
European Investment Bank

# EIB Policy towards weakly regulated, non-transparent and uncooperative jurisdictions

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# EIB POLICY TOWARDS WEAKLY REGULATED, NON-TRANSPARENT AND UNCOOPERATIVE JURISDICTIONS

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## I. INTRODUCTION

Following the international debate on non-transparent and uncooperative jurisdictions and the G20 call for enhanced and concerted action against such jurisdictions at the London Summit of April 2009, the EIB was the first international financial institution to review and publish on its website in July 2009 a revised and reinforced policy towards offshore financial centres.

The "EIB Interim Revised Policy towards Offshore Financial Centres" approved in July 2009 ("**2009 OFC Policy"**) amended the existing OFC Policy issued in 2005 and has now been updated in line with recent international developments and evolving practices, as summarised below.

### a) 2009 OFC Policy

The 2009 OFC Policy confirmed the 2005 core guidelines (prohibition to carry out operations with links to blacklisted jurisdictions; enhanced vigilance on operations with links to weakly regulated jurisdictions; provision of information to the Board of Directors concerning all operations linked to an offshore financial centre), but several innovative features were introduced:

1) A wider definition of offshore financial centre ("**OFC**"): in the absence of a generally accepted definition, the EIB definition of "OFC" encompassed all weakly regulated and in line with the G20 Action Plan all "non-cooperative" jurisdictions in connection with money laundering, financing of terrorism, tax fraud, tax evasion and harmful tax practices;
2) A stricter commitment to conform with the country assessments carried out by reputable international, standard-setting institutions and organisations ("**Lead Organisations**") including the European Union, the United Nations, the IMF, the Financial Stability Board, the FATF and the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes;
3) A wider scope of activities targeted: the 2009 OFC Policy targets not only money laundering, financing of terrorism, tax fraud and tax evasion but also disreputable practices such as harmful tax practices ("**Targeted Activities**");
4) A wide definition of "**OFC Link**": the 2009 OFC Policy targets not only counterparties located in OFCs but also counterparties owned or controlled by entities located in OFCs;
5) Equal treatment: at the express request of its Board of Directors, the EIB is committed to applying an equal regime to all OFCs, regardless of their location within or outside the EU;
6) Systematic enhanced due diligence and increased tax disclosure: all operations linked to an OFC are subject to enhanced due diligence. This includes increased tax disclosure requirements not only for EIB counterparties, but also for their controlling shareholders located in OFCs. Each of these persons will be asked to provide a detailed explanation of the economic reasons justifying recourse to an OFC for the relevant operation: should the justifications provided be insufficient or not satisfactory to the Bank, the operation cannot be authorised;
7) Relocation requirements: strict relocation requirements have been established for OFC-located counterparties and their controlling entities.

Given the ongoing international developments in connection with non-transparent and uncooperative jurisdictions, the 2009 OFC Policy was defined as "interim" and provided for ongoing follow-up and regular updates to allow the EIB to maintain its forefront role in the fight against OFCs.

### b) "EIB Policy towards weakly regulated, non-transparent and uncooperative jurisdictions" October 2010

More than a year after the entry into force of the 2009 OFC Policy, major developments occurred at the international level and the Bank's practices further evolved to ensure greater transparency of the Bank's activities with a link to an OFC.

Moreover, on the basis of the experience gained in the first phase of implementation of the 2009 OFC Policy, the Bank could observe the impact of the measures adopted and fine-tune their implementation in its daily operations to ensure more effective management of OFC-related risks.

It is for these reasons that the 2009 OFC Policy has been further updated and a revised version is now available.

