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Subject: Note to the Code of Conduct Group (Business Taxation)

Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.



Council of the European Union
General Secretariat

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FISC 177

NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	11535/17 FISC 171
Subject:	Note to the Code of Conduct Group (Business Taxation)

Delegations will find attached the first Presidency draft of the Council conclusions on the EU list of non-cooperative jurisdictions for tax purposes, which will be discussed at the Subgroup meeting of 12 September 2017.

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[COUNCIL CONCLUSIONS]

[RESOLUTION OF THE COUNCIL AND OF THE REPRESENTATIVES OF
THE GOVERNMENTS OF THE MEMBER STATES, MEETING WITHIN
THE COUNCIL]

on the EU list of non-cooperative jurisdictions for tax purposes (*)

(*) The Council agreed to publish [these conclusions] [this resolution] for information purposes in the Official Journal.

The Council [and] [the Representatives of the Governments of the Member States, meeting within the Council]:

1. RECALLS the Council Conclusions on an external taxation strategy and measures against tax treaty abuse of 25 May 2016, in particular points 6 to 10 thereof, and the Council Conclusions of 8 November 2016 on the criteria for and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes;
2. EMPHASISES the importance of promoting globally the criteria on tax transparency, fair taxation and implementation of anti-BEPS standards, which were endorsed by the Council Conclusions of 8 November 2016 ("the Criteria");
3. TAKES NOTE of the work achieved by the Global Forum on Transparency and Exchange of Information for Tax Purposes, the OECD Inclusive Framework for Tackling Base Erosion and Profit Shifting (BEPS), and of the Forum on Harmful Tax Practices;
4. WELCOMES the work that the Code of Conduct Group on Business Taxation ("Code of Conduct Group") has carried out, in co-ordination with the High-Level Working Party on Tax Questions ("the HLWP"), in selecting the relevant jurisdictions and analysing and assessing the facts pertaining to their tax legislation and policies in the context of the Criteria;

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5. NOTES with satisfaction that most of these jurisdictions have chosen to participate in this process and dialogue, and took or undertook to take active steps leading to resolving the concerns that the Code of Conduct Group has determined in the areas of tax transparency, fair taxation and implementation of anti-BEPS standards;
6. NOTES that, nonetheless, a number of jurisdictions have so far not clearly committed to effectively take steps to address the deficiencies or not engaged in a meaningful dialogue on the basis of the Criteria.
7. IS OF THE VIEW that, in such a case, tax legislation and policies of these few jurisdictions may present a persistent risk to the tax revenues of the Member States and where such a risk exists, such jurisdictions should be strongly encouraged to make necessary changes, to remedy this situation;
8. REITERATES that the EU must ensure efficient protection mechanisms against the erosion of Member States' tax bases through tax fraud, evasion and avoidance.
9. ENDORSES therefore the list of non-cooperative jurisdictions for tax purposes, set out in Annex I, which is common to the Member States;
10. OBSERVES that while some jurisdictions remain to present concerns in the areas of [tax transparency], [fair taxation] and [implementation of anti-BEPS standards], they meaningfully undertook to take the necessary steps to solve the outstanding issues by agreed deadlines and, therefore, at this stage, should not be placed on the list of non-cooperative jurisdictions;
11. TAKES THE VIEW that effective and proportionate defensive measures should be applied by the Member States towards the non-cooperative jurisdictions as long as they are part of that list;
12. TAKES THE VIEW that the list of non-cooperative jurisdictions and the defensive measures will have the effect of sending a strong signal to the jurisdictions concerned, thus encouraging a positive change;

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13. BELIEVES that these actions collectively taken by the EU Member States are in line with the agenda promoted by the G20, OECD and other international fora;
14. NOTES that these actions are without prejudice to the respective spheres of competence of the Member States, such as the competence to negotiate and agree bilateral tax treaties, apply additional measures or maintain lists of non-cooperative jurisdictions at national level of a broader scope;
15. DEEMS APPROPRIATE for the Code of Conduct Group to engage in discussions with listed jurisdictions to agree and monitor the steps that jurisdictions are expected to take in order to be removed from the list and ENCOURAGES these jurisdictions to swiftly take the necessary action to meet the Criteria;
16. CONFIRMS that a decision on removal from the list will be taken without delay, on the basis of the relevant factual information made available to the Council;
17. NOTES that the list of non-cooperative jurisdictions should be regularly updated, and the situation should be continuously monitored;
18. INVITES the Code of Conduct Group to continue dialogue with all jurisdictions to promote tax transparency, fair taxation and implementation of anti-BEPS standards; and continue the work on effective defensive measures that could be further defined and applied towards non-cooperative jurisdictions;
19. REITERATES that the Code of Conduct Group, supported by the General Secretariat of the Council, should continue to conduct and oversee this process, in co-ordination with the HLWP. The Commission services will assist the Code of Conduct Group by carrying out the necessary preparatory work for the screening process in accordance with the roles as currently defined under the Code of Conduct for Business Taxation, with particular reference to previous and ongoing dialogues with third countries;
20. DEEMS APPROPRIATE, in this context, to determine the Guidelines for further work in this area, set out in Annex III;

