

Civil Society joint paper
Submission for the EIB's Non-Compliant Jurisdictions (NCJ) Policy
review
12 January 2018

The 13 organizations signing this joint paper appreciate the opportunity to provide comments in relation to the review of the Non-Compliant Jurisdictions (NCJ) Policy of the European Investment Bank (EIB), despite regretting no formal consultation has been opened by the EIB on the future NCJ policy. The revision of the NCJ Policy is a crucial opportunity to strengthen the tools the EIB uses to ensure its operations do not fuel tax evasion and tax avoidance practices.

Therefore, we take this opportunity to formulate the following key recommendations:

1. The revised NCJ Policy review should lead to an ambitious outcome, ensuring strong policy coherence between the European Union efforts in fighting tax evasion and tax avoidance and setting in stone the EIB's role as a leading international financial institution in the field of responsible taxation.
2. Fundamental reforms to the existing NCJ Policy are necessary in order to address the serious structural flaws of this policy. The EIB, as the EU Bank, needs to act in coherence with its development mandate under the so-called External Lending Mandate and ensure investments in developing countries are bringing the due revenues to the local tax authorities.
3. The revised NCJ Policy should reflect appropriately the numerous calls from the European Commission, the European Parliament and civil society to stop investing via structures based in tax havens.

Background

For a decade, civil society has been increasingly monitoring the operations of the EIB and other DFIs, especially in relation to taxation. In this regard, civil society organisations (CSOs) have demanded that the bank steps up its effort to combat tax evasion and tax avoidance and does not finance operations linked to tax havens. In recent years, a set of reports has assessed the EIB's operations, coming to a critical conclusion: the bank needs to go beyond its current approach to taxation.

In parallel, the European Commission has also significantly raised the pressure on the EIB, especially via its [External Strategy for Effective Taxation](#) published on 28 January 2016. The Commission remarked that European legislation prohibits EU funds from being invested in entities in third countries which do not comply with international tax transparency standards. Then, it called on the EIB “to transpose good governance requirements in their contracts with all selected financial intermediaries”. It further regretted that “in the past [it] has had to block certain projects submitted by the [financial institutions – meaning the EIB] because they involved unjustifiably complex tax arrangements through harmful or no tax regimes in third countries”.

The European Parliament also intensified its calls on the EIB to clean up its act on fiscal matters. In 2017, it adopted a [resolution](#) which “*underlines that combating all forms of harmful tax practices should remain an important priority of the EIB*” and calls on the EIB to “*review and enhance its non-transparent and uncooperative jurisdictions policy (NCJ Policy) as soon as possible once the EU list of non-cooperative tax jurisdictions is drawn up*”.

This joint civil society submission provides an analysis and distils main recommendations about the NCJ Policy undergoing a review. One limit in this exercise though is that the Interim Approach to the NCJ Policy has not been fully disclosed to the public. Therefore, commenting on this Interim Approach proves to be quite complicated.

This submission is divided in three sections:

1/ Hallmarks for the NCJ policy: What are the risks indicators the EIB should consider during the appraisal, approval and monitoring of projects?

2/ Key tools needed to implement the NCJ policy, with a specific focus on tax transparency.

3/ Towards a responsible taxation policy for the EU bank: broadening the scope of the NCJ Policy and prioritising domestic resource mobilisation.

Section 1:

Hallmarks for the NCJ policy: What are the risks indicators the EIB should consider during the appraisal, approval and monitoring of projects?

The EIB should not finance - or use its mandatory relocation clause for a project to be re-structured - in the following situations:

- The jurisdiction is listed on the **EU list of non-cooperative jurisdictions** (hereafter “the **EU Black List**”) or is not yet compliant with EU tax good governance criteria and has made commitments to implement tax good governance principles (under the so-called “**Grey List**”). The revised External Lending Mandate of the EIB makes it clear that the EU Black List is binding to the bank, and that EIB operations shall not support projects that contribute to money laundering, terrorism financing, tax avoidance, tax fraud and tax evasion.

