



Brussels, 6.12.2012
C(2012) 8805 final

COMMISSION RECOMMENDATION

of 6.12.2012

**regarding measures intended to encourage third countries to apply minimum standards
of good governance in tax matters**

COMMISSION RECOMMENDATION

of 6.12.2012

regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters

THE EUROPEAN COMMISSION,

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

Whereas:

- (1) In an international context, the existence of differing tax legislation is generally accepted as a consequence of fiscal sovereignty. In this context, some, typically small, third countries with limited financial needs have opted for a low level of income tax which applies generally, both to individuals and to companies, or even no income tax at all. Such tax policies are not necessarily undesirable as such, as long as the state participates in international cooperation in order to allow other states to enforce their tax policy.
- (2) However, policies which entail a low level of income tax or none at all often go along with a lack of transparency or exchange of information with other states. The states concerned attract investment by offering non-residents a shelter for some types of mobile income or capital and allowing them to conceal the existence of such income or capital from the tax administration of their state of residence.
- (3) Various initiatives have been taken in international fora, such as the Organisation for Economic Co-operation and Development or G20, to address these concerns. Moreover, the Global Forum on Transparency and Exchange of Information for Tax Purposes (hereinafter "the Global Forum") has developed standards of transparency and exchange of information for tax purposes. In 2009, the Global Forum agreed to review the implementation of those standards. It has engaged in a comprehensive peer review process and many traditional low tax jurisdictions have agreed to conclude bilateral agreements on exchange of information on tax matters.
- (4) Within the Union, issues of transparency and exchange of information are addressed by Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC¹. Moreover, there is a consensus in the Union, expressed in the Code of conduct for business taxation referred to in Annex 1 to Conclusions of the ECOFIN Council meeting on 1 December 1997 concerning taxation policy², that harmful tax measures are not acceptable, which

¹ OJ L 64, 11.3.2011, p. 1.

² OJ C 2, 6.1.1998, p. 1.

makes it difficult for Member States to maintain or introduce such measures. In addition, a number of measures potentially falling under the Code of conduct are subject to scrutiny under the rules on state aid set out in the Treaty on the Functioning of the European Union (TFEU).

- (5) In its relations with third countries the Union has sought to convince them to subscribe to the Union principles concerning transparency and exchange of information (similar to the broadly accepted international standards for transparency and exchange of information) and the abolition of harmful tax measures as described in Commission Communication on promoting good governance in tax matters³ and Commission Communication on tax and development cooperation with developing countries on promoting good governance in tax matters⁴.
- (6) Member States whose tax base has been negatively affected by a lack of transparency or by harmful tax measures on the part of third countries have taken steps to remedy that situation. However, taxpayers respond to such measures by routing business or transactions through another jurisdiction with a lower level of protection. This risk is particularly relevant within the Union given the freedom of economic operators to do business anywhere in the Union. Consequently, the level of protection available within the Union against such erosion of the tax base tends to correspond to the lowest level of protection offered by any Member State.
- (7) The distortions that this situation brings about within the Union can lead to artificial capital flows and movements of taxpayers within the internal market and thus harm its proper functioning, as well as erode Member States' tax bases. Such distortions should be remedied through an approach shared by all Member States.
- (8) Therefore, it is necessary to clearly spell out minimum standards of good governance in tax matters, both in regard to transparency and exchange of information and in regard to harmful tax measures, and a number of measures to be taken vis-à-vis third countries, with a view to encouraging those countries to comply with those standards.
- (9) In regard to transparency and exchange of information, an internationally recognised standard has been set out in the Terms of Reference agreed by the Global Forum in 2009. Those terms should therefore form the basis of this Recommendation. As far as harmful tax measures are concerned, the Code of conduct for business taxation has proven to be a pertinent reference within the Union. Member States have committed themselves to promoting principles of that Code in third countries. It is therefore appropriate to refer to the criteria of that Code for the purposes of this Recommendation. In this regard, it is also appropriate to refer to the work of the Code of Conduct Group (business taxation), set up within the framework of the Council to assess the tax measures that may fall within scope of the Code of conduct for business taxation.⁵ The cases assessed by this group can be of assistance when it comes to examine whether a given measure is to be considered as harmful.
- (10) This Recommendation should indicate a set of measures to be applied in relation to third countries that do not meet the minimum standards of good governance in tax

³ COM (2009) 201 final of 28 April 2009.

⁴ COM (2010) 163 final of 21 April 2010.

⁵ OJ C 99, 1.4.1998, p. 1.

matters. By applying these measures together, Member States would significantly increase the overall effectiveness of the measures taken by each of them. Losses of tax revenues could therefore be reduced, along with administrative costs for tax administrations and the compliance burden on taxpayers.

- (11) In order to promote the application of the minimum standards of good governance in tax matters, it is also necessary to indicate positive measures to encourage third countries that meet these standards or that are committed to meeting them but need assistance to achieve this.
- (12) The measures indicated in this Recommendation and applied by Member States must be compatible with Union law, in particular with the fundamental freedoms enshrined in the TFEU,

HAS ADOPTED THIS RECOMMENDATION:

1. Subject Matter

This Recommendation provides criteria making it possible to identify third countries which do not meet minimum standards of good governance in tax matters. It also lists a series of actions that Member States may take in relation to third countries that do not meet those standards and in favour of third countries that do comply with them.

