



CONCORD
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Submission in relation to TAXUD’s “Discussion paper on possible future measures against non-cooperative jurisdictions and aggressive tax planning and a possible strategy at EU level”

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INTRODUCTION AND MAIN ASKS

The listed NGOs welcome the opportunity to submit our views on the various issues raised by the discussion paper following the consultation held by the Commission in July. We have identified the following key measures we believe the European Commission should adopt in order to make future EU policies as effective as possible. All this information is explained in greater detail below.

1. **Adopt an EU definition of tax haven.** Such definition should build on the agreement reached by the European Parliament and the Council in the framework of the AIFM Directive; but to be complete it should also include other criteria like preferential treatment to non-residents and secrecy regulations that are both essential features of non-cooperative jurisdictions or tax havens. Such definition should also be applied to EU jurisdictions.
2. The toolbox should be complemented with other incentive and offensive measures, including a **“full” country by country reporting** requirement at EU level; **automatic cross-border exchange of tax information**; and **alternative options for the taxation of multinational enterprises** (e.g. unitary taxation and thin capitalisation).
3. **Pay greater attention to the role of multinational corporations**, major players and users of non-cooperative jurisdictions, **and the impact of non-cooperative jurisdictions on developing countries**, most of which lack the resources to effectively fight against tax evasion and aggressive tax planning. The Commission should explore ways to strengthen tax administrations in developing countries and ensure the implementation of the principle of Policy Coherence for Development.

ISSUE 1: CHALLENGES TO BE ADDRESSED

a) Do participants agree that the main current challenges have been correctly identified? Should any others be mentioned?

In general, the main current challenges have been identified. However, we believe that several very important dimensions of these challenges have been left out:

1) The role of multinational corporations: Multinational corporations (MNCs) are a relevant actor in international tax avoidance through practices such as transfer mispricing and the use of non-cooperative jurisdictions. Trade mispricing accounted for 54.7% of total illicit financial flows from developing countries between 2000 and 2008, within the range of US\$ 397 billion to US\$ 443 billion per year, based on conservative estimate.¹

While both individuals and multinational companies evade taxes, multinational companies play such a significant role and have so many resources –both technical and economic- that the challenges they pose to tax administrations should be made explicit in the problem description.

2) Developing countries: Due to the lack of resources, weak tax administrations and the insufficiently regulated international financial system, developing countries are particularly vulnerable to aggressive tax planning and the abuse of non-cooperative jurisdictions for tax evasion and to hide assets. This was explicitly recognised by the European Commission in the Communication on tax and development from 2010: *“A number of developing countries claim that their capacity to mobilize domestic revenues is affected by international tax evasion and avoidance, in particular because of asset and profit shifting to and through attractive and/or non-cooperative tax jurisdictions.”*²

We welcome that DG DEVCO is part of the Impact Assessment for the Communication and consider it a positive result of the commitment of Policy Coherence for Development stated in article 208 in the Lisbon treaty. Nonetheless, we strongly encourage the Commission to implement in a more systemic manner and across all its areas of work the European Commission’s commitment to Policy Coherence for Development.

3) Tax administrations: The discussion paper considers increasing administrative costs and compliance burdens on tax authorities. While we believe this is an important challenge, we encourage the Commission to go further and to discuss the importance of building strong, efficient and progressive tax administrations both in EU Member States and in developing countries through capacity building. The EU should also promote platforms to share knowledge on aggressive planning schemes used by MNCs and other mechanisms to avoid the erosion of tax bases and avoid tax burden increases for the most vulnerable.

b) Do participants agree that an EU solution is favourable to a series of individual national solutions? What other approaches could be considered?

