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NOTE

From:	Presidency
To:	Members of the High Level Working Party on Tax issues
Subject:	BEPS: Presidency roadmap on future work

Following discussions at the High Level Working Party on 1 February 2016, delegations will find in Annex the final version of the Presidency roadmap, setting out future work in the Council during the coming months, in the field of Base Erosion and Profit Shifting (BEPS).

The Presidency will take into account relevant new developments when programming work in practice.

ANNEX

EU-BEPS ROADMAP

BY THE NETHERLANDS PRESIDENCY OF THE COUNCIL

1. On 25 November 2014, at the High Level Working Party on Taxation (HLWP), a discussion was held on further work related to unfair tax competition, base erosion and profit shifting in the EU context (hereinafter – EU BEPS). It was noted that this work should be brought forward on the basis of a concrete roadmap, which would include actions and clear timelines, taking account of the OECD work in this area.

2. The Italian Presidency presented a draft roadmap in the Working Party on Tax Questions (WPTQ) on 5 December 2014 setting out a number of priorities for actions in the short, mid and long term. The Latvian Presidency undertook to continue work on the basis of this draft roadmap, and circulated a final version of its Presidency roadmap (doc. 5968/15 FISC 15) following WPTQ technical examination on 21 January 2015 and discussion at the HLWP meeting of 5 February 2015. The Roadmap of the Luxembourg Presidency was issued on 8 July 2015 (doc. 10649/15 FISC 93) after the HLWP meeting of 2 July 2015.

3. On 17 June 2015, the Commission also adopted a Communication on a Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action. It was put forward to the Council and presented to ECOFIN Ministers on 19 June 2015. This Action Plan will be followed up by a series of legislative and non-legislative initiatives in the course of 2016, the first step of which was the proposal for an Anti-Tax Avoidance Package presented by the Commission on 28 January 2016.

4. In December 2015, the Council has adopted two sets of Council conclusions on base erosion and profit shifting (BEPS) in the EU context (doc. 15150/15), and on the future of the Code of Conduct (CoC) on business taxation (doc. 15148/15). These conclusions are providing the basis for further work by the Council in the area of BEPS in 2016.

5. This roadmap intends to set out how the Netherlands Presidency will conduct such work, taking into account views expressed by Member States in informal bilateral contacts and against the background of recent Commission initiatives, as well as the results of the OECD work on BEPS.

I. <u>SHORT-TERM WORK</u>

6. The Presidency will aim at reaching progress during the next months on the following EU-BEPS work items:

A. Interest and Royalties Directive (IRD)

7. Following the opinion of the majority of the Member States, the Latvian Presidency concentrated its work on a *de minimis* anti-abuse clause, similar to the one adopted for the Parent-Subsidiary Directive (Articles 1(2) to 1(4) of Directive 2011/96/EU). The aim was to reach an agreement at the June 2015 Council on this part of the IRD, leaving the remaining provisions for later discussions. A number of Member States were however not in the position to agree to that approach and argued that the discussion should be held on the proposal as a whole, notably on the 'effectively subject to tax' criterion contained in the 2011 recast proposal.

8. Against this background, the Luxembourg Presidency held a first discussion on the concept of minimum effective taxation (MET) at the HLWP meeting of 2 September 2015 and at the informal ECOFIN meeting on 11-12 September 2015. In the light of this debate, it devoted two meetings of the WPTQ on 30 September and 29 October 2015 to discuss the IRD proposal. Both meetings focussed on the possible inclusion of a MET clause and advanced technical work on three areas: the major elements of such a clause, the determination of a level of tax to be considered as low taxation, and the options to draft such a clause in a legislative text.

9. The Netherlands Presidency intends to take stock of these discussions on the possible inclusion of a Minimum Effective Taxation (MET) clause in the IRD and to use the result as a basis for a Presidency compromise, with a view to a political agreement on this file. Building on the two alternatives (MET rate as sole criterion or MET rate combined with an economic activity test) submitted under the Luxembourg presidency, the Presidency will further explore possibilities to have a practical and well targeted MET clause, giving legal certainty and preventing loopholes.

