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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: AT Presidency

To: Code of Conduct Group (Business Taxation)

Subject: Future criterion 3.2 for the EU listing process

- Implementation of anti-BEPS minimum standards

Delegations will find attached a document in view of the meeting of the Code of Conduct subgroup on third countries on 10 July 2018.

FUTURE CRITERION 3.2 FOR THE EU LISTING PROCESS**IMPLEMENTATION OF ANTI-BEPS MINIMUM STANDARDS****I. BACKGROUND**

1. The EU listing criteria approved by the ECOFIN Council of 8 November 2016 (doc. 14166/16) included the following reference:

" 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 jurisdictions should receive a positive assessment for the effective implementation of the agreed OECD anti-BEPS minimum standards"

2. A footnote to this future criterion 3.2 furthermore provided that *"once the methodology is agreed, the wording of the criterion will be revised by the Council accordingly"*.
3. In practical terms, contrary to criterion 1.4, the text of the November 2016 criteria does not at this stage need to be amended but the COCG should agree a guidance on how to apply it in practice. Once it will be possible to screen the implementation of the other BEPS minimum standards, the Council conclusions and the COCG guidance will be amended accordingly.
4. The COCG meeting of 14 February 2018 mandated the subgroup on third countries to prepare a proposal, with a view to starting to apply as soon as possible this new criterion 3.2 to jurisdictions that have been reviewed and rated by the Inclusive Framework for their implementation of agreed anti-BEPS minimum standards. It also noted that in the absence of ratings, the COCG, assisted by the Commission services, could proceed to the assessment on the basis of the Inclusive Framework on BEPS (IF) recommendations. This mandate was reiterated at the COCG meeting of 12 April 2018.

5. At the subgroup meeting of 16 March, delegations agreed that, at this stage, only the assessment of the implementation of the BEPS minimum standard on Country-by-country reporting (CBCR – BEPS action 13) is sufficiently advanced to deserve a parallel consideration by the EU within its listing exercise: the IF has indeed already agreed the first peer review reports on BEPS Action 13 for 95 jurisdictions.
6. At the subgroup meeting of 4 May 2018, the Commission services presented a preliminary analysis of the outcome of these reports as relevant for the future criterion 3.2 and proposed terms for implementing this criterion (doc. 8385/18 EU RESTRICTED).
7. Delegations supported the proposed way forward but raised the following comments:
 - a. One delegation suggested to underline that the jurisdiction should have arrangements in place to be able to exchange with all interested MS;
 - b. Some delegations noted that EU Member States should comply with the requirements before that the new criterion 3.2 is imposed to jurisdictions in the context of the EU listing exercise: 5 MS have indeed received one recommendation, 6 MS have received two recommendations;
 - c. Some delegations considered furthermore that the wording according to which recommendations by the IF on the implementation of the requirements "will be taken into account" is too vague.
8. The risk with regard to the proposed insertion of the word "interested" is that this would make the assessment of this aspect conditional on the willingness of a particular MS to exchange CBCR with a given third country. This criterion should not be based on discretionary decisions (by a MS or a third country) but should always occur when the factual elements required for the exchange of CBCR are present (i.e. entities belonging to MNEs in the scope). Nevertheless, a footnote has now been added to make clear that a jurisdiction cannot be considered non-compliant on criterion 3.2 if exchanges will not take place due to Member States not indicating this jurisdiction as an exchange partner for CbCR as long as this jurisdiction has in place all necessary arrangements for such an exchange.

9. With regard to recommendations, the Commission services clarified that some of them refer to the minimum standard as agreed in the 2015 Action 13 BEPS Report while some others refer to the guidance as issued afterwards. Recommendations to be looked at should only be those referring to the minimum standard.
10. At the meeting of the Code of Conduct Group of 31 May the approach suggested was broadly agreed though some delegations emphasised the need to make clearer that this analysis must consider only the proper implementation of the minimum standard without covering elements which are not part of that standard. The Chair of the Code of Conduct Group asked to have a further round of discussion at Subgroup level in order to better clarify this outstanding issue.

II. PROPOSED WAY FORWARD

11. The Presidency proposes to submit the draft compromise text set out below for endorsement by the ECOFIN Council:

(Draft) Guidance on criterion 3.2 of the EU listing exercise

“With respect to the Country-by-country reporting BEPS standard (the “CBCR”) the jurisdiction should have arrangements in place to be able to exchange with all Member States when this is relevant either by signing the CBCR MCAA₂ or through bilateral agreements **with those Member States**.¹ The domestic legal and administrative frameworks should be in place beforehand and should correspond to the **minimum standard as detailed in the** Terms of Reference. Depending on the situation of the jurisdictions **with reference to the time of their commitment to the standard (2017, 2018 or 2019)**, they should be in full compliance with the standard by the end of 2019, 2020 or 2021. **Furthermore:**

¹ **A jurisdiction cannot be considered non-compliant on criterion 3.2 if exchanges will not take place due to Member States not indicating this jurisdiction as an exchange partner for CbCR as long as this jurisdiction has in place all necessary arrangements for such an exchange.**

- a) The absence of recommendations made in the context of ~~for jurisdictions reviewed~~ by the Inclusive Framework on BEPS (IF) ~~on the implementation of the requirements to satisfy the minimum standard~~ will be considered by the Code of Conduct Group as a positive assessment.
- b) If a jurisdiction receives recommendations in the context of reviews by the IF that do not refer to the minimum standard, this will also be considered as a positive assessment. The assessment whether recommendations refer to the minimum standard will be made on a case-by-case analysis.
- c) A shortcoming in the implementation of the minimum standard as reflected in a recommendation by the IF (for jurisdictions reviewed) specifically referring to the element of the minimum standard would imply a negative assessment. In this case the jurisdiction cannot be considered as compliant with criterion 3.2."

12. This draft guidance is intended to cover the three situations described in the Commission Services' paper discussed at the Subgroup meeting of 4 May, in particular:

- a) For the jurisdictions that joined the IF in the last years, it is expected that they implement the minimum standard in full compliance by the end of 2019.
- b) Jurisdictions committed to become IF member (or to apply the standard on their own) by the end of 2018 would have until the end of 2019 to have in place the domestic legal and administrative framework and until the end of 2020 to actually exchange CBC reports in full compliance.
- c) Jurisdictions committed to become IF member (or to apply the standard on their own) by the end of 2019 (developing countries) would have until the end of 2020 to have in place the domestic legal and administrative framework and until the end of 2021 to actually exchange CBC reports in full compliance.

13. Following the endorsement of the guidance by the Council, criterion 3.2 will officially be included in the monitoring process and jurisdictions will receive letters informing them of the new criterion and of the calendar of its implementation. Ideally those letters should be sent before the end of this year in order to leave at least one year to the jurisdictions concerned by the first deadline of end 2019.
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