We welcome and support an EU solution, particularly the extension of the Savings Tax Directive to other legal entities and capital gains. In this regard, we would like to highlight that the bilateral treaties (e.g. between Switzerland and Germany/UK/Austria) adopted or under discussion undermine the application of the Savings Tax Directive and makes any further tax harmonization extremely difficult. We therefore urge

¹ Eurodad (2011) Exposing the lost billions: How financial transparency by multinationals on a country by country basis can aid development. Eurodad, Brussels

² http://ec.europa.eu/development/icenter/repository/COMM_COM_2010_0163_TAX_DEVELOPMENT_EN.PDF

the Commission to adopt a position against these bilateral treaties, including when they deal with capital gains which are not covered by the existing Savings Tax Directive.

On the introduction of a Common Consolidated Corporate Tax Base, we support the introduction of rules that prevent corporations from shifting profits and Member States from promoting tax competition. However, we oppose any outcome that would be optional for corporations and could contribute to regulatory arbitrage and a deterioration of the tax base.

ISSUE 2: THIRD COUNTRIES DIMENSION

b) Do participants agree that an EU definition of non-cooperative jurisdictions could be based on the implementation of the principles of good governance in the tax area? Would participants see any other relevant (tax and non-tax) criteria to be taken into account?

The European Parliament and the Council reached an agreement on the AIFM Directive on June 28th that essentially defines a tax haven as a territory or country that:³

1. provides for tax measures which entail no or nominal taxes;
2. grants tax advantages even without any real economic activity and substantial economic presence;
3. is listed as a non-cooperative Country and Territory by FATF;
4. does not comply with the standards laid down in Article 26 of the OECD Model Tax Convention and effective exchange of information in tax matters.

This definition is particularly relevant as the first two criteria (no or nominal taxes and lack of substantial presence) are new within the EU legal framework. We believe these are key features of non-cooperative and unfair tax regulation, and therefore extremely useful in determining a working definition of tax havens. However, criteria 3 and 4 listed above are insufficient to identify a tax haven (see below). The FATF list is biased, incomplete and relies to a large extent on negotiations (e.g. Luxembourg is off the list with 20.41% of compliance, but Turkey is on the blacklist with 30.61%).⁴ The list is the result of the mandate by the G20 to issue a list of risky jurisdictions for money laundering, which has resulted in several announcements which are difficult to understand and inconsistent from one session to another. The OECD standards have been proven ineffective in practice, as there is no longer any state on the black list and we are still waiting for the peer review process to be finalized in 2014. The criteria used to delete countries from the list, mainly participation in the process, were very weak.⁵ In addition, both the content of the treaties (information exchange on request rather than automatic information exchange) and the idea that bilateral treaty networks rather than multilateral agreements are the solution is flawed. Information exchange on request is often an excessively long and asymmetric process, as developing countries usually fail to

³ See the following press release from the Danish Presidency announcing the agreement:

<http://eu2012.dk/fr/NewsList/Juni/Uge-26/Funds>

For more information on the definition see Article 3(a) (iii) of the Directive

⁴ CCFD-Terre Solidaire (2011) "Paradis Fiscaux.: Le G20 de la dernière chance", CCFD-Terre Solidaire report, Oct. 2011, p. 40-41

⁵ TJN (2012) The Creeping Futility of the Global Forum's Peer Reviews. Tax Justice Briefing, March 2012

negotiate effectively to protect themselves. Moreover, obtaining information is still very difficult as the burden of proof still lies on the requesting country and secrecy jurisdictions can adopt measures (such as legislation) that hamper compliance with information requests. For instance, France submitted 230 information requests to 18 countries in early 2011 and received replies to only 30% of them. In most cases the quality of the information was poor.⁶

Criteria 1 and 2 above are a significant improvement on this, but they still fail to capture the whole spectrum of tax havens. Having no or nominal taxes is too broad a concept and fails to capture the real extent of the problem. First, there are tax havens with normal average rates, but which grant exemptions to non-residents or particular types of entities. This is recognised by the Commission in its communication of June 27th 2012, where tax havens, also sometimes referred to as “non-cooperative jurisdictions”, are considered to have the following attributes: “self-promotion as **offshore financial centre ... preferential tax treatment to non-residents** to attract investment from others countries”. **We believe that preferential tax treatments to non-residents should be included in a future EU definition of tax havens or non-cooperative jurisdictions.**

Second, it should be **expanded to specifically include mismatches or artificial tax bases**, such as Belgium's notional tax regime (although an EU example, similar regimes exist abroad). A better formulation should include concepts such as “artificial tax bases”, “non-taxation of income that is deductible abroad” and “zero or very low effective tax rates on foreign income”.

