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COMMUNICATION FROM THE COMMISSION

on new requirements against tax avoidance in EU legislation governing in particular financing and investment operations

I. Introduction

New steps have enhanced the long standing EU efforts to tackle tax avoidance both within the EU and beyond, with the introduction of specific provisions related to EU funding. They add the legal requirements that projects financed by EU funds should not contribute to tax avoidance, by reference to EU and international standards. In addition they now include a more explicit reference to the new EU list of non-cooperative jurisdictions for tax purposes.

The adoption on 5 December 2017 by the Council of the European Union of a list of non-cooperative jurisdictions for tax purposes ("EU list") represents an important milestone in the ongoing efforts to prevent tax fraud and tax avoidance, and to promote tax good governance worldwide. As of 13 March 2018, the EU list contains 9 non-cooperative jurisdictions ("Annex I Jurisdictions" or "non-cooperative jurisdictions") and is accompanied by another list of 62 jurisdictions ("Annex II Jurisdictions" or "Committed Jurisdictions") that have taken sufficient commitments to address their identified deficiencies and as such have not been considered as non-cooperative for the time being[1].

The EU list finds its origin on the Communication on an External Strategy for Effective Taxation (January 2016) (COM(2016)24 final). The Communication underlined the importance of promoting tax good governance not only within the EU but globally and the value of an EU list of third country jurisdictions as a common tool to deal with countries that fail to comply with tax good governance standards. The listing process has also been a very positive exercise in engaging with third countries on tax matters and trying to resolve any concerns about their compliance with tax good governance standards.

The current EU Financial Regulation[2] (FR), Regulation (EU) 2017/1601[3] on a European Fund for Sustainable Development (EFSD), Decision 466/2014/EU on the European Lending Mechanism[4] (ELM) and Regulation on a European Fund for Strategic Investments (EU) 2015/1017[5] (EFSI) already prohibit EU funds implemented through financial instruments from being invested in or channelled through entities incorporated in jurisdictions which do not cooperate with the Union in relation to the application of the internationally agreed tax standard. These requirements must already be transposed into contracts with all selected financial intermediaries when implementing financial instruments or guarantees supported by the Union budget. To make this process even more effective, the EU has in parallel agreed to reinforce the link between EU funds and tax good governance. Relevant specific provisions are added in the EFSD Regulation, the ELM Decision and the EFSI Regulation as well as in the Financial Regulation that will enter into force in summer 2018.

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[1] See ECOFIN Council conclusions 5 December 2017 *(link: http://www.consilium.europa.eu/media/31945/st15429en17.pdf)* and 23rd of January 2018 (*link: http://data.consilium.europa.eu/doc/document/ST-5086-2018-INIT/en/pdf).*

[2] *OJ L 298, 26.10.2012, p. 1–96* (the "Financial Regulation" or "FR")

[3] Regulation (EU) 2017/1601 of the European Parliament and of the Council of 26 September 2017 establishing the European Fund for Sustainable Development (EFSD), the EFSD Guarantee and the EFSD Guarantee Fund, OJ L 249, 27.9.2017, p. 1–16.

[4] Decision No 466/2014/EU of the European Parliament and of the Council of 16 April 2014 granting an EU guarantee to the European Investment Bank against losses under financing operations supporting investment projects outside the Union, OJ L 135, 8.5.2014, p. 1–20.

[5] Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 — the European Fund for Strategic Investments, OJ L 169, 1.7.2015, p. 1–38.

Taken together, these provisions require that EU funds do not support projects contributing to tax avoidance. Coupled with the publication of the EU list, there is a robust framework to ensure that EU funding is routed according to sound tax good governance standards.

Notwithstanding the obligation arising from already signed agreements, it is good practice if changes entering into force in summer 2018 are already now taken into account to the largest possible extent by all entities involved.

This Communication aims to facilitate the implementation of these compliance requirements. The Commission will provide updates on the information contained in this document on an as needed basis. This Communication will therefore be revisited in order to adapt its content when and where appropriate in order to take into account the experience acquired in implementing it.

II. Purpose and scope

Information is needed on how the above mentioned commitments in relation to tax good governance should be implemented, including on the consequences of the adoption of the EU list. It will be relevant for all Implementing Partners[6] and for financing/investment operations as well as other forms of cooperation. Compliance with general tax avoidance requirements has to be ensured for all operations under indirect management. In addition, compliance with the specific requirements for non-cooperative jurisdictions shall be ensured for financial instruments and budgetary guarantees.