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21. RECALLS that the Criteria, as specified in Annex IV, should be promoted by the Member States;
22. CONFIRMS that the Criteria will be regularly updated, as necessary, taking into account international developments and having regard to the evolution of international standards and TAKES THE VIEW that future ratings on third countries should be based on those standards keeping in mind the importance of continued and rapid progress by all relevant jurisdictions in these areas.

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**The list of non-cooperative jurisdictions for tax purposes, common to EU
Member States**

1. [jurisdiction A]

1.1. The reasons for listing [jurisdiction A] are as follows:

[...]

1.2. Recommendations to [jurisdiction A] on steps to take in order to get de-listed are as follows:

[...]

2. [jurisdiction B]

2.1. The reasons for listing [jurisdiction B] are as follows:

[...]

2.2. Recommendations to [jurisdiction B] on steps to take in order to get de-listed are as follows:

[...]

3. [jurisdiction C]

3.1. The reasons for listing [jurisdiction C] are as follows:

[...]

3.2. Recommendations to [jurisdiction C] on steps to take in order to get de-listed are as follows:

[...]

4. [jurisdiction D]

4.1. The reasons for listing [jurisdiction D] are as follows:

[...]

4.2. Recommendations to [jurisdiction D] on steps to take in order to get de-listed are as follows:

[...]

[...]

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Defensive Measures

1. Placement of a jurisdiction on the list of non-cooperative jurisdictions for the tax purposes is expected to have a dissuasive effect that encourages jurisdictions to comply with international standards.
2. Nevertheless, should the list prove insufficient to encourage expected change by jurisdictions, certain defensive measures in tax area shall be taken by the Member States, in addition to the non-tax measures taken by the EU, to effectively discourage non-cooperative practices in the jurisdictions placed on the list.
3. It is to be noted that any defensive measures should be without prejudice to the respective spheres of competence of the Member States to apply additional measures or maintain lists of non-cooperative jurisdictions at national level of a broader scope.

1. DEFENSIVE MEASURES IN NON-TAX AREA

Certain EU legislative acts contain a link to the list of non-cooperative jurisdictions for tax purposes, in particular:

a) [...]

b) [...]

c) [...]

Overall effects of such measures should be monitored by the HLWP in the context of implementation of the EU external strategy on taxation.

[2. DEFENSIVE MEASURES IN TAX AREA

Options for discussion:

- a) a fully harmonised set of measures the Member States undertake to apply;
- b) a "de minimis" list of measures that all Member States would agree to take;
- c) a "menu" of precise measures that Member States are free to choose from, but should choose at least agreed number of measures.
- d) a "menu" of categories of where national defensive measures taken by Member States have to fall into;
- e) engagement to continue analysis of which defensive measures in tax area could be taken collectively by the Member States.

The list of possible defensive measures that could be applied by the Member States:

a) Non-deductibility of costs

Member States shall not allow to deduct certain payments made to the legal persons located in listed third countries. These limitations may cover different types of expenses, including interests, royalties, service fees or all type of costs. The deductibility of costs may be accepted if the taxpayer can prove that the payments relate to transactions justified on economic grounds.

b) Controlled Foreign Company (CFC) rules

Member States shall tax the profits made by the controlled foreign company located in the listed third countries in the hands of the resident company. The principle will be applicable automatically for all jurisdictions featuring on the EU list without case-by-case analysis or will be limited to those jurisdictions listed for specific tax issues, particularly for facilitation of offshore structures and arrangements, (criterion 2.2), and application of harmful tax regimes (criterion 2.1).

c) Withholding Tax measures (WHT)

Member States shall apply more restrictive tax treatment for certain outbound payments when these have been made to individuals or legal persons located in third countries listed for tax purposes (e.g levy a WHT or a higher WHT on payments made to third countries or disallow reduced WHT rates).

d) Participation exemption rule

Member States shall deny or limit the tax exemption if non-resident entity distributing dividends is located in a listed jurisdiction.

e) Reinforced monitoring on certain transactions

Member States shall apply special documentation requirements for outbound payments to the entities located in the listed jurisdictions.

f) Reversal of the burden of proof

Member States shall require taxpayer to submit a proof that the deductibility of certain expenses is justified.]