In addition, **any future definition should also emphasize transparency as one of its key criteria.** Often, an environment of legalised secrecy is purposefully created by not requiring disclosure of ownership for corporations, trusts, foundations and other legal entities. Secrecy jurisdictions enable companies and individuals to create complex and opaque offshore structures to facilitate tax evasion and aggressive tax planning while protecting them from investigation.⁷ The EU Code of Conduct for Business Taxation recognises,⁸ in addition to some of the criteria already mentioned, lack of transparency as a potential harmful measure. Transparency is therefore an essential component of the principle of fair tax competition, which EU Member States committed to adopt as part of the principles of good governance in the tax area.⁹ In addition, lack of transparency is at the core of the Financial Secrecy Index, a relevant tool for assessing and ranking the opacity of jurisdictions created by the Tax Justice Network (TJN)¹⁰ and referred to by the Parliamentary Assembly of the Council of Europe.¹¹

In conclusion, we believe **the Commission should use the definition included in the AIFM Directive as a starting point towards an EU definition, and strengthen it with specific criteria on tax regimes for non-residents and transparency.** We also believe that **such definition should apply to EU jurisdictions.** The fact

⁶ See: <http://taxjustice.blogspot.be/2011/11/france-information-exchange-systems-are.html>

⁷ Christensen, J. (2012) The hidden trillions: Secrecy, corruption, and the offshore interface. *Crime Law Soc. Change* 2012 – 57: 325-343

⁸ http://ec.europa.eu/taxation_customs/resources/documents/coc_en.pdf

⁹ EU Finance Ministers in Council (Ecofin) 14 May 2008

¹⁰ www.taxjustice.net

¹¹ Promoting an appropriate policy on tax havens – Parliamentary Assembly of the Council of Europe (Committee on Social Affairs, Health and Sustainable Development – Doc. 12894 – 05 April 2012)

is that several EU Member States or other European countries closely integrated through trade agreements; are behaving as tax havens, by implementing preferential tax regimes. For example, the Netherlands is a conduit for flows which are many multiple times the size of the Dutch economy (Luxembourg is another example),¹² this prompted the Central Bank to record such flows separately from flows which are linked to substantial economic activity within the jurisdiction. Requiring or encouraging all EU Member States to use this distinction and record this data would be extremely useful to pin point potentially double non taxed flows.

In general, very few tax havens meet all the criteria listed above, therefore a jurisdiction that meets most but not all of the criteria should be classified as a tax haven. We understand that the terms “tax haven” or “non-cooperative jurisdiction” might be difficult to apply within the EU, where the problem is the implementation of very specific tax regimes which have similar effect as tax havens legislations.

c) Do participants agree with the suggested toolbox of incentives and defensive measures? What other measures could be taken into consideration?

We welcome the creation of a toolbox with incentives and especially sanctions for non-cooperative jurisdictions as requested by the G20 communiqué in 2009.¹³ However, we would like to provide some comments on the content of the toolbox.

On incentives for cooperative jurisdictions and the “possible enhancement of development aid for capacity building against strict conditionality”, we welcome the use of aid to strengthen tax administrations. However, we would also like to call the EC’s attention to the fact that some forms of donor conditionality on tax issues –using aid to change government policy- have often been harmful.¹⁴ A more nuanced approach is therefore needed.