The scope of this Communication is the following: First, it sets out the legal framework and rules on tax avoidance and non-cooperative jurisdictions applicable to EU funds. Secondly, it provides elements allowing to ensure: (i) compliance with tax avoidance requirements, and (ii) compliance with EU policy on non-cooperative jurisdictions. Thirdly, it serves to facilitate alignment of the Implementing Partners' internal policies with the new EU requirements in terms of tax governance.

The contents of this document should be reflected in the delegation agreements (as well as future contribution agreements) between the Commission and the Implementing Partners whenever the Commission entrusts implementation of EU budget funds to Implementing Partners. It should also be of relevance in agreements for budgetary guarantees covered by the specific EU regulations mentioned below.

This Communication will be complemented by a separate internal guidance document for the European Commission, which is the EU institution ultimately responsible for the implementation of the Union budget.

This Communication does not create any new legal obligations.

III. Legal framework

In order to reflect the EU engagements in tax good governance and to give expression to the adoption of the EU list of non-cooperative jurisdictions, standardised wording was inserted into various EU legal acts (see Annex 2). Other rules of the current and the revised Financial

[6] "Implementing Partners" are the entities implementing EU funds under indirect management, in contrast with the direct management of EU Funds, which is performed by the European Commission and its agencies. Implementing Partners generally are International Financial Institutions, development financial institutions (DFIs) or other types of eligible counterparts of the indirect management of EU budget (e.g. the UN family).

Regulation related to tax governance for direct management and indirect management are also described in Annex 1.

Tax avoidance provisions in regulations concerning EU funds

Four legal acts currently contain or will contain in the near future references to the tax good governance[7]:

- **Article 22 of Regulation (EU) 2017/1601 establishing the European Fund for Sustainable Development:** This Regulation includes the legal provisions on tax avoidance and non-cooperative jurisdictions referred to above and, in recital 37, an explicit reference to the Council conclusions on this matter. All operations[8] benefitting from a guarantee under this Regulation shall comply with these legal provisions.

- **Article 22 of Regulation (EU) 2015/1017 establishing the European Fund for Strategic Investments and Article 13 of Decision 466/2014/EU on the External Lending Mandate:** Following their amendment by respective Regulations[9], these two acts include similar legal provisions as EFSD, slightly modified to be directed at the European Investment Bank (EIB) Group[10].

- **Article 140(4) of Regulation (EU) 966/2012 on the financial rules applicable to the general budget of the Union:** The legal provisions referring to tax-related matters in the current version of the Financial Regulation are not strictly similar to EFSI, ELM and EFSD provisions mentioned above, as the current Financial Regulation precedes the commitment on tax avoidance and the adoption of the EU list. Article 140(4) covers financial instruments and states in substance: (1) that entities entrusted with the management of those financial instruments and financial intermediaries shall comply with relevant standards and applicable legislation on the prevention of money laundering, the fight against terrorism and tax fraud, and (2) that the entities entrusted with the management of those financial instruments shall not be established in non-cooperative jurisdictions and shall not maintain business relations with entities incorporated in territories whose jurisdictions do not cooperate with the Union in relation to the application of the internationally agreed tax standard. With a view to ensure a consistent application, the prohibition under the current Financial Regulation, Article 140(4) FR should be interpreted as applying with the same derogation regarding physical implementation of projects as the one laid down in the EFSD, EFSI and ELM. Article 140(4) also states that the entrusted entities shall transpose such requirements in their contracts with the selected financial intermediaries.

[7] These legal provisions are applicable to budgetary guarantees via the EFSD and the EFSI Regulations and the ELM Decision. Concerning other budgetary guarantees, pursuant to Article 280(a) of the new Financial Regulation, Article 155(2) new FR will apply to budgetary guarantees only as from the date of entry into force of the post 2020 multiannual financial framework, while it will apply to the financial instruments as from the date of entry into force of the new Financial Regulation.

[8] Under the EFSD and all the other EU acts mentioned in this Communication, operations are loans, guarantees, equity or a quasi-equity investments or other risk-sharing exposures as well as Technical Assistance undertaken by an Implementing Partner with a relevant entity through a contract or an indirect relationship based on this contract.

[9] Regulation (EU) 2017/2396 of 13 December 2017 and Regulation concerning the revision of the External Lending Mandate expected to enter into force in April 2018.

