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NOTE

From:	Presidency
To:	Delegations
No. prev. doc.:	15066/16 FISC 215 ECOFIN 1141
Subject:	Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (ATAD 2)

Delegations will find in the Annex the room document #1 that was distributed electronically on 5 December 2016 in view of the ECOFIN meeting on 6 December 2016.

The Presidency suggests the following changes to doc. 15066/16:

- The following recitals are inserted:

- "(16a) In order to avoid unintended outcomes in the interaction between the hybrid financial instrument rule and the capital requirements imposed on banks, insurance companies and other regulated entities, the directive provides that Member States may exclude from the scope of the directive, instruments that have been issued intra-group with the sole purpose of meeting the issuer's regulatory capital requirements and not for the purposes of avoiding tax. This exclusion should apply only to the amount of regulatory capital that has been issued in order to meet regulatory requirements and that is connected to regulatory capital instruments issued by ultimate parent to the market.
- (16b) In order to avoid unintended impacts in respect of the securities lending market the directive provides that Member States may exclude from the scope of the directive, a payment that is made by a financial trader under a hybrid transfer where that hybrid transfer has been entered into in the ordinary course of a business of borrowing or lending securities. This exclusion will not apply, however, unless the financial trader is taxable on any income it receives under the same hybrid transfer arrangement or where the payment is made under a structured arrangement."

- In Article 9(4), points (b) and (c) are replaced by the following:

- "(b) Article 9(2)(a) and (b) hybrid mismatches resulting from a payment of interest under a financial instrument to an associated enterprise where:
- (i) the financial instrument has conversion, bail-in or write down features;
 - (ii) the financial instrument has been issued with the sole purpose of satisfying regulatory capital requirements applicable to the banking and insurance sector;

- (iii) the financial instrument has not been issued for the purpose of obtaining a tax advantage; and
 - (iv) the issuance does not exceed a level necessary to satisfy applicable regulatory requirements and is connected to financial instruments with conversion, bail-in and write-down features at the level of the ultimate parent undertaking.
- (c) Article 9(2)(a) and (b) hybrid mismatches resulting from a payment made by a financial trader under a hybrid transfer that is entered into in the ordinary course of a business of borrowing or lending securities provided that:
- (i) the payment is not made as part of a structured arrangement; and
 - (ii) the income that the financial trader receives under the hybrid transfer is included.

A financial *trader* is a person or entity engaged in the business of regularly buying and selling *financial* instruments on its own account for the purposes of making a profit."