10. In the light of the discussions on the above, a possible inclusion or reference to the OECD modified nexus approach in the IRD could be explored.

B. Anti-Tax Avoidance Directive

11. On 28 January 2016, the European Commission submitted a proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market, which aims at implementing a number of outcomes of the OECD BEPS project and other measures against tax avoidance into EU legislation.

12. Capitalising on work that has already been done in the context of the OECD and by previous Presidencies, in particular by the Luxembourg Presidency with regard to the international anti-BEPS aspects of the original Common Consolidated Corporate Tax Base (CCCTB) proposal (doc. 14544/15), the Netherlands Presidency will give high priority to the proposed anti-tax avoidance directive, with a view to reaching a political agreement by the end of its term.

C. Country-by-country reporting (CBCR) on transfer pricing agreements

13. On 28 January 2016, the European Commission also submitted a proposal for a third revision of the Council Directive on Administrative Cooperation (DAC4) aimed at reflecting the OECD BEPS minimum standard on country-by-country reporting into EU legislation, as appropriate.

14. The Netherlands Presidency will give high priority to this file, on which considerable work was already done in the OECD, with a view to reaching an early political agreement and adopting the legislative act by the end of its term.

D. Reform of the Code of Conduct Group (business taxation)

15. A discussion was held during the Latvian Presidency on the scope and the governance of the Group, on the basis of various proposals from Member States. In June 2015, the HLWP welcomed that the Code of Conduct Group will continue work on this issue in July 2015, focusing on: a) making better use of the existing mandate of the Code; b) examining the possibilities to extend the mandate and to update the criteria; c) the possible need to adjust the governance of the Code of Conduct accordingly. The ECOFIN Council endorsed this approach on 19 June 2015.

16. The ECOFIN Council adopted conclusions on the future of the Code of Conduct (doc. 15148/15) in December 2015, which completed the first phase of this reform. They invited notably the HLWP to "*discuss a revision to the mandate in relation to the concept that profits are subject, as appropriate, to an effective level of tax within the EU, notwithstanding the competencies of Member States in the area of taxation*" and to "*conclude on the need to enhance the overall governance, transparency and working methods and to finalise the reform of the Group during the Dutch Presidency*".

17. In line with the Council conclusions on BEPS in the EU context (doc. 15150/15), which note that where the implementation of anti-BEPS measures is foreseen through EU legislation this process should be given priority over possible parallel soft-law discussions, the Netherlands Presidency considers that, at this stage, it would be difficult to discuss the revision of the mandate of the Code of Conduct in parallel with above-mentioned discussions on the possible inclusion of a MET clause in the IRD.

18. Considering that further discussion on the possibilities and modalities to extend the mandate should take into account the possible inclusion of a MET clause in the IRD, the Netherlands Presidency intends:

a) as a first step to discuss the governance, transparency and working methods of the Group. The need to improve the Group's political visibility and transparency in the future should be seen in the light of the growing attention paid to its work. It is important to strike the right balance between enhancing transparency and the need for confidentiality in the Group's deliberations, as recalled by ministers, so that it can continue to deliver results, given the public interest involved as regards the economic policy of the Member States. The Presidency intends to put forward concrete proposals in this area, with the aim to reach a swift consensus.

b) as a second step, to start discussions on a revision to the mandate in relation to the concept that profits are subject, as appropriate, to an effective level of tax within the EU, with the aim to decide on the issue of the mandate of the of the Code of Conduct before the end of the Presidency's term.

E. Hybrid mismatches

19. On 2 June 2015 the Code of Conduct Group decided to extend the mandate of the Subgroup to continue work on further cases of hybrid mismatches: hybrid entities and hybrid permanent establishments in situations involving third countries; hybrid financial instruments other than dividends/interest; hybrid transfers; dual resident companies and imported mismatches.

