tax justice network

Tax-responsible rules for Corona Bailouts

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1. Introduction

Public bailouts to business are a central element of limiting the non-medical human and economic impacts of the pandemic. They represent major commitments of taxpayer funds; quite exceptional state interventions, in these exceptional times. As such, there are three key reasons why stringent conditions should be imposed.

First, the bailout must be effective. This requires that companies receiving public funds meet high standards of behaviour in terms of their use of funds to protect employment, with full labour rights protections. It also bars the use of funds to reward shareholders or executives in any way.

Second, the bailout must be fully supported by the public, whose funds are effectively being used. This means that a high degree of transparency is necessary, both of the ownership structure of recipients and of their tax behaviour, to facilitate full public scrutiny and accountability.

Third, and not to be overlooked, the bailouts should play an important role in ensuring that countries can 'build back better'. These exceptional interventions should not prop up the status quo of markets that are often marred by an intersecting set of behaviours and characteristics that curb public benefits, and instead ensure private capture of value. These include a high degree of market concentration, weak competition, feeble regulation and abusive tax practices. Bailouts should, quite deliberately, militate in favour of cleaner, less extractive, more competitive and tax-compliant markets in the post-pandemic future - instead of protecting a damaging status quo.

[1] This report has been jointly written by various staff of Tax Justice Network, with a first draft written by Moran Harari, and substantial subsequent edits and input by Alex Cobham, Andres Knobel, Luke Holland, Mark Bou Mansour and Markus Meinzer. We welcome any feedback or questions to info@taxjustice.net.

2. No more unfair bailouts for companies

Covid-19 is creating havoc in the health and economic systems of all countries. Urgent measures are necessary. But urgent doesn't mean indiscriminate or counterproductive. Using taxpayer money to bail out tax abusing companies is not only unfair, but runs counter to protecting an economic system that will guarantee equal opportunities and the human rights of all.

While a great deal of controversy remains over whether large corporations should receive state bailouts at all, the current reality is that many such companies are likely to receive very significant flows of public money in the near future. As such, the conditions set out below should not be considered a tacit endorsement of bailouts *per se*, but instead a statement of criteria that can and must be applied where states do decide to provide such support.

In the last month, a number of EU countries announced they would deny coronavirus pandemic aid to companies using tax havens. According to Poland's aid package, large companies will be bailed out provided they pay their taxes in Poland and not in tax havens. Similarly, Denmark's Finance Ministry announced that Danish companies registered in tax havens won't be eligible for a state refund of their running costs. Other bailout conditions mentioned in the Danish political agreement restrict companies from paying out dividends or buying back their own shares and require them to adhere to the UN Guiding Principles on Business and Human Rights.

Austria's parliament decided on 22 April not to bail out companies with presence in tax havens, with Attac Austria criticising the move as largely ineffective and insufficient. Germany's green party has requested a debate in the German parliament on 23 April, arguing that Germany should not bail out companies registered in internationally blacklisted jurisdictions for purposes of aggressive tax avoidance. Some German states expressed their intent to bar companies from bailout funds if they are in unregulated arrears with the tax authorities or if there are being investigated for tax offences.

The decision to restrict bailouts to exclude companies using tax havens should be praised and adopted by more countries around the globe. It emphasises the companies' obligations to the country in question and the reciprocal approach towards the use of tax in a country. However, while it is a step in the right direction, not only has this approach some caveats, but it is also too narrow and ignores some fundamental transparency requirements which should be considered when bailing out companies.

Both Denmark and Poland determine whether a country is considered a tax haven or not according to the EU tax haven list. But as TJN has pointed out in the past, this list excludes some of the most significant tax havens - predominantly EU countries. Rather, it blacklists several developing countries which were prevented from engaging in fair negotiations in determining the OECD BEPS Action Plan and are now forced to comply with it if they wish to avoid sanctions. Instead of using a binary approach towards the classification of tax havens, we take the view that every country is placed somewhere on a spectrum between full transparency and full secrecy according to objective and verifiable criteria as included in our [Financial Secrecy Index] and [Corporate Tax Haven Index]. As such, instead of using the EU tax haven list to define tax haven countries for bailout conditions, we suggest taking the top ten countries listed on these two indices.[2] The resulting list of relevant tax havens comprises 13 jurisdictions:

- Bahamas
- Bermuda
- British Virgin Islands
- Cayman Islands
- Hong Kong
- Japan
- Jersey
- Luxembourg
- Netherlands
- Singapore
- Switzerland
- United Arab Emirates
- United States of America

In addition, the presence of subsidiaries in tax havens cannot in itself be considered a sufficient criterion to exclude companies from being eligible for bailouts. What if companies engage in legitimate business in the Netherlands or the United States? It is impossible to tell what a multinational company is up to in any given jurisdiction without getting a full picture of its global activities, profits and taxes on a country by country basis. Therefore, companies which are present in these jurisdictions should be able to obtain bailouts if they publish a full country by country report now (where they have one prepared under current OECD rules already); or if they commit to publish one according to the Global Reporting Initiative standard before end of 2020. In addition, they should commit to close down any subsidiary that is mainly used for tax avoidance purposes with immediate effect.

