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

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

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NOTE

From:	Commission Services
To:	Code of Conduct Group (Business Taxation)
Subject:	The EU list of non-cooperative jurisdictions for tax purposes – Approach to jurisdictions that missed 2018 deadline

Delegations will find attached a document by the Commission services.

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ANNEX

NOTE BY THE EUROPEAN COMMISSION SERVICES

EU LIST: APPROACH TO JURISDICTIONS THAT MISSED 2018 DEADLINE

A number of jurisdictions have not met the 31 December 2018 deadline for delivering on their commitments under the EU listing process. Many have written to the Commission and/or CoC Chair, to explain their delay and to request more time. The reasons for missing the deadline vary from one jurisdiction to the next. However, they can be broadly grouped under 3 headings, as set out below.

On one hand, the EU needs to be consistent in its treatment of jurisdictions under the EU listing process. Many jurisdictions invested heavily, at both technical and political level, in order to meet the required deadline. Allowing excessive flexibility to those that did not meet that deadline may send a negative signal regarding the fairness and objectivity of the EU listing process. On the other hand, some jurisdictions have engaged constructively and done everything possible to deliver on their commitments, but were delayed due to unforeseen and unsurmountable obstacles. A pragmatic and reasonable approach may be needed for these particular cases.

Member States need to agree on an overall approach on how to deal with jurisdictions that did not meet the set deadline. These jurisdictions could either be added to Annex I for failure to meet the deadline, or they could be offered more time to meet their commitments. This paper proposes an approach, which the Commission considers to be reasonable and objective, to help feed the Member States' discussions. It also seeks to confirm the approach on extended grandfathering provisions and on the how often the EU list should be updated, moving forward.

1. CONSTITUTIONAL DELAYS

Some jurisdictions have not been able to adopt the legislation to meet their commitments by the end of 2018, for constitutional or institutional reasons.

In the case of **Cook Islands** and **Maldives**, elections in mid-2018 left them with no government for most of the rest of the year, which made it impossible to pass any legislation. Both jurisdictions repeated their willingness to deliver on their commitments as soon as possible. Maldives shared draft legislation, which goes in the right direction. Cook Islands did not have draft legislation but it outlined its plans for the reform.

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Switzerland and **United Arab Emirates** both claim that complexities in their federal systems have prevented their reforms from being finalised. In the Swiss case, the legislation abolishing 3 harmful regimes was adopted by Parliament in October 2018, while the administrative regimes were closed to new entrants from 1 January 2019. However, constitutionally, the final legislation cannot enter into force until after a referendum in May (pending a positive result). The legislation is scheduled to enter into force on 1 January 2020 unless there is a negative result in the referendum. Switzerland remained actively engaged with the EU throughout 2018 on the obstacles it was encountering.

United Arab Emirates wrote to Commissioner Moscovici in December 2018, explaining that it faced delays in adopting the relevant reforms due to its complex federal system. UAE shared a concept paper and timeline for reforms, indicating that the legislation will be adopted sometime in the second half of 2019. It has not yet shared any draft legislation.

Proposed approach

Jurisdictions that faced genuine constitutional or institutional problems could be given more time to complete the reforms. This should be subject to them delivering within a fixed date, decided on a case-by-case basis and indicated in Annex II. It should also be subject to their submitting acceptable draft legislation (i.e. which looks compliant with their commitment) before ECOFIN.

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2. DELAYS IN PROCESS

Some jurisdictions have made important progress in the work to meet their commitments, but did not complete the legislative process by the end of 2018.

Aruba and **Hong Kong** have indicated that they will only adopt the final reforms by March and April 2019, respectively. **Dominica** claims that OECD delays prevented it from ratifying the MAC on time. However, the OECD was delayed because Dominica did not have the necessary domestic legislation in place.

In a letter to the Code Chair in 2018, **Palau** asked for more time (to end 2019) and EU financial assistance to meet the transparency criteria, due to capacity constraints. It is worth noting that 3 jurisdictions (Oman, New Caledonia, Taiwan) are already benefitting from an extended deadline to deliver on criteria 1.1, through a step-by-step process agreed by the CoCG.

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Proposed approach

Jurisdictions that have not met their deadline for procedural reasons should be put on Annex I, until their commitment is completed i.e. adopted and implemented. Member States could consider whether to grant jurisdictions with severe capacity constraints an additional year to meet their commitments, and keep them on Annex II in the meantime.

3. NON-HIGHLY MOBILE REGIMES

In October 2018, the CoC Group agreed on an approach for possible delays in amending regimes covering non-highly mobile activities, such as manufacturing. It was agreed that, on a case-by-case basis, jurisdictions could be given extra time to adapt their legislation on manufacturing regimes, subject to certain conditions. The conditions are related to the overall level of cooperation of the jurisdiction, the existence of a clear timetable for reform and clear evidence of the tangible steps that will be taken to reform the harmful regime. **Morocco** took measures in 2018 to fulfil these conditions for the two regimes covering non-highly mobile activities it had committed to reform. **Costa Rica** also fulfils these conditions for its Free Trade Zones regime (mostly manufacturing) it should have reformed by end 2018, but which will only be abolished in April 2019.

Proposed approach

Jurisdictions that face delays in reforming regimes for non-highly mobile activities should be given until the end of 2019 to deliver, subject to their fulfilment of the conditions agreed at the October COCG meeting. They should remain on Annex II in the meantime.

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4. GRANDFATHERING CLAUSES

In July 2018, the CoC Group agreed to allow Korea to extend the grandfathering provisions for its regime until 2034, due to potential litigation risk Korea faced from closing it earlier. The Group noted that only a limited number of companies were likely to benefit from this extension, and asked Korea to provide an annual update with statistics. Since then, **Grenada, Morocco** and **Thailand** have signalled their need for longer grandfathering periods for certain regimes than the standard 3 years, for constitutional or legal reasons.

Proposed approach

Jurisdictions that can provide evidence of genuine constitutional or legal challenges arising from the 3-year limit on grandfathering should be allowed to extend the period for specific regimes. They should provide an overview of the entities that will benefit and report to the CoCG on the use of the regime on an annual basis. They can be removed from Annex II if all other issues have been addressed.

5. UPDATING THE LIST

In light of the possible extensions that may be given to jurisdictions that missed the 2018 deadline, Member States should consider continuing a dynamic approach to updating the EU list for 2019. Any extension given to a jurisdiction should be clearly indicated in Annex II, and failure to deliver within this extended deadline should result in the jurisdiction moving automatically to Annex I.

Maintaining a dynamic approach in 2019 would also allow the jurisdictions that have already been given until the end of 2019 to meet commitments (e.g. developing countries without a financial centre or newly identified regimes) to be assessed within that timeline.

From 2020, ECOFIN should agree on an updated EU list every October, based on the situation with all jurisdictions at that point in time. Once this update is agreed, it would remain valid until the following October. That way, Member States can use it as a basis for applying national and/or EU defensive measures from January the following year.

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