This Recommendation concerns income taxation.

2. Definitions

For the purpose of this Recommendation, the following definitions apply:

- (a) "income tax" means any tax on income, whether levied from individuals or from legal entities and irrespective of the manner in which it is levied, imposed on behalf of a state, its political subdivisions or its local authorities;
- (b) "third country" means any jurisdiction that is not a Member State;
- (c) "national blacklist" means a list adopted by a Member State which identifies other jurisdictions in regard to whom the Member State applies predefined tax measures or tax policies.

3. Minimum standards of good governance in tax matters

A third country only complies with minimum standards of good governance in tax matters where:

- (a) it has adopted legal, regulatory and administrative measures intended to comply with the standards of transparency and exchange of information set out in the Annex, and effectively applies those measures;
- (b) it does not operate harmful tax measures in the area of business taxation.

Tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the third country in question are to be regarded as potentially harmful. Such a level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor.

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

- (a) whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or
- (b) whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or
- (c) whether advantages are granted even without any real economic activity and substantial economic presence within the third country offering such tax advantages, or
- (d) whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the Organisation for Economic Co-operation and Development, or
- (e) whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.

When applying those criteria, Member States should take account of the conclusions reached in the Code of Conduct Group (business taxation) in regard to tax measures it has assessed as harmful.

4. Measures directed against third countries not complying with minimum standards set out in point 3
 - 4.1. Member States should publish blacklists of third countries not complying with minimum standards set out in point 3, with a view to the application of point 4.3. Those blacklists should make reference to this Recommendation.
 - 4.2. Member States that have adopted national blacklists should include in such lists third countries not complying with minimum standards set out in point 3.
 - 4.3. Each Member State having concluded a double taxation convention with a third country not complying with minimum standards as set out in point 3 should, as most appropriate with a view to improve compliance by that third country with these standards, either seek to renegotiate the convention, suspend or terminate the convention.
5. Measures in favour of third countries complying with minimum standards set out in point 3
 - 5.1. Member States should remove third countries which comply with minimum standards set out in point 3 from the blacklists referred to in point 4.1.

- 5.2. Member States should consider removing third countries which comply with minimum standards set out in point 3 from any existing national blacklists referred to in point 4.2.
- 5.3. Member States should consider initiating bilateral negotiations for the conclusion of double tax conventions with third countries which comply with minimum standards set out in point 3.
6. Measures in favour of third countries which are committed to comply with minimum standards set out in point 3.
 - 6.1. Member States should consider offering closer cooperation and assistance to third countries, especially developing ones, which are committed to complying with minimum standards set out in point 3, in order to assist those third countries in fighting effectively against tax evasion and aggressive tax planning. To this end, they could second tax experts to such countries for a limited period of time.

When judging third countries' commitment to complying with those minimum standards, Member States should take into account all concrete indications to this effect, in particular steps towards compliance already taken by the third country concerned.

- 6.2. As long as a third country benefits from assistance in accordance with point 6.1 and accomplishes the expected progress towards compliance with the said minimum standards, Member States should abstain from applying the measures referred to in point 4, except for the renegotiation of double tax conventions.
7. Follow-up

Member States should inform the Commission on the measures taken in order to comply with the present Recommendation, as well as any changes made to such measures.

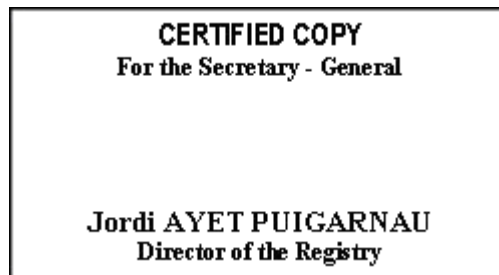
The Commission will publish a report on the application this Recommendation within three years after its adoption.

8. Addressees

This Recommendation is addressed to the Member States.

Done at Brussels, 6.12.2012

For the Commission
Algirdas ŠEMETA
Member of the Commission



Annex
Standards of transparency and exchange of information

A AVAILABILITY OF INFORMATION

A.1 The third country concerned ensures that ownership and identity information for all relevant entities and arrangements is available to its competent authorities.

A.2 The third country concerned ensures that reliable accounting records are kept for all relevant entities and arrangements.

A.3 Banking information is available for all account-holders.

B ACCESS TO INFORMATION

B.1 Competent authorities of the third country concerned have the power to obtain and provide information that is the subject of a request under an agreement on exchange of information, from any person within their territorial jurisdiction who is in possession or control of such information.

B.2 The rights and safeguards that apply to persons in the requested third country concerned are compatible with effective exchange of information.

C EXCHANGING INFORMATION

C.1 Mechanisms for the exchange of information with Member States are such that this exchange is carried out in an effective manner.

C.2 The network of information exchange mechanisms of the third country concerned covers all Member States.

C.3 The mechanisms for exchange of information of the third country concerned contain adequate provisions to ensure the confidentiality of information received from Member States.

C.4 The exchange of information mechanisms of the third country concerned respect the rights and safeguards of taxpayers and third parties.

C.5 The third country concerned provides information under its network of agreements with Member States in a timely manner.