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NOTE

From:	General Secretariat of the Council
To:	Council
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Subject:	Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries – General approach

I. INTRODUCTION

1. The Commission presented its proposal for a Council Directive amending Directive (EU) 2016/1164¹ as regards hybrid mismatches with third countries ('ATAD 2') on 25 October 2016.
2. This proposal responded to a Council statement entered into the minutes of the ECOFIN Council meeting of 12 July 2016, when Directive (EU) 2016/1164 (ATAD 1) was adopted, which requested the Commission to "*put forward a proposal by October 2016 on hybrid mismatches involving third countries in order to provide for rules consistent with and no less effective than the rules recommended by the OECD BEPS report on Action 2, with a view to reaching agreement by the end of 2016*".

¹ Anti-Tax-Avoidance Directive ('ATAD 1').

3. The opinions of the European Economic and Social Committee and of the European Parliament on this Commission proposal are expected to be delivered soon.
4. The ECOFIN Council at its meeting of 8 December 2015 has stressed in its conclusions² the need to find "*common, yet flexible, solutions at the EU level consistent with OECD BEPS conclusions, paying specific attention to compliance with EU Treaty freedoms and competences*" and supported "*an effective, swift and coordinated implementation by Member States of the anti-BEPS measures to be adopted at EU level*". The ECOFIN Council has also indicated that "*EU directives should be, where appropriate, the preferred vehicle for implementing OECD BEPS conclusions in the EU in order to ensure both legal certainty and proportionality in the level of harmonisation required by the Single Market*" and made in this respect a particular reference to OECD BEPS conclusions on Actions 2 (hybrid mismatches).

II. STATE OF PLAY

5. The Slovak Presidency has prioritized work on the ATAD 2 legislative proposal and the ECOFIN at its meeting of 8 November 2016 has broadly confirmed that work on this dossier should be brought forward swiftly.
6. The Commission proposal was presented to the Working Party on Tax Questions (WPTQ) on 3 November 2016 and further examined at technical level at the WPTQ meeting of 10 November 2016. Delegations reiterated their wish that ATAD 2 be fully consistent with and no less effective than OECD BEPS Action 2 recommendations.
7. Against this background, the Presidency identified at the WPTQ meeting of 10 November a number of cases of hybrid mismatches that were not fully tackled by the proposal, notably some types of hybrid permanent establishment and financial instrument mismatches, as well as differences in definitions, language and scope.

² See "Council Conclusions on base erosion and profit shifting (BEPS) in the EU context", doc. 15150/15 FISC 185 ECOFIN 965, points 10, 12 and 17.

8. Further technical and legal issues were addressed at subsequent WPTQ meetings on 15, 16 and 23 November 2016 and led to a number of changes to the Presidency compromise.
9. The ATAD 2 proposal was furthermore discussed at the High Level Working Party on Tax Questions (HLWP) meetings of 27 October and 22 November 2016, and during the Fiscal Attachés meeting of 28 November, in preparation for the Coreper meeting of 30 November 2016.
10. During its meeting on 30 November 2016, Coreper discussed the compromise text, which was supported by several delegations. Some delegations reminded that they still had parliamentary reservations and called for more time to address the outstanding issues. It was agreed to insert language in Article 9(5) on the interaction of the proposal with double tax treaties. The insertion of a provision on reverse hybrid entities (Article 9a) was supported by a large number of Member States. A limited number of outstanding issues was identified, and the Presidency confirmed its intention to bring the file to Ecofin for a General Approach on 6 December. Bilateral contacts will continue in order to prepare the Ecofin meeting.
11. The main outstanding issues may be summarised as follows:
 - a) Optional carve-out rules (Article 9 (4) (a), (b) and (c)):

The proposed exemptions are expressly allowed by the OECD BEPS report on Action 2 but face opposition by some delegations.
 - b) Revers hybrid mismatches (Article 9a):

A provision has been inserted in order to tackle reverse hybrid mismatches.
 - c) Date of implementation (Article 2):

One delegation put forward a proposal to postpone the date of transposition of ATAD 2 to 1 January 2024. The Presidency is aware that it is being opposed by several delegations.

III. THE WAY FORWARD

12. In the light of the above, the Council is invited to reach a General Approach on the Directive, on the basis of the compromise text set out in doc. 15066/16 FISC 215 ECOFIN 1141, with a view to adopting the Directive, subject to receiving the opinion of the European Parliament and legal-linguistic revision, as an "A" item on the agenda of a forthcoming meeting.
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