[10] Composed of the European Investment Bank (EIB) and the European Investment Fund (EIF).

- **Article 155 (2) of the revised Financial Regulation**[11]: It will insert legal provisions on tax governance similar to those of EFSD, EFSI and ELM in the Financial Regulation. The first subparagraph, stating the obligation for entities implementing EU funds not to support actions that contribute to tax avoidance, tax fraud and tax evasion, applies to all actions funded under indirect management[12]. The remaining text on the compliance with the EU list, stating the obligation not to enter into new or renewed operations with entities incorporated or established in non-cooperative jurisdictions, applies to financial instruments and budgetary guarantees only.

Pursuant to Article 155(4) of the revised Financial Regulation[13], the Commission will have to verify that the Union funds or budgetary guarantee has been used in accordance with the conditions laid down in the relevant agreements[14]. To this purpose, the Commission intends to rely on the ex-ante assessment of the rules and procedures established by Implementing Partners for the implementation of actions supported by the Union budget, as far as it considers that they ensure compliance with the obligations stemming from Article 154(4) of the new FR equivalent to the protection ensured by the Commission, in accordance with Article 154(3) of the new FR. Where the relevant rules of the Implementing Partner have not, not yet or only partially been positively assessed, compliance will be ensured through contractual provisions. The existing pillar assessments will be updated to assess whether the Implementing Partners' exclusion systems or procedures include requirements on money laundering and taxation policy equivalent to those foreseen by the new Financial Regulation. Existing contribution agreements and framework partnership agreements will be reviewed as appropriate on the basis of the results of these updated pillar assessments and shall indicate whether and the extent to which the Commission may rely on the Implementing Partners' systems and procedures. Until then, the existing pillar assessment, contribution agreements and framework partnership agreements will continue to apply (Article 279 FR).

Where the Union funds or budgetary guarantee have been used in breach of the obligations laid down in the relevant agreements, pursuant to Article 131(3), the authorising officer responsible may suspend payments or the implementation of the legal commitment or declare the related costs ineligible, in particular where implementation of the legal commitment proves to have been subject to irregularities, fraud or breach of obligations or where irregularities, fraud or breach of obligations call into question the reliability or effectiveness of the implementing partner or the legality and regularity of the underlying transactions. The authorising officer responsible may terminate the agreement in whole or with regard to one recipient. Pursuant to Article 131(4), the authorising officer may reduce the contribution in proportion to the seriousness of the breach of obligations. In addition, the authorising officer shall ensure protection of the Union's financial interests in accordance with Article 135 of the new FR, in particular by ensuring compliance with Article 135(2)(c) of the new FR.

[11] The revised Financial Regulation has not yet been adopted by the co-legislators. It is expected to enter into force in summer 2018.
[12] Non reimbursable assistance (grants, technical assistance, etc.),financial instruments and budgetary guarantees.
[13] Similar provisions exist in the current version of the Financial Regulation cf. Article 60(6)(c)FR, Article 116 FR, Article 135 (1) to (3)FR, Article 166 RAP.
[14] That includes framework/contribution/financing/guarantee and delegation agreements

IV. Information for Implementing Partners of the new EU requirements on tax avoidance/ EU list of non-cooperative jurisdictions for tax purposes

The EU funds covered by the relevant legal act(s) shall, inter alia[15]:

1. not be granted to projects that are structured to contribute to tax avoidance, by reference to EU and international tax standards (see point 1. below);
2. for financial instruments/budgetary guarantees: comply with the EU list on non-cooperative jurisdictions (see point 2. below).

This section provides elements of information on how to ensure (i) compliance with tax avoidance requirements, and (ii) compliance with EU policy on non-cooperative jurisdictions.

In line with the legal framework set out in section III, this part covers operations financed under the current and revised Financial Regulation and under EFSI, EFSD and ELM.

It should be noted that until the entry into force of the revised Financial Regulation, Art 140(4) of Regulation 966/2012 (current Financial Regulation) remains into force. The information on the implementation of financial instruments or budgetary guarantees involving non-cooperative jurisdictions (section IV (2) of the present Communication) will also be applicable with reference to financial instruments managed in accordance with the Financial Regulation currently in force. Article 140(4) of the current Financial Regulation does not contain a general provision prohibiting the financing of projects that contribute to tax avoidance. Nevertheless, pending the entry into force of the revised Financial Regulation, the explanations on tax avoidance (section IV (1) of the present Communication) should already be considered as good practice.