The present version of the Policy maintains all the principles and measures provided for in the 2009 OFC Policy (i.e. wide definitions of "OFC", "Targeted Activities" and "OFC Link"; strict alignment with Lead Organisations' listings; equal treatment between EU and non-EU OFCs; enhanced due diligence and tax disclosure on all operations with a link to an OFC; relocation requirements), and includes the following additional features:

- Updating of legal references after the entry into force of the Lisbon Treaty;
- Changing the name "OFC" to "**NCJ**" ("**Non-Compliant Jurisdiction**", i.e. country not aligned to international standards in connection with Targeted Activities). In the absence of a generally accepted OFC definition, "OFC" in the 2009 Policy designated all weakly regulated and uncooperative jurisdictions and was in line with pre-existing policies. However, in common jargon, the notion of "OFC" continues to evoke only tax havens and small overseas jurisdictions facilitating tax fraud and tax evasion. The term "OFC" does not therefore appear appropriate to target all jurisdictions currently listed as weakly regulated, non- transparent or uncooperative in connection with the Targeted Activities covered by the Policy. For this reason all references to "OFC" in the Policy were changed to "NCJ" to cover any jurisdiction not aligned to international standards and reported as weakly regulated, non-transparent or non-cooperative by a Lead Organisation in connection with any Targeted Activity covered by the Policy, i.e. not just tax evasion but also money laundering or financing of terrorism. This change is reflected in a change of title: instead of the traditional title "Policy towards offshore financial centres" the title of the present Policy is "Policy towards weakly regulated, non-transparent and uncooperative jurisdictions" with the acronym "NCJ" defined in the Policy. Renaming has no impact on the scope and substance of the Policy;
- More than a year after the entry into force of the 2009 OFC Policy, several core principles of the Bank's Policy towards OFCs can be deemed consolidated and the present Policy is no longer defined as "interim". However, the EIB will continue to monitor international developments in relation to NCJs and Targeted Activities and will continue to update the Policy on an ongoing basis whenever appropriate to ensure the highest standards of integrity and transparency in the Bank's operations;
- Enhanced tax disclosure obligations have been expressly included for cross-border operations which pose tax concerns, even if none of the jurisdictions involved is grey- or blacklisted by any Lead Organisation;
- All measures provided for in the 2009 Policy have been maintained: in particular the relocation requirements have been further highlighted in the present Policy as a fundamental tool for the effective management of risks related to listed jurisdictions in the Bank's daily operations. Additional wording has been inserted for provisions relating to funds in which the Bank invests.

## I.1 PREAMBLE

1. The European Investment Bank (the **"EIB"** or the "**Bank**") welcomes and wishes to contribute to the international efforts to promote integrity in financial markets, in order to protect the global financial system from weakly regulated, non- transparent and uncooperative jurisdictions that pose higher risks of Targeted Activities, as defined herein;

2. The EIB follows up on an ongoing basis the international developments concerning tax, transparency, anti-money laundering and combating the financing of terrorism and promptly updates its relevant policies as appropriate;

3. This document (the "**Policy**") updates the 2005 policy and the 2009 OFC Policy of the EIB in its lending (including fund investments), borrowing and treasury activities connected with weakly regulated, non-transparent and/or non-cooperative jurisdictions, as defined herein;

4. The EIB is the financing body of the European Union and operates in accordance with the Community legal framework. The mission of the Bank is defined in Art. 309 of the Treaty on the Functioning of the European Union (the "**Treaty**") as follows:

   *"The task of the European Investment Bank shall be to contribute, by having recourse to the capital market and utilising its own resources, to the balanced and steady development of the internal market in the interest of the Union".*

5. The mission of the Bank in development cooperation is expressly defined under Art. 209 paragraphs 1 and 3 of the Treaty providing that:

   *"1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures necessary for the implementation of development cooperation policy, which may relate to multiannual cooperation programmes with developing countries or programmes with a thematic approach".*

   *3. The European Investment Bank shall contribute, under the terms laid down in its Statute, to the implementation of the measures referred to in paragraph 1"*

6. Pursuant to Art. 18 of the Bank's Statute:

   *"In its financing operations, the Bank…shall ensure that its funds are employed as rationally as possible in the interests of the Union".*

   The EIB is therefore committed to ensuring that its funds are used for the purposes intended.

