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COMMISSION RECOMMENDATION

of 14.7.2020

**on making State financial support to undertakings in the Union conditional on the
absence of links to non-cooperative jurisdictions**

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) The diversion of financial aid to tax havens can damage the integrity of Member States' public finances as well as the proper functioning of the Union financial system and the internal market of the Union. The Commission has taken a clear stance against tax havens in recent years through its External Strategy for Effective Taxation¹.
- (2) The COVID-19 outbreak has prompted unprecedented action at national and Union level to support Member States' economies and facilitate their recovery. This includes State intervention to ensure liquidity and access to finance for undertakings, considerable part of which has been subject to Union State aid rules.
- (3) The volume of financial support, in particular liquidity support, granted to undertakings in the current COVID-19 related circumstances, calls for immediate and coordinated action to prevent the misuse of public financing. Such action so far has mostly been undertaken in the context of Union State aid rules. Furthermore and beyond the COVID-19 related circumstances, the granting of financial support should address the need for tackling tax avoidance and fraud as well as the abuse of national and Union budgets at the expense of taxpayers and social security systems.
- (4) In order to effectively pursue the efforts to curb tax avoidance, fraud and abuse, it is equally important to cater for the proper functioning of the internal market. For that purpose, Member States should coordinate their action, to prevent their tax bases from being unduly eroded and ensure that they adopt solutions which do not create significant discrepancies or market distortions.
- (5) The Union list of non-cooperative jurisdictions for tax purposes ('EU list of non-cooperative jurisdictions')² is designed to address threats to EU Member States' tax bases. Against that background, it would be appropriate to recommend that Member States make their financial support to undertakings in the Union conditional on the absence of links between those undertakings and jurisdictions that feature on the Union list. Moreover, the Commission observes that, in the context of granting State aid in the form of recapitalisations, several Member States have indicated their

¹ Communication from the Commission to the European Parliament and the Council on an External Strategy for Effective Taxation, 28 January 2016 (https://eur-lex.europa.eu/resource.html?uri=cellar:b5aef3db-c5a7-11e5-a4b5-01aa75ed71a1.0018.02/DOC_1&format=PDF)

² Jurisdictions featuring in Annex I of the relevant Council Conclusions (so-called "black list"). The list is regularly updated: https://ec.europa.eu/taxation_customs/tax-common-eu-list_en

intention to create a strong link between financial support and a fair share of tax paid by the beneficiary.

- (6) Nonetheless, it is critical that Member States protect genuine economic activities in listed non-cooperative jurisdictions and guarantee that those economic activities are not inadvertently affected. For this purpose, Member States should include appropriate exceptions in their laws, in order to ensure that financial support not be prevented where there is real economic activity.
- (7) In order to ensure that the financial support can flow to eligible undertakings, Member States should establish reasonable requirements to demonstrate the absence of links to a jurisdiction that features on the EU list of non-cooperative jurisdictions. At the same time, it is essential to guarantee that undertakings cannot circumvent the requirements for entitlement to financial support.
- (8) In an effort to create a comprehensive framework, Member States should extend the conditions for granting State financial support to undertakings beyond the absence of links to listed non-cooperative jurisdictions, in order to include cases where it has been established that an undertaking or its owners have been the subject of a conviction to a serious crime or in breach of obligations relating to the payment of taxes or social security contributions.

HAS ADOPTED THIS RECOMMENDATION:

1. Subject-matter and scope

This Recommendation sets out a coordinated approach to making the granting of financial support by Member States conditional on the absence of links between the recipient undertaking and jurisdictions which feature on the EU list of non-cooperative jurisdictions.

2. Definitions

“Ownership” means direct and indirect holdings, as well as the beneficial owner, as defined in Article 3 point 6 of Directive 2015/849 of 20 May 2015³.

‘Financial support’ means any type of financial assistance available to all undertakings or selective measures, including State aid granted pursuant to the new State Aid Temporary Framework⁴.

‘Undertaking’ means any entity or natural person engaged in economic activities regardless of its legal form or sector of activity.

3. Making State financial support to undertakings in the Union conditional on the absence of links to jurisdictions which feature on the EU list of non-cooperative jurisdictions

Where Member States adopt measures that provide financial support to eligible undertakings in their jurisdiction, they should make the entitlement to such financial support contingent upon a number of conditions. Therefore, the undertakings that receive the financial support should not:

³ 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 purpose of money laundering or terrorist financing, OJ L 141, 5.6.2015, p. 73.