Application of defensive measures by the Member States

Point for discussion:

- Will the application of defensive measures end when the jurisdiction is removed from the list or is there a need for a transposition time?

Guidelines for further process concerning the list of non-cooperative jurisdictions for tax purposes common to EU Member States

1. VALIDITY OF THE LIST AND DE-LISTING PROCESS

- 1.1. The list of non-cooperative jurisdictions for tax purposes set out in Annex I shall be revised by the Council twice per calendar year and endorsed within report from the Code of Conduct Group on Business Taxation to the Council, indicating the starting date of application of that modification.
- 1.2. This list may be amended or its duration may be modified under the same procedural rules as it has been endorsed. In this process, European Commission should provide the necessary technical assistance.
- 1.3. The decision of the Council will be based on a report of the Code of Conduct Group, in coordination with the HLWP, and prepared by the Committee of Permanent Representatives.
- 1.4. As soon as a jurisdiction is placed on the list, it should be informed by a letter signed by the Chair of the Code of Conduct Group, clearly stating:
 - a) the reasons for its inclusion in the list, and
 - b) which steps from a jurisdiction concerned are expected in order to be de-listed.
- 1.5. The jurisdiction concerned should be equally efficiently informed of its removal from the list, with the indication of the starting date of the application of such modification.
- 1.6. Decisions on listing or de-listing a jurisdiction should clearly specify the dates when any defensive measures should start or cease to apply.

2. COMMITMENTS BY JURISDICTIONS (WAY FORWARD, DIALOGUE AND MONITORING)

- 2.1. Commitments officially taken by jurisdictions to implement recommendations requested by the EU in order to address the issues identified should be carefully monitored by the Code of Conduct Group, supported by the General Secretariat of the Council, with technical assistance of the European Commission, in order to evaluate their effective implementation.
- 2.2. Bilateral discussions with jurisdictions that present concerns by not fulfilling the requirements of the Criteria should continue, with the aim of
- a) exploring and determining solutions to identified concerns with the tax systems and policies of these jurisdictions, as well as
 - b) obtaining the appropriate and necessary commitments to remedy the situation.
- 2.3. In particular, the Code of Conduct Group should continue discussion with relevant jurisdictions and seek their commitment to effectively address the concerns identified in the screening process, as well as a result of the ongoing monitoring.
- 2.4. Should these jurisdictions fail to address commitments by the [established timeframe], the Council will revisit the issue of potential inclusion of the jurisdictions concerned into a list set out in Annex I.
- 2.5. Stock should continue to be taken of the work achieved by the Global Forum on Transparency and Exchange of Information for Tax Purposes, the OECD Inclusive Framework for Tackling Base Erosion and Profit Shifting, and of the Forum on Harmful Tax Practices.

- 2.6. The Code of Conduct Group should contribute to promoting globally the Criteria in coordination with the work of the Global Forum on Transparency and Exchange of Information for tax Purposes, the OECD Inclusive Framework for Tackling Base Erosion and Profit Shifting, and of the Forum on Harmful tax Practices, and monitor, whether jurisdictions comply with the listing criteria set out in the Council Conclusions of 8 November 2016. Where jurisdictions fail to meet the criteria, consideration should be given as to whether this failure actually causes serious risks to the revenues of the Member States.
- 2.7. The Code of Conduct Group should continue developing appropriate practical arrangements on implementing of these Guidelines.
- 2.8. The Code of Conduct Group, supported by the General Secretariat of the Council will continue to conduct and oversee this process, in co-ordination with the HLWP. The Commission services will assist the Code of Conduct Group by carrying out the necessary preparatory work for the screening process in accordance with the roles as currently defined under the Code of Conduct for Business Taxation, with particular reference to previous and ongoing dialogues with third countries.
- 2.9. The EU list of non-cooperative jurisdictions shall be updated by the Council, along these Guidelines, on the basis of information that will be made available to the Code of Conduct Group. The Code of Conduct group will work on the basis of information provided to it, inter alia, by the jurisdiction concerned, the Commission or the Member State(s).
- 2.10 Following a balanced review of all collected information, the Code of Conduct Group shall report to the Council twice a year, by 30 June and 31 December, on the list of non-cooperative jurisdictions to enable the Council to decide, as appropriate, to include jurisdictions in the list of non-cooperative jurisdictions if they do not comply with the screening criteria, or remove them from such list, if they fulfil the conditions.
- 2.11 General Secretariat of the Council will continue to serve as a focal point in order to facilitate the process described in this document.

