compliant" on criterion 1.2 or which have not obtained at least "Largely Compliant" rating on that criterion by 30 June 2018.

Countries and jurisdictions which will feature in the list of non-cooperative jurisdictions currently being prepared by the OECD and G20 members will be considered for inclusion in the EU list, regardless of whether they have been selected for the screening exercise.

Fair taxation criterion

Criteria that a jurisdiction should fulfil in order to be considered compliant on fair taxation:

2.1. the jurisdiction should have no preferential tax measures that could be regarded as harmful according to the criteria set out in the Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997 on a code of conduct for business taxation, and

2.2. The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.

Implementation of anti-BEPS measures criterion

3.1. Initial criterion that a jurisdiction should fulfil in order to be considered compliant as regards the implementation of anti-BEPS measures:

- the jurisdiction, should commit, by the end of 2017, to the agreed OECD anti-BEPS minimum standards and their consistent implementation.

3.2. Future criterion that a jurisdiction should fulfil in order to be considered compliant as regards the implementation of anti-BEPS measures (to be applied once the reviews by the Inclusive Framework of the agreed minimum standards are completed):

- the jurisdiction should receive a positive assessment for the effective implementation of the agreed OECD anti-BEPS minimum standards.

END NOTES

¹ <http://reports.weforum.org/global-competitiveness-report-2015-2016/economies/#economy=MLT>

² <http://www.tradingeconomics.com/malta/gdp-growth>

³ http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/economic_analysis/tax_papers/taxation_paper_61.pdf

⁴ The seven measures were related to 1. Offshore trading and non-trading companies, 2. Offshore insurance firms, 3. Offshore banking companies, 4. International Trading Companies, which created an effective tax rate of 4.2% for non-residents, 5. The beneficial tax treatment of dividends from companies with foreign income, 6. The tax treatment of Investment Service Companies, and 7. The deferral of tax on foreign income for non-resident companies.

⁵ http://europa.eu/rapid/press-release_IP-06-363_en.htm?locale=en

⁶ http://europa.eu/rapid/press-release_IP-06-608_en.htm

⁷ <http://mpcc.org.mt/wp/wp-content/uploads/2013/09/FM-Maltas-Financial-Services-Industry-Presentation-January-2014.pdf>

⁸ Resident companies: these are companies incorporated in Malta or which management and control is exercised in Malta. Resident companies can be resident and domiciled in Malta (those incorporate in Malta) and are taxed in their worldwide income according to Maltese company law, or resident but not domiciled in Malta (those not incorporated in Malta but which management and control is exercised there). These companies are only taxed on their Maltese income and on foreign income received in Malta but they are not taxed on capital gains taking place overseas.

⁹ Non-resident companies: They are only taxed on their Maltese source of income

¹⁰ When dividends are distributed to individuals out of taxed profits, the dividend carries an imputation credit of the tax paid by the company on the profits so distributed.

¹¹ <http://www.independent.com.mt/articles/2017-01-08/local-news/Konrad-Mizzi-s-secret-audit-to-be-released-to-coincide-with-EP-s-Panama-Papers-committee-visit-6736168778>

http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/economic_analysis/tax_papers/taxation_paper_61.pdf

¹² An active indicator is one which can directly promote or prompt an aggressive tax planning structure

¹³ Anti-abuse rules are rules aimed at counteracting the avoidance of tax. Their scope can be either specific to certain transactions, or broader and generally applicable to several forms of transaction. Examples of the former include a beneficial-owner test for the reduction of withholding taxes and thin capitalization rules; examples of the latter include a general anti-avoidance rule as well as CFC rules.

¹⁴ A passive indicator is one which does not by itself promote or prompt any aggressive tax planning structure, but which is necessary for an aggressive tax planning structure not to be hindered or blocked. A simple example is the absence of royalty withholding tax, which aims to prevent double taxation

¹⁵ Except in cases where the income derives from immovable property located in the country.

¹⁶

<http://www.maltaenterprise.com/sites/default/files/Incentive%20Guidelines%20%28Royalty%20Income%20from%20Patents%29.pdf>

¹⁷ https://www.ccmalta.com/publications/malta_ip_holding_company

¹⁸ [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563454/IPOL_IDA\(2015\)563454_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563454/IPOL_IDA(2015)563454_EN.pdf)

¹⁹ <http://www.mfsa.com.mt/pages/viewcontent.aspx?id=196>

²⁰ <http://www.greens-efa.eu/tax-avoidance-15689.html>

²¹ Together with Austria, Belgium, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Sweden and the UK

²²

http://www.maltatoday.com.mt/news/national/69486/every_year_malta_wipes_out_4_billion_in_foreign_tax_by_giving_shareholders_85_rebates_on_their_tax#.WEavZrKLQnQ

²³

https://nso.gov.mt/en/News_Releases/View_by_Unit/Unit_A1/National_Accounts/Documents/2016/News2016_041.pdf



²⁴ <https://panamapapers.icij.org/>

²⁵

http://www.maltatoday.com.mt/news/world/63702/over_11_million_mossack_fonseca_files_leaked_by_world_media#.WHEeivmLTIU

²⁶ https://panamapapers.icij.org/the_power_players/

²⁷ https://panamapapers.icij.org/the_power_players/

²⁸ <https://polcms.secure.europarl.europa.eu/cmsdata/upload/dbf7a9a8-50b0-433d-86a2-af75bd84003b/2016-12-13%20-%20PANA%20draft%20programme%20hearing%20and%20missions.pdf>

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