But presence in tax havens should not be the sole criterion for excluding companies from bailouts. What about companies that were charged with corruption or with money laundering? Or companies which were involved in the

[2] These are the most important jurisdictions, based on a combination of global scale with, respectively, financial secrecy and corporate tax aggressiveness. It would also be possible to focus on those with the highest secrecy or tax aggression only. Equally, both indexes are published as open data, so countries could also choose to use one indicator or a subset, if they care more about one specific factor – for example, the lowest applicable tax rates applied to multinationals (the LACIT indicator of the Corporate Tax Haven Index).

Cum-Ex Trading Scheme? Companies which the EU Commission found received tax incentives in violation of EU State aid rules? Or companies involved in profit shifting or enabling tax evasion as revealed by the LuxLeaks and the Panama Papers scandals? When a government decides to bail out companies and provide them with a state refund, it uses public money to do so. Neither the public nor the government should be helping companies that previously chose to abuse the tax system to boost their profits. Because of those tax abuses, governments' ability to offer sufficient public services was undermined and as a result the public was denied proper health care services. Pope Francis has recently held tax dodgers partially responsible for the struggle governments' health systems are facing in dealing with Covid-19 and stated that "those who do not pay their taxes are not only committing a crime, but a felony". Using the Pope's comparison, bailing out these companies will allow them to also confiscate the profits of serious crime. The criteria for excluding companies from pandemic aid should therefore be much broader than having subsidiaries in tax havens and should include some of the criteria mentioned above.

Finally, a company found eligible to be bailed out should commit to the following requirements:

First, by the end of 2020, publish its most recent (and future) annual accounts, along with associated tax payments regardless of whether it is a private or a public company, as explained in haven indicator 9 of our Corporate Tax Haven Index. Multinational companies should also publish the accounts for all entities in their group on a country by country basis in line with the GRI standard before end of 2020. This way, it would also be far easier for the public to identify whether they use any accounting shenanigans to shift profits to low-tax jurisdictions (see haven indicator 10 of the Corporate Tax Haven Index).

Second, ensure no shareholder extraction of the bailout. The company should not distribute any dividend, buy back their own share capital or convert other shareholder equity reserves such as share premiums, into bonuses for shareholders until the company has paid back in full its rescue loans and returned to profitability. As we explained here, such shareholder extraction can reduce retained earnings accumulated in shareholder equity and threaten the company's balance sheet solvency.

Third, publish legal and beneficial ownership information for all legal vehicles included in the corporate group, including trusts, partnerships, investments funds, and foundations before the end of 2020. If the country providing the bailout doesn't yet have beneficial ownership registration laws, or the ownership details registered in the Corporate Registry are not accessible online, this information should be published on the company's own website.

Fourth, ensure employee protections. The International Labour Organisation has already indicated that Covid-19 will push millions of people into unemployment, underemployment and working poverty. Many of these workers are women and girls on whom the impact of this pandemic will have first order and secondary impacts that will devastate their lives. Bailed out companies should at the very least commit to not firing employees that need to be self-quarantined or hospitalised, and to pay all staff a living wage until full repayment of bailout funds or insolvency of the company.

Companies which are bailed out should be given a set number of months to implement these four commitments. Once the deadline has passed, if for any reason one or more of these commitments is violated, the company should be forced to immediately pay the bailout money back to the government.

3. Criteria and Conditions for Corona bailouts

Disqualifying criteria to be eligible for a bailout should include:

1. Presence in 'tax havens' unless it is related to legitimate business activity. A 'tax haven' should not be defined according to highly politicised national or regional listings that exclude relevant tax havens, but based on the top 10 ranking of the Financial Secrecy Index and the Corporate Tax Haven Index. If a corporate group has one or more subsidiaries in any of these jurisdictions, full country by country reporting in line with the standard set by the Global Reporting Initiative should be required to demonstrate legitimate business activity by the end of 2020, and an immediate commitment should be given to close down any subsidiaries used merely for tax avoidance purposes. Moreover, the legal and financial burden of proof for demonstrating the legitimacy of business activities in a tax haven should lie with the company itself.

2. Participation in tax abuse or other illicit financial flows scandals such as Luxleaks, Cum-Ex, illegal state aid etc, or open unregulated arrears with tax payments in any jurisdiction.

Conditions that, if unmet within deadline, money must be returned:

1. Publish online most recent (and future) accounts for all entities in the group, and full country by country reporting in line with GRI standard by end of 2020.

2. Ensure no shareholder extraction of bailout (e.g. dividend distribution, share buybacks) until it has paid back in full its rescue loans and returned to profitability.

3. Publish beneficial and legal ownership information for all legal vehicles included in the corporate group, and full group structure, by end of 2020.

4. Ensure employee protections until a return to profitability or insolvency.

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