Box 1: Clarifications on blending

The above legal requirements also apply to the EU support under indirect management (financial instruments/budgetary guarantees/non-reimbursable support) when it is blended with financial instruments provided by the Implementing Partners through their own resources.

For policy consistency reasons, before entering into blended operations or portfolio of operations, it would be advisable to ensure that the entire operation or portfolio of operations is compliant with the tax good governance requirements set out in these guidelines.

Under the revised Financial Regulation, where the EU support to a blended operation is by way of a non-reimbursable support, the legal provision regarding tax avoidance(Article 155 (2)(a)) has to be respected in line with the respective obligation in the relevant contribution agreement. Where the EU support is by way of a financial instrument/budgetary guarantee, compliance with the EU list (Article 155 (2) (b) and (3)) applies in addition to the legal provision regarding tax avoidance.

[15] This guidance does not cover compliance with money laundering, terrorism financing and tax fraud, which are areas covered already under the current Financial Regulation with which international financial institutions need to comply.

IV (1) Information on the criterion of tax avoidance

Implementing Partners shall not support projects that are structured to contribute to tax avoidance by reference to EU and international tax standards.

The following section sets out how checks could be performed by Implementing Partners to assess whether a project or an action may contribute to tax avoidance.

1.1 Tax avoidance standards

The applicable EU legislation and agreed international and EU standards, mentioned in the legal provisions, are laid down in the regulatory and policy applicable frameworks and aim, broadly, at ensuring that tax rules for effective taxation are in place and not circumvented. At international level (i.e. OECD), they include notably the principles of transparency and exchange of information, and the work on base erosion and profit shifting (BEPS)[16]. More specifically at EU level, they include the EU tax policy framework on tax avoidance, essentially contained in Council conclusions and the EU regulatory framework[17].

While there is no need to assess compliance of countries against EU standards of tax good governance (including BEPS aspects) beyond the assessments made in the Council Conclusions, this section covers the assessment of the contribution of projects (both directly and indirectly) to tax avoidance.

Therefore, the criteria used by Implementing Partners and other relevant financial intermediaries to assess projects covered by the relevant legal act(s) should clearly refer to EU and international tax standards against tax avoidance. The financed projects should not involve aggressive tax planning, i.e. it should be established that there are sound business reasons (other than tax reasons) for structuring of the projects and that they are not structured so to take advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability.

As mentioned in the Commission proposal for a Directive amending Directive 2011/16/EU with regards to mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements[18], aggressive tax planning arrangements have evolved over the years to become increasingly more complex and are always subject to constant modifications and adjustments as a reaction to defensive countermeasures by the tax authorities. While not being exhaustive, the detailed list of "hallmarks" set out in that Commission proposal facilitates the identification of transactions that may include features of tax avoidance or abuse.

Therefore, tax planning that is considered aggressive should be excluded from the justifications accepted for structuring a project.

1.2 Tax avoidance checks

Tax avoidance risks in the use of EU funds need to be identified as early as practically possible and adequately mitigated. A risk-based approach based on key risk indicators may be considered where appropriate.

- The **scope** of the assessment should be sufficiently comprehensive to cover the relevant entities involved in the financial flows of the project. In practice, a recommended method

[16] OECD work on transparency and exchange of information (*link: http://www.oecd.org/tax/exchange-of-tax-information/*) and on base erosion and profit shifting (*link: http://www.oecd.org/tax/beps/*).
[17] See Annex 3.
[18] COM/2017/335 of 21 June 2017. Political agreement was reached on 13 March.

is that the *ex-ante* assessment should lead to the conclusion that the potential tax avoidance risks have been adequately mitigated; that the relevant financial flows[19] linked to EU funding would be effectively taxed, i.e. taxed according to the applicable rules in the countries concerned (such as national rules and bilateral tax conventions) in compliance with the agreed EU and international tax standards; and that the project has not been artificially structured to aim at avoiding tax up to the ultimate beneficial owners. In this context identification of the beneficial owners is critical in reducing tax avoidance risks.