Criteria on tax transparency, fair taxation and implementation of anti-BEPS measures that EU Member States undertake to promote

The following tax good governance criteria should be used to screen jurisdictions, with a view to establishing the EU list of non-cooperative jurisdictions for tax purposes, in line with the guidelines for the screening. The compliance of jurisdictions on tax transparency, fair taxation and the implementation of BEPS measures will be assessed cumulatively in the screening process.

1. Tax transparency

Criteria that a jurisdiction should fulfil in order to be considered compliant on tax transparency:

- 1.1. Initial criterion with respect to the OECD Automatic Exchange of Information (AEOI) standard (the Common Reporting Standard – CRS): the jurisdiction, should have committed to and started the legislative process to implement effectively the CRS, with first exchanges in 2018 (with respect to the year 2017) at the latest and have arrangements in place to be able to exchange information with all Member States, by the end of 2017, either by signing the Multilateral Competent Authority Agreement (MCAA) or through bilateral agreements;

Future criterion with respect to the CRS as from 2018: the jurisdiction, should possess at least a “Largely Compliant” rating by the Global Forum with respect to the AEOI CRS, and
- 1.2. the jurisdiction should possess at least a “Largely Compliant” rating by the Global Forum with respect to the OECD Exchange of Information on Request (EOIR) standard, with due regard to the fast track procedure, and

1.3. (for sovereign states) the jurisdiction should have either:

- i) ratified, agreed to ratify, be in the process of ratifying, or committed to the entry into force, within a reasonable time frame, of the OECD Multilateral Convention on Mutual Administrative Assistance (MCMAA) in Tax Matters, as amended, or
- ii) a network of exchange arrangements in force by 31 December 2018 which is sufficiently broad to cover all Member States, effectively allowing both EOIR and AEOI;

(for non-sovereign jurisdictions) the jurisdiction should either:

- i) participate in the MCMAA, as amended, which is either already in force or expected to enter into force for them within a reasonable timeframe, or
- ii) have a network of exchange arrangements in force, or have taken the necessary steps to bring such exchange agreements into force within a reasonable timeframe, which is sufficiently broad to cover all Member States, allowing both EOIR and AEOI.

1.4. Future criterion: in view of the initiative for future global exchange of beneficial ownership information, the aspect of beneficial ownership will be incorporated at a later stage as a fourth transparency criterion for screening.

Until 30 June 2019, the following exception should apply:

- A jurisdiction could be regarded as compliant on tax transparency, if it fulfils at least two of the criteria 1.1, 1.2 or 1.3.

This exception does not apply to the jurisdictions which are rated "Non Compliant" on criterion 1.2 or which have not obtained at least "Largely Compliant" rating on that criterion by 30 June 2018.

Countries and jurisdictions which will feature in the list of non-cooperative jurisdictions currently being prepared by the OECD and G20 members will be considered for inclusion in the EU list, regardless of whether they have been selected for the screening exercise.

2. Fair taxation

Criteria that a jurisdiction should fulfil in order to be considered compliant on fair taxation:

- 2.1. the jurisdiction should have no preferential tax measures that could be regarded as harmful according to the criteria set out in the Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997 on a code of conduct for business taxation¹, and
- 2.2. The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.

3. Implementation of anti-BEPS measures

3.1. Initial criterion that a jurisdiction should fulfil in order to be considered compliant as regards the implementation of anti-BEPS measures:

- the jurisdiction, should commit, by the end of 2017, to the agreed OECD anti-BEPS minimum standards and their consistent implementation.

3.2. Future criterion that a jurisdiction should fulfil in order to be considered compliant as regards the implementation of anti-BEPS measures (to be applied once the reviews by the Inclusive Framework of the agreed minimum standards are completed):

- the jurisdiction should receive a positive assessment² for the effective implementation of the agreed OECD anti-BEPS minimum standards.

¹ OJ C 2, 6 January 1998, p. 2.

² Once the methodology is agreed, the wording of the criterion will be revised by the Council accordingly.