20. A guidance and explanatory notes on Hybrid Entity Mismatches in situations involving third countries were finalised by the Code of Conduct Subgroup and agreed by the Code of Conduct Group in November 2015.

21. The Netherlands Presidency intends to capitalise on this success and reach agreement before the end of its term on guidance and explanatory notes on Hybrid Permanent Establishment (PE) Mismatches in situations involving third countries.

F. Patent boxes

22. The Netherlands Presidency notes that the Code of Conduct Group will continue monitoring the legislative process necessary to change existing patent box regimes following the agreement reached on the interpretation of the third criterion of the Code of Conduct (modified nexus approach, see doc. 16553/14 annex 1) and Member States' subsequent commitment to report on the progress made through the annual standstill and rollback reports.

G. Good governance in Tax matters in third countries

23. In line with the ECOFIN conclusions of 14 May 2013 (item 20), the Netherlands Presidency will pay attention to good governance in tax matters in third countries and discuss the appropriate way forward in the Council, including possible Council conclusions on the Commission Communication of 28 January 2016 on an External Strategy for Effective Taxation.

H. OECD BEPS issues in Double Taxation Agreements

24. As mentioned by the Council conclusions on BEPS in the EU context (doc. 15150/15), certain OECD BEPS conclusions concern bilateral double taxation agreements entered into by Member States.

25. An exchange of views through the HLWP is foreseen, also with a view to the multilateral instrument to modify tax treaties, envisaged under OECD BEPS conclusions on Action 15 (expected by the end of 2016), and to the Commission Recommendation of 28 January 2016 on the implementation of measures against tax treaty abuse. The latter may be tackled through the above-mentioned possible Council conclusions.

II. MEDIUM-TERM WORK

26. The Presidency also notes the willingness of Member States to undertake work in the medium term on the following items:

A. Transfer Pricing

27. Several Member States stressed the need to ensure coordination between EU work in the area of Transfer Pricing and the OECD's work in the context of its BEPS project (Working Party N°6), against the background of BEPS priorities defined within the Council and its preparatory bodies.

28. The Code of Conduct Group will start work on EU guidance on the interpretation of the fourth criterion following OECD BEPS conclusions on Actions 8-9-10 (Aligning transfer pricing outcomes with value creation). This work should take into account the work done in the EU Joint Transfer Pricing Forum as a Commission advisory body which will continue to communicate its findings to the Council.

B. Outbound payments

29. The Code of Conduct Group included outbound payments in its Work Package 2015. The initial work of the Code of Conduct Group with regard to this issue will involve the identification of potential problems which arise when payments are made from the EU to a third country. Work on this item could start in spring 2016.

C. Disclosure of aggressive tax planning

30. The Code of Conduct Group will assess the opportunity of developing EU guidance for implementing OECD BEPS conclusions on Action 12 (disclosure of aggressive tax planning), notably with a view to facilitate exchange of such information between tax authorities.

D. Beneficial ownership of non-transparent entities

31. Some Member States expressed strong interest in a possible extension of the access to the register foreseen in the 4th Anti-Money Laundering directive (Articles 29-30) to tax authorities, in order to exchange information for tax purposes.

32. This 4th Anti-Money Laundering Directive (Directive EU 2015/849) has come into force in June 2015 and the outcome of the negotiations, as well as possible next steps, could therefore be discussed on this basis from a tax perspective, also taking into account the Action Plan to strengthen the fight against the financing of terrorism adopted by the Commission on 2 February 2016.

E. Dispute settlement in the area of transfer pricing

33. The Council HLWP could discuss the state of play regarding the Arbitration Convention allowing the settlement of disputes concerning transfer pricing.

F. Conditions and rules for the issuance of tax rulings

34. According to its Work Package 2015 the Code of Conduct Group will develop a set of guidelines on the conditions and rules for the issuance of tax rulings by Member States.