For the purposes of analysing tax compliance in this document, relevant entities shall include entities with which, in relation to a given project, the Implementing Partner has a contract or an indirect relationship based on this contract and shall mean *inter alia*:
For debt transactions:
(1) the borrower;
(2) the promoter or sponsor, if other than the borrower;
(3) the (counter-) guarantor, if any;
(4) the financial intermediary, if any;
For securitisation, including loan subsitutes:
(5) the originator and the special purpose vehicle; the issuer of covered bonds (loan substitutes), if any;
For transactions with investment funds:
(6) the investment fund structure itself;
(7) the fund manager (or equivalent entity with managing or delegated investment powers) and other entities forming part of the fund structure (such as team members, General Partners, advisors and carry vehicles), if any;
(8) the entity established for the collection of revenues for the benefit of the fund manager (or of the equivalent entity with managing or delegated investment powers), if any.

- **Effective taxation** relates essentially to the profits that are realised and channelled to beneficial owners and covers direct taxation (taxation of income and capital gains, and withholding tax). In very specific cases consideration of other aspects (such as VAT avoidance) may be appropriate. Without prejudice to the role of the national tax authorities[20], the assessment by the Implementing Partners should verify that profits realised and channelled would be taxed. In so doing, particular attention should be given to the use of tax avoidance practices, such as harmful tax regimes, offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction or other BEPS-related practices (such as abuse of double tax conventions, artificial use of hybrids, artificial avoidance of permanent establishment status). Where taxation of an entity is transferred at the level of its partners (so-called "tax transparent

[19] For instance, in the case of a debt financing, the relevant financial flows would typically cover interest payments, capital repayments, dividends and profits of the project relevant entities. In the case of an investment in a private equity fund, the relevant financial flows would typically cover profits, dividends, interests, management fees, capital gains, and other similar types of income. Effective taxation of these financial flows should be evidenced. The part of the structuring that may have been designed to optimise inheritance rules (unrelated to the financial flows) would not need to be assessed.

[20] While deterring tax avoidance risks requires to identify what tax rules are applicable, it remains the sole responsibility of the national tax authorities to ensure that the tax rules are applied in practice.

entities"[21]), and when taxation has not yet been established, the same tests should then be replicated at the level of the partners, and Implementing Partners should endeavour to obtain the relevant information at the level of the partners to the extent practically possible. However, once effective taxation has been established for a given financial flow, no further evidence of taxation of the same financial flow would in principle be required beyond this point[22].

- **Artificial structuring** is often related to tax avoidance practices and should be carefully assessed. It can be delineated as "an arrangement or a series of arrangements which, having been put into place for the main purpose, or one of the main purposes, of obtaining a tax advantage that defeats the purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part, and shall be regarded as non-genuine to the extent that it is not put into place for valid commercial reasons which reflect economic reality"[23]. In practice, evidencing the economic rationale of a given structuring, the effective substance of the various entities and the tax impact[24] of the structuring should generally suffice to prevent artificial structuring.

- **Committed jurisdictions:** The Annex II Jurisdictions have taken political commitments to implement tax good governance principles within a given timeline (end of 2018, or end 2019 in the case of developing countries), and operations involving entities established and/or incorporated in Annex II Jurisdictions are therefore not prohibited. These operations should be assessed as indicated above and require specific attention to ensure that the concerns[25] which these jurisdictions have committed to address in order to comply with tax good governance criteria, are not exploited in projects financed by EU funds. In case the commitments are not complied with within the agreed timeframe indicated in the Council conclusions, an Annex II Jurisdiction may eventually be put on Annex I. Therefore, the presence of an Annex II Jurisdiction in the structure of an operation should trigger a case-by-case examination, which should demonstrate that the use of such jurisdiction is not motivated by tax reasons that have raised EU concerns.

[21] For example, equity investment funds generally are tax transparent entities.

[22] For instance, when profits have been taxed at the project entity level and dividends in the hands of the recipient, effective taxation of redistributed profits is not further required.

[23] General anti-abuse rule of the EU anti-tax avoidance directive (2016/1164) laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

[24] The tax treatment of the structuring may be compared to the one that would have applied in the absence of such a structure (direct investment), in order to identify whether a reduction of tax liability is justified by economic substance or is the result of artificial arrangements. The tax impact may result for instance, in changing the tax qualification of the financial flows for tax purposes (such as changing taxable dividends into non-taxable capital gains).

[25] These may relate to any of the criteria mentioned in Annex V to the Council conclusions of 5 December 2017: transparency and exchange of information, fair taxation (including criterion 2.2), BEPS standards. For example, the harmful tax regimes that a jurisdiction under Annex II has committed to abolish should be banned from structures of projects financed by EU funds; similarly, where a jurisdiction would not yet meet transparency criteria because of insufficient exchange of information mechanisms with EU member states, it should be checked whether the non-reportable tax information may result in avoiding taxation in the EU member states concerned.