⁴ Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak C/2020/1863, OJ C 91I , 20.3.2020, p. 1, as amended on 3 April, 8 May and 29 June 2020.

- (a) be resident for tax purposes in, or incorporated under the laws of, jurisdictions that feature on the EU list of non-cooperative jurisdictions;
- (b) be controlled, directly or indirectly, by shareholders in jurisdictions that feature on the EU list of non-cooperative jurisdictions, up to the beneficial owner, as defined in Article 3 point 6 of Directive 2015/849;
- (c) control, directly or indirectly, subsidiaries or own permanent establishments in jurisdictions that feature on the EU list of non-cooperative jurisdictions; and
- (d) share ownership with undertakings in jurisdictions that feature on the EU list of non-cooperative jurisdictions.

In order to verify compliance with the rule prescribing the absence of links to jurisdictions that feature on the EU list of non-cooperative jurisdictions, Member States should ensure that not only the immediate shareholders but also the ultimate owner and all other undertakings under the same ownership are not tax resident in, or incorporated under the laws of, such a jurisdiction. The owners of the undertaking that receives financial support may be legal entities (e.g. corporations, partnerships, etc.), legal arrangements (e.g. trusts) or natural persons.

For the purpose of determining whether an undertaking may be granted financial support, it should be irrelevant how many tiers of legal entities or legal arrangements may sit between the undertaking established in the Member State that grants the financial support and the entity in a jurisdiction that features on the EU list.

4. Carve-outs

Member States may disregard the existence of links to the listed non-cooperative jurisdictions, when the undertaking provides evidence that one of the following circumstances is met:

- (a) where the level of the tax liability in the Member State granting the support over a given period of time (e.g. the last three years) is considered adequate when compared to the overall turnover or level of activities of the undertaking receiving the support, at domestic and group level, over the same period.
- (b) where the undertaking makes legally binding commitments to remove its ties to EU listed non-cooperative jurisdictions within a short timeframe, subject to appropriate follow-up and sanctions in case of non-compliance.

Member States should disregard the existence of links to the listed non-cooperative jurisdictions where the undertaking has substantial economic presence (supported by staff, equipment, assets and premises, as evidenced by relevant facts and circumstances) and performs a substantive economic activity in listed non-cooperative jurisdictions.

Member States should not apply those exceptions if they are not in a position to verify the accuracy of the information. This could be due to the insufficient exchange of information on request with the third country concerned, in particular the absence of a tax treaty allowing exchange of information or the lack of cooperation from the third country jurisdiction concerned.

5. Implementation and enforcement

Member States should agree to reasonable requirements demonstrating the absence of links to a jurisdiction that features on the EU list of non-cooperative jurisdictions. The following principles aim at assisting Member States in ensuring swift implementation and effective enforcement of the requirements:

- (a) In order to simplify procedures and facilitate access to financial support, Member States could accept self-certifications by the applicants as evidence that they are fully compliant with the requirements for receiving the financial support. That process should be complemented with enhanced audits/controls at a later stage making full use of the tools available in order to mitigate the risk of non-compliance such as country by country reports, automatic exchange of financial account information, exchange of information on request or access to beneficial ownership information.
- (b) Member States should provide for effective, proportionate and dissuasive sanctions in order to discourage false or inaccurate information by the applicants, including, as a minimum, the recovery of unduly granted financial support.
- (c) Member States should not allow self-certification and should carry out enhanced verifications where the undertaking in question has links to EU listed jurisdictions and claims the benefit of a carve-out.

6. Other restrictions

Member States should refrain from providing financial support to undertakings in the following cases:

- where it has been established that an undertaking or its owners have been the subject of a conviction by final judgment for any of the crimes laid down in Article 57(1) of Directive 2014/24/EU of the European Parliament and of the Council⁵;
- where it has been established by final judgment or final administrative decision that an undertaking or its owners is in breach of its obligations relating to the payment of taxes or social security contributions in accordance with the applicable law.

7. Follow-up

Member States are requested to inform the Commission about the measures taken further to the present Recommendation.

The Commission is ready to discuss with Member States their plans for ensuring that the granting of State aid, in particular in the form of recapitalisations, should be limited to undertakings paying their fair share of tax.

⁵ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, OJ L 94, 28.3.2014, p. 65-242.

The Commission will publish a report on the application of this Recommendation within three years after its adoption.

Done at Brussels, 14.7.2020

For the Commission

The President

