OXFAM International

INPUTS ON THE REVIEW OF THE MANDATE OF THE CODE OF CONDUCT GROUP

CRITERIA

1. **Use the same criteria for the assessment of Member States and third countries.**
   Currently only the criterion 2.1 of the list of non-cooperative jurisdictions (Fair taxation criteria – preferential tax measures) applies to Member States too, since it directly refers to the Code of Conduct for Business Taxation, that is used for the assessment of Member States. The criteria on tax transparency (criterion 1) and on the implementation of anti-BEPS measures (criterion 3), as well as the substance criterion (criterion 2.2) are not applied for the screening of Member States. Applying the same criteria to both Member States and third countries is essential to assure the coherence of the EU blacklisting process.
   For example, Malta is not compliant with the tax transparency criterion of the list of non-cooperative jurisdiction, but this will not be assessed by the Code of Conduct Group since Member States are not screened according to that criterion. In particular, in September 2020 Malta was assessed sufficiently compliant by the Global Forum with respect to the OECD Exchange of Information on Request (EOIR) standard and the tax transparency criteria of the EU list of non-cooperative jurisdictions requires third countries to have at least a "Largely Compliant" rating. Panama and, most recently, Barbados and Anguilla, have been blacklisted for that criterion but Malta, as Member state, is not.

Review of the definition and assessment of harmful tax regimes

2. **Include economic analysis to assess harmful tax regimes**, and in particular consider whether FDI (inward and outward) and passive income (e.g. royalties paid and received, net intra-group interest income, net intra-group dividend payments) are disproportionate compared to the country GDP.
   Oxfam conducted the analysis for EU Member States and found out that both in 2017 and in 2018 five EU Member States (Cyprus, Ireland, Luxembourg, Malta and the Netherlands) had disproportionate levels of FDI and/or passive income. A similar methodology has been applied by the European Commission in the European Semester: the European Semester Country Reports state that economic evidence suggests that the above MSs have tax rules that are used for aggressive tax planning.
   The IMF has also shown the correlation between tax havens and FDI: it demonstrated that 10 countries host more than 85 percent of all phantom investments (Luxembourg, Netherlands Hong Kong SAR, the British Virgin Islands, Bermuda, Singapore, the Cayman Islands, Switzerland, Ireland, and Mauritius). None of them is currently blacklisted.

3. **Erase the reference to preferential tax regimes according to which a regime is considered harmful if it grants tax advantages to non-resident compared to domestic business.** A regime should be considered harmful *per se* even if it applies to both domestic and non-resident business. This criterion pushes countries into a 'race to the bottom' by simply lowering tax rates instead of designing a selective tax practice.
   Morocco for example is likely to be delisted soon from the greylist because the harmful tax regime "Casablanca Finance City" was changed and companies' export activities will be taxed the same as their local ones. However, the regime will still grant a five-year CIT exemption and a 0% withholding taxes on dividends.

Another example comes from Barbados. The country offered preferential tax reductions for international companies registered there, which were taxed on their profits at rates of just 0–3%, while domestic companies had to pay 30% tax. In order to align its regime with the EU requirements, Barbados applied tax reductions to all companies registered in the country. This effectively means that, from 2019, small companies have to pay 5.5% tax on their profits, while the corporate income tax rate for big companies is only 1%.

4. **Include 0 or low level of taxation as standalone criteria and not just indicator, and consider the country effective tax rate**. The Dutch definition of low tax jurisdiction (9% statutory corporate rate) could be considered, but a Minimum Effective Tax Rate (METR) will be a better solution. The EU can fix a METR while the OECD/BEPS2 negotiations on Pillar 2 are still ongoing.
   In the assessment of both MSs and third countries, the low tax rate is considered a gateway criterion, meaning that, if it is not met, the other criteria can be applied. This approach is used for the screening of both Member States and third countries. In the case of Member States there is also a higher degree of discretionarily since the Code states that the level of taxation should be significantly lower, including zero taxation, than those levels which generally apply in the Member State in question but "significantly lower" is not defined and the Member State is taken as reference point.
   The fact that 0 tax rate regimes are not considered automatically harmful, in addition to the shortcomings of other criteria, have allowed countries like Bahamas, Bermuda, Guernsey and Isle of Man to be completed delisted despite still having a standard corporate tax rate of 0%.