1.3 Information records

Given the nature and scope of information relevant to assess tax avoidance risks, such information should be retrieved and held by the Implementing Partners in accordance with their rules and procedures. Where applicable, information could also be usefully sought by the Implementing Partners with respect to advice provided by tax advisers or other intermediaries.

In addition, Partners implementing EU funds in indirect management should report to the Commission their decisions to exclude a participant or a beneficiary from EU financing on the basis of exclusion grounds equivalent to those set out by the Financial Regulation, including tax avoidance.[26]

IV (2) Information on the criterion of non-cooperative jurisdictions for tax purposes

Implementing Partners managing EU financial instruments or budgetary guarantees shall not enter into new or renewed operations with entities established or incorporated in jurisdictions listed as non-cooperative by the EU, unless the project is physically implemented in the jurisdiction and contains no aspect, *inter alia*, of tax avoidance[27]. Therefore, jurisdictions listed under Annex I to the Council conclusions shall be considered as non-cooperative for tax purposes ("the Annex I Jurisdictions") and shall therefore not be used for financial instruments or budgetary guarantees (subject to the physical implementation derogation).

This section provides information on the definition of new and renewed operations, the conditions for applicability of the derogation for physical implementation as well as setting out how changes in the status of jurisdictions can be implemented.

2.1 Temporal scope of the provision

The adoption of the EU list on 5 December 2017 triggered the application with regard to the listed jurisdictions of article 22 of the EFSD Regulation, article 140(4) of the Financial Regulation as well as article 13 of the ELM Decision and article 22 of the EFSI Regulation in the versions then applicable of these two legal acts[28].

All operations, approved or not by the Governing Board of the Implementing Partner, that remained to be signed with financial intermediaries and/or other implementing entities at the date of adoption of the EU list fall under the above mentioned provisions.

If a jurisdiction is added to the EU list by the Council, operations that bear a link with that jurisdiction and that are signed after the EU list is updated shall be considered as "new or renewed operations".

For delegation/guarantee agreements signed between the Commission and the relevant Implementing Partner before the adoption of the EU list the following shall apply: If the relevant delegation or guarantee agreement includes a reference to the EU list, the Implementing Partner may not sign agreements for new or renewed operations under such delegation/guarantee agreement that would show presence of Annex I Jurisdictions as from

[26] These decisions should then be reflected in the Recommendation of the Panel convened at the request of the Commission to exclude the same participant/beneficiary and/or impose a financial penalty (see Annex 1).

[27] Since the current article 140(4) of the Financial Regulation does not mention tax avoidance and pending the entry into force of the revised Financial Regulation, it is to be considered that, regarding Financial instruments under indirect management, checking that the project physically implemented in a non-cooperative jurisdiction does not contribute to tax avoidance is good practice.

[28] Article 13 of the ELM Decision and Article 22 of the EFSI Regulation in the version applicable on 5 December 2017 contained provisions regarding non-cooperative jurisdictions that have a scope similar to the scope of the currently applicable version of these provisions.

the date of adoption of the EU list. Contracts which have been signed already and where Implementing Partners have contractual obligations to commit financing will not be considered new or renewed operations. However, it is advisable that Implementing Partners consider enhanced monitoring of their existing portfolio of transactions or relocation where their policies allow.

Relevant agreements for new and renewed operations shall also encompass any operation that requires a new contract signature or any new commitment by the Implementing Partner that is supported by EU funds (i.e. including *inter alia* top-ups, project extensions, project restructuring)

2.2 Derogation for physical implementation

Implementing Partners may derogate from the above mentioned prohibition on non-cooperative jurisdictions under the conditions that (a) the project is physically implemented in a non-cooperative jurisdiction **and** (b) the operation does not present any indication that it contributes to money laundering, terrorism financing, tax avoidance, tax fraud or tax evasion. This derogation intends to preserve the development policy of the EU[29].

In assessing the applicability of this derogation in the context of tax avoidance, Implementing Partners shall assess:

(i) The physical location of the project, which is the ultimate activity supported by the EU funds. Determination of physical location should involve an appropriate economic substance test, which for example could determine: whether a significant proportion of the investments are made within the jurisdiction in question (in tangible and/or intangible assets); whether the entity financed is operating in the said jurisdiction through local offices; whether the entity financed generates revenues locally, employs staff locally and/or taxes are being paid locally.