Nevertheless, the EIB should keep a “**physical implementation clause**” and could accept a project located in one of these jurisdictions if the project is implemented in this country. The EIB should prevent money to be routed through NCJ jurisdictions otherwise. The idea is not to harm the local population of a country but rather avoid companies and consortium to exploit such jurisdictions - mostly for tax purposes.

It is crucial to note that, even if the EU Black and Grey Lists are binding to the EIB, relying on these lists is not sufficient to ensure that EIB investments do not end up supporting clients avoiding or evading tax. Recent reports by [Oxfam International](#) and [Tax Justice Network](#) - using the same criteria than the European Union - came up with a much larger list including key jurisdictions like the Mauritius, as well as EU Member States (Ireland, Luxembourg, Malta and the Netherlands).

- The operation uses entities either subject to **zero taxation** or less than 50% taxation rate compared to the country of implementation of the project, including hybrid entities (i.e.

entities that are treated as transparent by one country but as non-transparent by another country).

- EIB operations shall not make any use of entities for which a **hybrid mismatch** is possible especially if it can benefit from **preferential tax regimes**, including **intellectual property (IP) transfers or license agreements** in low-tax jurisdictions or if the entities are not covered by Controlled foreign corporation (**CFC**) rules and/or **withholding taxes**.

- The [Annex IV](#) to the proposed revision of the directive 2011/16/EU on mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements provides a **series of hallmarks that should be used as reference by the EIB**. These hallmarks are linked to the so-called “main benefit test” which identifies if “*the main benefit of an arrangement or of a series of arrangements is to obtain a tax advantage if it can be established that the advantage is the outcome which one may expect to derive from such an arrangement, or series of arrangements, including through taking advantage of the specific way that the arrangement or series of arrangements are structured*”.

The OECD also just released a [consultation paper](#) on disclosure rules for Common Reporting Standards (CRS) avoidance and offshore structures. A body such as the EIB should at least apply the types of hallmarks proposed by the OECD, and shall monitor the outcomes of this process.

- Under the current NCJ Policy, counter-parties can still operate in a prohibited jurisdiction if this jurisdiction offers a level of “**corporate security**” but the policy remains unclear about what this can and might entail. Hence, such provision must be taken out of the revised policy.

- In addition, the **tax due diligence** conducted by the EIB must be strengthened. In this regard, the **Interim Approach to the NCJ Policy** adopted by the bank in January 2017 seems to be a step in the right direction. Hence, the revised NCJ policy needs to fully integrate thorough tax due diligence checks, taking into account the following elements that should represent red flags for the EIB:

- Identification of beneficial owners, integrity assessments to identify any sanctioned individuals or entities, screening for adverse media, presence of Politically Exposed Persons (PEPs) and potential conflict of interests, as part of the **EIB’s standard due diligence procedure** and the **EIB’s Anti-Fraud Policy**. No financing should be granted when legal arrangements and entities such as trusts are routed or located in jurisdictions that pose difficulties to identify the **Beneficial Ownership (BO)** of such structures.
- **Reputational checks**, including verifying if future clients are linked to previous tax scandals, by conducting press reviews and exploring the database of the International Consortium of International Journalists (ICIJ) for instance.
- **Enhanced tax-related due diligence** should identify all above-mentioned elements, including links to NCJs, use of preferential tax regimes, tax treatment of cashflows, indicators leading to tax avoidance concerns (such as high leverage ratio), etc. Tax avoidance is a new area of focus for the EIB, and it is necessary that the revised NCJ Policy can be used as a stringent pre-emptive filter at appraisal stage.