   In particular, the EIB is committed i) not to tolerate activities carried out for illegal purposes, including money laundering, terrorism financing, tax fraud and tax evasion[1]; and ii) to discourage prohibited activities and harmful tax practices in all the Bank's areas of operation, including the weakly regulated, non-transparent and uncooperative jurisdictions, as defined herein.

1 See also EIB "Policy on preventing and deterring corruption, fraud, collusion, coercion, money laundering and the financing of terrorism in European Investment Bank activities" ("Anti-Fraud Policy")

### I.2 MAIN DEFINITIONS

For the purposes of this Policy:

**"EU"** means European Union;

**"EU Framework"** [2] includes applicable principles, policies, rules and regulations issued by the EU in connection with NCJs and Targeted Activities, as defined below;

**"Grace Period"** means a standard 6-month period after listing of a Monitored Jurisdiction by a Lead Organisation, as defined below. The Grace Period is granted to all newly listed Monitored Jurisdictions to allow them to take the necessary steps to promptly align with relevant international standards;

**"Cross-border Operation"** means an operation where the counterparty and the project are located in different jurisdictions;

**"Lead Organisations"** means the EU, the United Nations, the International Monetary Fund, the Financial Stability Board, the Financial Action Task Force and the Organisation for Economic Cooperation and Development, and any successor organisation;

**"NCJ"** means "**Non-Compliant Jurisdiction**", i.e. a jurisdiction classified by one or more Lead Organisations as not aligned to international standards in connection with Targeted Activities, as defined below, and includes the following:

- **"Monitored Jurisdiction"** means a jurisdiction classified by one or more Lead Organisations as "grey-listed", weakly regulated and/or weakly supervised and/or non-transparent or equivalent in connection with Targeted Activities, as defined below;
- **"Prohibited Jurisdiction"** means a jurisdiction classified by one or more Lead Organisations as "blacklisted", uncooperative or equivalent in connection with Targeted Activities, as defined below;

**"NCJ Link"** means any of the links below to an NCJ:

- **Location Link**, where the project and/or the relevant counterparty are located in an NCJ;
- **Ownership Link**, where the project and/or the relevant counterparty are owned by a legal or natural person located in an NCJ;
- **Control Link**, where the project and/or the relevant counterparty are controlled by a legal or natural person located in an NCJ (e.g. fund managers);

**"NCJ Operation"** means a lending (including fund investments), borrowing or treasury operation with an NCJ Link;

**"Reference Lists"** means any country list or report on NCJs issued by a Lead Organisation in connection with Targeted Activities;

2 See mainly Treaty on European Union and Treaty on the Functioning of the European Union; Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, as implemented by Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of politically exposed person and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis ("AML Directive"); Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, as amended by Directive 2004/56/EC of 21 April 2004 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, certain excise duties and taxation of insurance premiums; Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures; Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments; Code of Conduct for Business Taxation in the conclusions of the ECOFIN Council meeting of 1 December 1997 (see http://ec.europa.eu/taxation _customs/resources/documents/COC_EN.pdf); Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 31 May 2006 concerning the need to develop a co-ordinated strategy to improve the fight against fiscal fraud; Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee of 28 April 2009 Promoting Good Governance in Tax Matters.

**"Targeted Activities"** means prohibited activities such as money laundering, financing of terrorism, tax fraud and tax evasion ("**Illegal Activities**") and harmful tax practices ("**Harmful Activities"**).

### I.3 REFERENCE LISTS

For the purposes of determining the risk related to the involvement of the Bank in an NCJ Operation, the EIB:

1) is committed to complying with the EU Framework;
2) endeavours to consistently conform with the Reference Lists;
3) in the event of conflict between different Reference Lists, the EU Framework and any Reference List published by the EU shall prevail; and
4) in the absence of relevant Reference Lists or the applicable EU Framework, the EIB may decide to carry out an independent assessment and monitoring of the relevant jurisdiction, in accordance with the EU Framework and internationally accepted standards and best practices.