(ii) The risk of contribution of the operation to tax avoidance[30]. In determining whether there is a risk that the operation contributes to tax avoidance, the Implementing Partner should carry out the same checks on tax avoidance as set out in section IV (1).

The derogation can only apply when both of the above conditions are met.

It should be noted that operations where a relevant entity is located in a different non-cooperative jurisdiction than the project should be considered as having a clear tax avoidance risk and therefore the derogation should not apply. In this context for projects that involve financial intermediaries established in a non-cooperative jurisdiction, the derogation should apply only when the financial intermediary (ies) and final beneficiary are established in the same jurisdiction.

The derogation for physical implementation is the only derogation to the EU list explicitly allowed by the legal provisions. With regard to the Annex I Jurisdictions, there is no other derogation possible.

[29] Article 140(4) that will remain applicable until summer 2018 shall be interpreted as containing a similar derogation.

[30] Under the EFSD and all the other EU acts mentioned in this Communication, operations are loans, guarantees, equity or a quasi-equity investments or other risk-sharing exposures as well as Technical Assistance undertaken by an Implementing Partner with a relevant entity through a contract or an indirect relationship based on this contract.

2.3 Change of status of a jurisdiction

The EU list is expected to evolve and the content of the Annex I and the Annex II of the Council conclusions is expected to change over time (see Box 2).

In the case of a jurisdiction newly listed under Annex I, any new or renewed operation with entities established or incorporated in such jurisdiction will be immediately prohibited, according to the legal provisions described above. In the case of a jurisdiction being delisted, it will immediately be taken off the EU list. Operations involving entities located in such a jurisdiction may be approved by Implementing Partners from the date of the Council conclusions indicating de-listing of such jurisdiction. Signature of these operations should only take place after the publication of the de-listing in the Official Journal.

The presence of an Annex II Jurisdiction in the structure of an operation triggers a case-by-case examination to address the tax avoidance risk and demonstrate that the use of such jurisdiction is not motivated by tax reasons (as set out in section IV (1)). In addition, pending the fulfilment of the commitments taken by an Annex II jurisdiction, the Implementing Partners are recommended to cater for the case where the jurisdiction may be listed as non-cooperative for tax purposes, by including where possible a contractual commitment to relocate or take other appropriate actions within 6 to 9 months following the change of status. This would provide an incentive to the jurisdictions to swiftly follow-up on commitments while enabling the approval or signatures of projects in these jurisdictions.

Box 2: Listing process

A decision to amend the EU list may be taken by the Council at any moment in time, taking into account:

- For Annex I Jurisdictions, the said jurisdiction would have taken commitments to implement good tax governance principles, and therefore, could be moved from Annex I to Annex II, or would implement these principles immediately and therefore, be removed from the EU list completely;
- For Annex II Jurisdictions, the said jurisdiction would have met the commitments taken to implement tax governance principles, and could therefore be taken off the list or, if commitments have not been implemented, shifted to Annex I.

Table 1: Rationale for change of status of a jurisdiction

From: \ To:	**Annex I**	**Annex II**	**Non-listed**
Annex I		The jurisdiction listed under Annex I has taken commitments to address the tax governance issues identified during the screening process, and is therefore moved to Annex II.	The jurisdiction listed under Annex I has addressed the tax governance issues that led to its listing, as a result, it is taken from the list completely.
Annex II	The Annex II Jurisdiction has not met the commitments taken by the date indicated in the Council conclusions within the agreed timeframe.		The jurisdiction listed under Annex II has respected its commitments to address the tax governance issues that led to its listing in the agreed timeframe.

Non-listed	The jurisdiction has been reviewed as part of the screening process of the EU, issues related to tax governance have been raised and no commitment have been given from the jurisdiction to improve the situation, hence it is listed on Annex I.	The jurisdiction has been reviewed as part of the screening process of the EU, issues related to tax governance have been raised, and commitments have been given by the jurisdiction that it will address the tax governance issues raised, hence it is listed on Annex II.	

New jurisdictions can also be added by the Council at any time to the list, either in Annex I or Annex II.

V. Aligning Implementing Partners' internal policies to new EU tax requirements

Today, most Implementing Partners, including international financial institutions, have in place an internal policy related to the treatment of non-cooperative jurisdictions, which essentially clarifies the practicalities of implementation of internationally agreed standards for tax governance.