5. **Review the definition of real economic activity or substantial economic presence**, defining a precise 'adequate' quantity of business and staff a multinational must locate in a jurisdiction in order to assess if there is a real economic activity or a substantial economic presence. Moreover, **the implementation of the substance criterion should be monitored and evaluated.** At this purpose, the country by country reports should be accessible and analysed by the Group.
   The EU has not required neither EU countries or third countries to include in their laws a quantitative definition of the 'adequate' quantity of business and staff a multinational must locate in a jurisdiction in order to pass this criterion. Moreover, even when a country passes a legislation containing the substance criterion, this not necessarily means that the substance test will be quickly applied, or that a company which fails the test will quickly have penalties imposed on it. For example, the laws of the Cayman Islands, the British Virgin Islands and Jersey, stipulate that the authorities have up to six years after the end of a financial reporting period to determine that a company has not met the test. Moreover, these reports have to be sent only to the tax authority of the country where that company's parent company or ultimate owner is based, and therefore the European Commission does not often have any monitoring role.
   An adequate definition of real economic activity or substantial economic presence should be able to detect and stop all letterbox companies. They are still widely used in the EU. The Netherlands for example is home to more than 14 000 letterbox companies and a recent Oxfam report demonstrates that TOTAL used, among others, letter box companies in the Dutch country to extensively avoid paying taxes.

6. **Expand the definition of harmful tax practices** to include territorial tax regimes that facilitate double non-taxation, unilateral transfer pricing adjustments and similar rules that result in a deduction without a corresponding inclusion, along with all aggressive tax rules that facilitate tax avoidance (such as low withholding taxes for interests, royalties and dividends) and other no-tax or low-tax regimes that inherently attract profit shifting (regardless of whether they are applied to foreign or domestic companies) like patent boxes and tax holidays.
   Many EU governments and companies are abusing tax practices like patent boxes, research and development super deduction and tax credits. Evidence shows that these practices, introduced to support innovation, instead have led to a new, harmful race to the bottom in corporate taxation. According to EU figures, 15 out of 28 EU member states had a patent box in 2018.
   To expand the fair taxation pillar, the EU could use the methodology applied in two studies on aggressive tax planning it conducted in 2015 and 2017.

Review of the transparency criteria

7. **Introduce a standard flexible approach for developing countries on the transparency and anti-BEPS measures criteria.**
   A number of developing countries have been listed by the EU for failing to comply with international standards which these countries have not had a chance to agree on, and which some of them do not have the capacity to implement. Currently countries like Botswana, Eswatini, Namibia and Jordan are on the 'grey list' and risk to be blacklisted because they have not yet signed the OECD Multilateral Convention on Mutual Administrative Assistance.
   Their specific situations should be taken into account, allowing the countries to make a voluntary decision based on their national priorities and capacities as to whether they want to join the OECD BEPS Inclusive Framework and the Global Forum and/or adopt the OECD BEPS minimum standards. Softer countermeasures should be applied for countries not complying with the transparency and anti-BEPS measures criteria. At the same time, the EC and Member States should provide more and better support to developing countries for Domestic Revenue Mobilisation (DRM).

8. **Finalise the inclusion of a criterion on beneficial ownership transparency.**
   Tax havens can offer high levels of confidentiality around beneficial ownership in order to attract financial activity, and corporate actors may exploit this lack of transparency in order to illicitly reduce their tax liabilities. It is therefore important that a criterion on beneficial ownership, already in the pipeline, is promptly introduced.

TRANSPARENCY OF THE CODE OF CONDUCT GROUP

9. **Give same visibility on the assessment of Member States and third countries**.
   Currently the review of the list of non-cooperative jurisdictions is published twice a year and general assessments of new listed or delisted countries are published and advertised. Differently, assessments about harmful tax regimes of Member States are not officially announced and they can be retrieved only in the communications of the Code of Conduct Group to the Council, but without any explanation of the assessments and any official public communication. The two assessment processes should receive the same visibility and level of

explanation. This would guarantee coherence of the EU approach towards tax havens and harmful tax practices.

10. **Publish composition and contacts of the Code of Conduct Group.**
Due to the relevance of the topics discussed and agreed in the Code of Conduct Group, the composition of the group (not only the Chair) and of the sub-groups, as well as the contacts, should be published and easily accessible.

11. **Publish more substantial and regular reports on the work of the Group and background documents before the meetings, and archive all documents in a consistent and user-friendly way.** Currently the agenda, the minutes and documents of the meetings are not accessible. Some efforts have been done to increase transparency, but the documents are still limited, published later in time and not easily retrievable.

12. **Inform the European Parliament and national parliaments in detail ahead of any proposed changes to the list of non-cooperative jurisdictions and assessment of Member States.** Currently the European Parliament and national Parliaments are excluded from the process. Informing them in advance will give them the possibility to comment and assure more accountability of the process.

13. **Consider mechanisms to better include the voices of non-EU countries in this process**. One possibility would be to set up a working group or a consultative body that brings together non-EU countries, civil society and experts to facilitate dialogue on the decisions made. This could significantly increase the legitimacy of the EU process and its acceptance by non-EU countries.