We agree with the EC’s opinion that donors should not use aid money to promote unfair tax competition or the creation of tax havens. But this should not be confused with the use of policy conditionality. Policy conditionality has often been ineffective, and undermined domestic decision-making. We believe that donors currently attach too many conditions, and that too often these are the wrong type of conditions to achieve poverty reduction. Examples of this include trade liberalization or privatization. EU donors have the right to set certain limited conditions, such as fiduciary conditions or conditions to strengthen domestic accountability and democratic processes within cooperative and non-cooperative jurisdictions. These include, for example, making donors’ budget aid conditional on basic information like government budgets being made publicly available.

The EU should make strengthening tax systems in developing countries a priority in order to prevent illicit capital flight and artificial profit shifting to tax havens. It should support reforms relating to transparency in the handling of public finances at all levels of government, pushing for systems that offer as much information as possible on public finances and the use of public money. Finally it should support oversight

¹² CCFD-Terre Solidaire (2010) An Economy Adrift.

¹³ London Summit – Leaders’ Statement - 2 April 2009: Strengthening financial supervision and regulation, §15

¹⁴ Eurodad & Action Aid (2011) Approaches and impacts: IFI tax policies in developing countries.

and accountability programmes on tax collection and spending involving National Parliaments and Civil Society Organisations.

On defensive measures against non-cooperative jurisdictions, we believe that the European Commission could put in place more ambitious measures than those described in the discussion paper. For example, the European Commission could include in the tool box:

- automatic exchange of information, as now required by the US FATCA and the EU Savings Tax Directive;
- country-by-country reporting (including project-by-project reporting for government contracts, concessions, licenses or public private partnerships);
- a public register of beneficial ownership for all relevant legal entities (corporations, foundations, trusts etc.), and discrimination of entities that do not have an identifiable beneficiary;
- a European Bank accounts register or at least national ones with full information regarding beneficial ownership;¹⁵
- more detailed penalties such as withdrawing the license of financial companies if they do not comply with the rules;
- a minimum tax requirement should also be part of the conditions, as is the case for the Brazilian black list;
- a predominately source-based approach to taxation.

On the other hand, the application of withholding taxes should be treated with caution. While this measure can be applied in certain circumstances, it should not be used to tax capital gains in general because this allows tax payers to remain anonymous. This creates a two tier system where those who can afford cross-border banking and investment relationships are treated differently from other citizens. Withholding taxes also tend to be less conducive to compliance and collect less revenue than other taxes; for example, the application of withholding taxes in Germany since 2008 has significantly reduced the tax burden for capital gains.

More generally, we believe that **the EU toolbox cannot limit itself to incentives and defensive measures**. There are other measures, such as legislation, that the EU could put in place to help both developing countries and EU Member States to fight tax evasion and avoidance. Examples of such measures are:

- Adopt a “full” country by country reporting requirement at EU level. Country-by-country reporting is being discussed in the Council and the European Parliament following a proposal of the European Commission in October 2011 to increase the transparency of multinational corporations. However, the recently stated position of the European Parliament is that ¹⁶ “*country-by-country reporting requirements for cross-border companies are essential for detecting corporate tax*

¹⁵ TJN & CCFD-Terre Solidaire (2012) Bank account registries in selected countries. Lessons for registries of trusts and foundations and for improving automatic tax information exchange. Tax Justice Network & CCFD-Terre Solidaire

avoidance” but this can only be effective if reporting requirements include the disclosure of additional corporate financial information to put the disclosure of payments into context.

Therefore, the European Commission should promote an ambitious country-by-country reporting requirement (and support any attempt from other EU institutions to do so) which would include for companies disclosure of payments but also:

- each country in which companies operate as well as the names of all its subsidiaries for each country in which they operate;
- their financial performance in every country in which they operates, including sales, purchases, labour costs and employee numbers and pre-tax profits;
- the tax charge included in their accounts for the country in question;
- details of their physical fixed assets located in each country as well as their gross and net assets in total for each country in which they operate.