For the EIB Group that is subject to EU law in general, the ELM Decision and the EFSI Regulation impose to the EIB and the EIF a legal obligation to review their policies of non-cooperative jurisdictions following the adoption of the EU list and to report on these policies on a regular basis. The EIB Group adopted an interim approach to the non-cooperative jurisdictions policy of the Group in January 2017 in order to prepare the ground for a methodology adapted to the new rules, until the EU list had been adopted, and should now review its non-cooperative jurisdictions policy.

For IFIs and other Implementing Partners not subject to EU law, such as the World Bank, the European Bank for Reconstruction and Development (EBRD) and other institutions, the delegation/contribution agreements for their activities involving EU funds will require that the operations financed comply with EU tax standards. These standards would ideally be expanded across all their operations. This could be translated into a revision by these Implementing Partners of their internal policies on non-cooperative jurisdictions, which would ideally take place within 2018. The review of internal non-cooperative jurisdictions policies of Implementing Partners should not delay the implementation of the legal requirements related to the compliance with the EU list described above, as these take immediate effect.[31]

Scope

It would seem useful that Implementing Partners ensure coherence in their approach to tax governance matters by recognising the EU list as one of the key international list of jurisdictions, in addition to the ones of the Organisation for Economic Cooperation and Development (OECD) Global Forum or the Financial Action Task Force (FATF), and apply it to all their operations, involving EU funds or not.

The relevant EU legal provisions require that, when implementing financial instruments and budgetary guarantees, the Implementing Partners shall transpose compliance with the EU tax requirements to their financial intermediaries or other implementing entities and shall request the financial intermediaries to report on their observance. Since Implementing Partners may

[31] Member State development finance institutions should comply with the same standards as a consequence of application of EU law (regulations and directive)

rely on the same financial intermediaries for channelling EU funds and other types of funds, it is expected that the requirements of such financial intermediaries complying with the EU tax requirements is applied across all their contracts with the Implementing Partner in question, not only the ones relevant to EU funds.

Identification of beneficial owners

When reviewing the structure of an operation to determine potential issues in terms of tax governance, the Implementing Partners generally use a minimum threshold of ownership, direct or indirect, of the relevant entities, to determine the significance of the presence of an entity in the shareholding structure. In this context, further consideration should be given to the proper identification of who ultimately owns or controls the beneficiary or beneficiaries of the funds, i.e. the ultimate beneficial owners. Consistency with the customer due diligence requirements from the anti-money laundering directive (Directive 2015/849[32]) is considered good practice. In the case of legal entities or legal arrangements, reference should be made to the beneficial ownership definition stemming from Article 3(6) (a) (b) (c) of Directive 2015/849 which is set on internationally agreed standards. In particular, Implementing Partners should at least identify the natural persons having a controlling ownership interest in a legal entity by considering the indicative threshold of 25% direct or indirect ownership - or having control through other means (i.e. consideration of lower threshold and other means of control). The Commission recommends that this assessment should be made for corporate entities even below such 25% threshold and ideally aiming at a 10% minimum threshold. After having exhausted all possible means and provided there are no grounds for suspicion, Implementing Partners can consider the natural person holding the position of senior managing official as the beneficial owner. In any case, Implementing Partners should record the actions taken in order to identify the beneficial owner. Where there is a remaining risk of tax avoidance linked to the identification of ultimate beneficial owners, the Commission recommends that Implementing Partners perform tax avoidance checks on all relevant entities involved in the project, whereby the relevant entities are defined under section IV (1).

Relocation provisions

Currently, Implementing Partners generally outline relocation conditions in their non-cooperative jurisdictions policies, whereby an operation remains eligible for approval and/or signature if, under certain conditions set by the internal policies, the project promoter agrees to a restructuring aiming at relocating an entity from a listed jurisdiction to another acceptable jurisdiction. It would be useful if the Implementing Partners aligned the relocation provisions outlined in their internal policies to reflect the specificities of the EU policy on non-cooperative jurisdictions for tax purposes as set out in section IV (2).

Existing operations

Although the EU list applies to new and renewed operations only, it would seem good practice if Implementing Partners took the opportunity of the revision of their non-cooperative jurisdictions policies to reflect on potential enhanced monitoring of tax avoidance issues on their existing portfolios.

[32] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, p. 73–117.