In this respect, the Group Chief Compliance Officer (**"GCCO"**) will inform the operational services of the Bank of any material change in connection with:

- the EU Framework;
- the Reference Lists; and
- any independent assessment carried out by the Bank pursuant to paragraph I.3.4) above.

### I.4 BASIC PRINCIPLES

The present Policy aims to ensure that no NCJ Operation in which the Bank participates is intended to be used to facilitate Targeted Activities, thus contributing to the international efforts to promote integrity in the financial markets and helping to mitigate the Bank's exposure to legal and reputation risks.

The EIB is fully aware that, because of their light regulatory and tax regimes, lack of transparency and uncooperativeness, certain NCJs raise serious prudential and integrity concerns and are particularly exposed to the risk of hosting Targeted Activities.

In this context it is worth recalling that the OECD and the EU institutions have stated that banking secrecy cannot be an obstacle to cooperation and the exchange of information for tax purposes.[3]

For this reason, as early as 2005 the Bank established specific principles and rules for its activities in NCJs, taking into account the relevant Reference Lists published by the Lead Organisations.

The core principles of the present Policy are summarised below:

1. Prohibition to carry out or participate in any operation with a link to a Prohibited Jurisdiction, except if i) the project is physically implemented in the relevant Prohibited Jurisdiction and ii) the operation does not present any indication that it is being artificially structured or used for Targeted Activities;
2. Enhanced Vigilance on all NCJ Operations; and
3. Informing the Board of Directors of the existence, nature and economic rationale of any NCJ Operation.

3 See Art. 26 of the OECD Model Tax Convention and Art. 5 of the OECD Agreement on the exchange of information on tax matters.

### I.5 SCOPE OF THE POLICY

This Policy applies to all NCJ Operations in which the Bank participates in the course of its lending, borrowing and treasury activities, including guarantees and EIB-financed structures implemented on behalf or for the account of other bodies within or outside the EU.

## II. POLICY GUIDELINES

The EIB will follow the guidelines below in all its NCJ Operations.

### A) Prohibition:

The EIB will not participate in any operation with an NCJ Link to a Prohibited Jurisdiction. Exceptions can be made by the Bank only if i) the project is physically implemented in the relevant Prohibited Jurisdiction, and ii) does not present any indication that the relevant operation is being artificially structured or used for Targeted Activities.

Such limited exceptions are envisaged in order to avoid penalising the local population of countries where the Bank has received an EU mandate to provide finance and to support the EU objectives of development, cooperation and economic, social and territorial cohesion stipulated in Art. 209 and 309 of theTreaty and its Protocol No 28.

In any event, the Bank will not make investments supporting the financial sector (e.g. participation in the recapitalisation of banks, insurance companies or other financial intermediaries) in any Prohibited Jurisdiction, unless the supported financial entity serves as an intermediary for the Bank's investments in other permitted sectors of the relevant Prohibited Jurisdiction.

### B) Enhanced Vigilance:

Without prejudice to the above and subject to the relocation requirements, as defined in Section III.3 below, the EIB may participate in NCJ Operations provided that:

- the transparency and integrity of the relevant operation is satisfactory to the Bank. In particular the relevant counterparty/ies and their beneficial owners must always be clearly identified and must not pose any integrity concern;
- the relevant counterparty/ies can provide adequate justifications for recourse to the relevant structure. Such justifications may include tax neutrality for investors from different jurisdictions; avoidance of double taxation and other tax burdens that could make the structure uneconomical; a legal framework not equally available in the jurisdiction where the project is physically located; corporate security for companies and investors seeking a platform not equally available in their respective countries of incorporation or residence; marketability of the structure in accordance with standard market practice. The above justifications shall be satisfactory to the Bank and shall ensure adequate transparency to the benefit of the tax authorities in all concerned jurisdictions;
- the relevant operation does not present any indication that it is being artificially structured or used for Targeted Activities.