Section 2:

Key tools needed to implement the NCJ policy, with a specific focus on tax transparency

The EIB, as a public institution, should **raise the bar on transparency and accountability** towards European citizens and taxpayers. In this context, the EU bank needs to require its clients more than what commercial banks usually do in order to ensure that these clients are not linked to tax evasion or tax avoidance practices. In practice, this means implementing the following recommendations:

- The EIB should require **public Country by Country Reporting (CBCR)** from its clients, without exemptions. Public CBCR requirements should be made an essential part of the Corporate and Social Responsibility (CSR) strategy of the bank, as well as of the EIB project-selection under its 3 Pillar Assessment (3PA) and Result Measurement Framework (REM)..

For EIB lending to multinational companies, the EIB should make public CBCR a mandatory eligibility criteria for any company approaching the bank to benefit from its direct financing, in any economic sector. For EIB lending through financial intermediaries, public CBCR requirements should apply to both the intermediary and the ultimate beneficiaries of EIB funds (if operating in several countries).

This measure would help bring to the public domain how much income and profits are produced in each country by multinational companies, as well as the often modest taxes they pay in each country. Exposing how little tax major corporations pay is one of the best ways to move tax authorities and governments to crack down on tax avoidance by multinational companies within the EU and in developing countries.

- The EIB itself needs to step up the transparency of its operations by **disclosing the beneficial ownership of its clients** on the EIB website as part of the information available during the project's appraisal phase.

- Transparency requirements need to be set in stone as part of the clauses of contracts with EIB clients. In order to demonstrate that, as requested by the European Commission, the EIB is effectively "transposing good governance requirements in contracts", the bank should publish the integrity covenant of its contracts.

Section 3:

Towards a responsible taxation policy for the EU bank: broadening the scope of the NCJ Policy and prioritising domestic resource mobilisation

As some tax issues remain hard to tackle by purely legal means, public institutions such as the EIB need to go beyond its minimum legal obligations and consider all options available to avoid its funding supports companies with tax avoidance schemes. This requires a policy framework that allows the bank to take a proactive and responsible approach to tackle abuses wherever they may appear. Therefore, **in 2018, the EIB should use the review of its NCJ policy to develop a broader responsible taxation policy:**

- The EIB should **include and mainstream tax indicators in its projects indicators**, especially under its operations outside of Europe, and its 3PA and REM evaluation systems. Such indicators need to include minimum effective tax rate for projects as a priority indicator. The EIB needs to explain how these tax indicators are measured and what importance is attached to them in comparison to other development indicators.

- The EIB should assess the impact of its supported projects on **domestic resources mobilisation** in the country of operation. When evaluating projects ex-ante, periodically and ex-post, it is crucial for the bank to include corporate tax payments as a separate indicator in addition to total payments to governments.

A key question in this regard is: will the project have a neutral or even positive impact on tax collection in the country of operation? Any project having a negative impact should be rejected.

- The EIB should **publish on a yearly basis a “Tax report”** on the implementation of the NCJ Policy. To be meaningful, this report needs to include disaggregated data on the tax impact of its investments, and information about how the relocation clause is used. Currently the public is neither aware of the number of applications turned down by the EIB due to non-compliance with the NCJ Policy nor of the number of relocations requested and implemented. If necessary, the EIB should publicly demonstrate that the use of a third jurisdiction was superior in advancing its development mandate compared with a direct domiciliation in the targeted developing country.

- The EIB shall **require all clients to have a responsible corporate tax policy** approved by its board. The policy should be published on the company’s website.

- The EIB shall **develop and strengthen in-house capacity** to oversee due diligence and project monitoring activities to ensure there is no dependency on external advisers who might have a conflict of interest. This could include hiring new staff to focus on tax matters beyond legal compliance, and raising awareness in the Projects and Operations Directorates on the need for fair taxation and to help contribute to sustainable development and human rights. Then, the EIB should consider the creation of a Working Group on tax to take stock of the most recent developments at EU level and supervise the creation of an EIB Responsible Taxation policy.

- Integrating tax evasion and tax avoidance in the **future EIB exclusion system**, which is likely to see the light in 2018. A system of sanctions for clients violating the relocation requirement should also be put in place, including potential suspension or cancellation of the financing, as well as exclusion from future EIB financing.

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