Moreover, such reporting requirements should be extended to all sectors: corruption and tax avoidance are particularly severe around extractives, but they are also major problems in other sectors like construction or banking. The 50 largest European corporations’ annual reports show that at least 21% of their subsidiaries are located in tax havens¹⁷.

- Introduce a system for automatic cross-border exchange of tax information on personal and business accounts which, unlike the current OECD model of “on request” demand, does not put the burden of proof on the requesting administration. A truly multilateral tax information exchange framework should be encouraged with incentives for secrecy jurisdictions to adhere to it.
- Explore alternative options for the taxation of multinational enterprises (e.g. unitary taxation and rules against thin capitalization or dismantlement of the intangible added value created by the company). Alternatives would look at improving the alignment of tax and genuine economic activity and would prevent multinational corporations using intra-group transactions to reduce or avoid tax payments.

ISSUE 4: DOUBLE TAX CONVENTIONS

a) Do you find the concept above suggested appropriate in order to tackle aggressive tax planning? If not, what are the strength and weaknesses of it? Do you have other suggestions?

There are concerns that relying on a treaty based solution to tax fraud may leave developing countries exposed. Developing countries lack the economic and political power to negotiate treaties and so often have much less extensive treaty networks than developed countries (e.g. Kenya has just 8 in force, the most recent dating from 1985 compared to over 100 treaties signed by the UK; the most recent coming into

¹⁶ European Parliament resolution on Combating tax fraud and evasion – 19 April 2012

¹⁷ See report “An Economy adrift” – Regulate Finance for development and CCFD- Terre Solidaire, December 2010

force in 2012). They could therefore be effectively excluded from the process to reduce double non-taxation. Even where treaties do exist, such a provision as outlined would require the renegotiation of treaties, and developing countries would be likely to be among the lowest priorities for such renegotiation. Furthermore, there is currently a significant gap in the international treaty framework in that most tax havens have not signed full double tax treaties and so one of the key routes for double non-taxation would not be covered by this solution.

Therefore, whilst there may be some value in the approach outlined, where treaty networks are being exploited, of much greater value would for any treaty based solutions to include a clear strategy to utilise the EU's political and economic power to ensure that tax havens are brought into the multilateral convention on mutual assistance on tax matters and that ways are found to assist developing countries to be more comfortable to sign and better prepared to participate. With respect to this last point a clear commitment to ensuring that the multilateral convention tackles double non-taxation as well as double taxation may provide some encouragement to developing countries' participation.

ISSUE 5: ANY OTHER SUGGESTIONS

a) We would therefore ask you to provide any other suggestion you might have for ways in which non-cooperative jurisdiction and aggressive tax planning could be tackled?

In order to discourage the continued existence of non-cooperative jurisdictions or other tax havens and to curtail aggressive tax planning we find it important that EU Member States do not use these territories themselves in any of their internal or external actions. Research has shown that Development Finance Institutions (DFIs) in several Member States use entities based in tax havens to facilitate investments.¹⁸ This behaviour sets a perverse precedent, emboldens existing non-cooperative jurisdictions (tax havens) and undermines EU measures against aggressive tax planning. We encourage the Commission to include incentives and defensive measures in the Communication and action plan, which will prevent EU Member States from profiting from the services of tax havens.

Finally, we would like to stress that the problem of non-cooperative jurisdictions or tax havens cannot be effectively addressed without considering EU jurisdictions. We strongly believe that the measures being considered by the Commission should apply within the EU. As mentioned above, we understand that, in many cases, the terms "tax haven" or "non-cooperative jurisdiction" might be difficult to apply within the EU, where the problem is the implementation of very specific tax regimes.

¹⁸ Eurodad, IBIS, NCA, CRBM, Forum Syd and the Tax Justice Network (2010) Investments for Development: Derailed to Tax Havens. A report on the use of tax havens by Development Finance Institutions.