### C) Informing the Board of Directors:

The Board of Directors shall be adequately informed by the Management Committee of the existence, nature and economic rationale of any NCJ Operation.

Such information shall be included in the relevant Board report. In the event that a link to an NCJ comes into existence only after the Board's approval, the information shall be

given to the Board as soon as practicable after the services of the Bank have become aware of the existence of such a link.

For operations where approval is delegated by the Board of Directors to the Management Committee, the Board shall be informed pursuant to the normal reporting procedures for delegated activities.

## III. MEASURES IMPLEMENTED BY THE BANK IN ITS NCJ OPERATIONS

The Bank implements the following measures in its NCJ Operations in accordance with the terms set out below.

### III.1 Integrity due diligence extended to all NCJ Operations

The Bank carries out a specific due diligence as part of the appraisal process for each NCJ Operation in order to ensure that it:

- is not implemented in a Prohibited Jurisdiction, unless the relevant project is also physically located in that jurisdiction and no indications are identified that the relevant operation is being artificially structured or used for Targeted Activities;
- does not constitute an investment supporting the financial sector of a Prohibited Jurisdiction, unless the supported financial entity serves as an intermediary for the Bank's investments in other permitted sectors of the relevant Prohibited Jurisdiction;
- does not prevent or hinder the identification of the relevant counterparty/ies;
- does not pose integrity concerns;
- can be justified by specific economic requirements (see Section II.B above) that make recourse to the relevant structure necessary;
- does not present any indication that the relevant structure is being artificially structured or used for Targeted Activities.

### III.2 Tax Disclosure

NCJ-located counterparties and their NCJ-located controlling shareholders will be required to:

- disclose in detail the economic rationale of the structure and the specific economic requirements that make recourse to the relevant structure necessary; and
- provide a description of the tax regime applicable to the proceeds of the structure.

It is acknowledged that certain Cross-border Operations present a higher risk of being structured or used for tax fraud, tax evasion and harmful tax practices even where no NCJs are involved in the structure.

The Management Committee may therefore impose, in the measures implementing this Policy, additional tax disclosure obligations for such operations even if none of the jurisdictions involved qualifies as an NCJ.

### III.3 Relocation requirements

In addition to the general prohibition to carry out operations linked to a Prohibited Jurisdiction (except if the relevant project is also physically located in that jurisdiction and no indications are identified that the NCJ Operation is being artificially structured or used for Targeted Activities, see Section II.A above), the Bank adopts the relocation requirements below for relevant Cross-border Operations with counterparties incorporated in Monitored (i.e. "grey-listed" or equivalent, as defined in Section I.2 above) Jurisdictions.

It should be recalled that no relocation requirements are needed for Cross-border Operations with counterparties located in a Prohibited (i.e. "blacklisted" or equivalent, as defined in Section I.2 above) Jurisdiction because these are already banned without any grace period immediately after blacklisting, except if the project is physically implemented in such Prohibited Jurisdiction and no indications are identified that the NCJ Operation is being artificially structured or used for Targeted Activities (see Section II.A above).

The Board will be informed by the GCCO of the application of the relocation requirements to the relevant Cross-border Operations in accordance with Section II.C) of the Policy.

**a) After the end of the Grace Period: Counterparty's obligation to relocate prior to signing new contracts (relocation "*ex-ante*")**

After the end of the Grace Period, as defined in Section I.2 above, if the relevant counterparty's place of incorporation remains classified as a Monitored (i.e. "grey-listed" or equivalent, as defined in Section I.2 above) Jurisdiction by one or more Lead Organisations, the Bank will not sign new contracts unless the relevant counterparty relocates outside an NCJ prior to signing.

This essential measure is aimed at ensuring that the Bank does not enter into new operations with relevant counterparties located in grey-listed countries which fail to quickly implement the relevant international standards. As such, it contributes to maintaining the international pressure on grey-listed jurisdictions to promptly align with international standards and be ultimately "white-listed" by the Lead Organisations.

**b) During the Grace Period: relocation provisions ("Relocation Undertaking")**

During the Grace Period, as defined in Section I.2 above, relocation provisions ("**Relocation Undertaking**") will be inserted in lending contracts with relevant counterparties located in Monitored Jurisdictions, providing for the relevant counterparty's obligation to relocate outside an NCJ within 12 months in the event that its country of incorporation remains classified as a Monitored (i.e. "grey-listed" or equivalent, as defined in Section I.2 above) Jurisdiction by one or more Lead Organisations.

Upon recommendation by the Office of the GCCO, the Relocation Undertaking may also be imposed on the entity controlling the relevant contractual counterparty, in the event that such controlling entity is incorporated in an NCJ.

**c) Physical implementation of the project in the relevant NCJ**

As stated above the relocation requirements only apply to Cross-border Operations: by analogy with the principles stated in Section II.A for Prohibited Jurisdictions, no relocation requirements will be imposed if the counterparty is located in the same NCJ in which the project is physically implemented and no indications are identified that the NCJ Operation is being artificially structured or used for Targeted Activities.

This rule applies in order not to penalize the local population of countries where the Bank has received an EU mandate to provide finance and to support the EU objectives of development, cooperation and economic, social and territorial cohesion stipulated in Art. 209 and 309 of the Treaty and its Protocol No 28.

**d) Remedies**

In the event of breach of the above relocation requirements, the Bank may have recourse to appropriate measures, including cancellation or suspension of the financing and, where applicable, exclusion from future EIB operations.

### III.4 Integrity covenant in the Bank's contracts; Counterparty's declarations and undertakings

In EIB lending contracts outside the EU, the relevant counterparties are generally required to confirm, among other things, that:

- they have not committed or will not commit any prohibited practices in connection with the execution of the structure;
- they apply the FATF Recommendations[4] or, where applicable, the AML Directive;
- no part of their share capital is of illicit origin; and
- they will inform the Bank of any alteration of their legal status and any transaction involving a material change in ownership, thus ensuring the transparency of the relevant counterparty/ies on a continuing basis.

Additional contractual provisions addressing specific transparency and integrity issues can be imposed by the Bank on a case-by-case basis for NCJ Operations connected to certain NCJs, following the publication of negative reports by Lead Organisations and/or specific recommendations by the Office of the GCCO.

In particular, appropriate provisions can be included in the legal documentation of the fund in which the Bank participates to address compliance issues, including but not limited to anti-money laundering, combating the financing of terrorism, anti-fraud, and compliance with this Policy and its implementing provisions.

In the event of breach of the above clauses, the Bank may have recourse to appropriate measures, including cancellation or suspension of the financing and, where applicable, exclusion from future EIB operations.

## IV. POLICY ADMINISTRATION

The Management Committee will adopt detailed operational provisions for the implementation of this Policy and update them as appropriate in order to ensure the effective implementation of the Policy in all the Bank's evolving activities.

The GCCO is responsible for the administration of this Policy pursuant to the applicable internal procedures established in close cooperation with the relevant Bank services.

## V. FURTHER REVIEW

This Policy replaces the "EIB Interim Revised Policy towards Offshore Financial Centres" issued in 2009. The Bank will keep this Policy under review and will propose to the Board any appropriate updating in line with developments in other IFIs' practices and regulatory frameworks and following any changes in the EU Framework or Lead Organisations' positions.

4 The FATF has issued 40 Recommendations to provide a complete set of counter-measures against money laundering and 9 Special Recommendations as a basic framework to detect, prevent and suppress the financing of terrorism and terrorist acts.

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