



Council of the
European Union

060396/EU XXVI. GP
Eingelangt am 03/04/19

Brussels, 3 April 2019
(OR. en)

6743/19
DCL 1

FISC 117

DECLASSIFICATION

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| of document: | ST 6743/19 RESTREINT UE/EU RESTRICTED |
| dated: | 21 February 2019 |
| new status: | Public |
| Subject: | (5th draft) Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes |

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: Chair of the Code of Conduct Group (Business Taxation)
To: Code of Conduct Group (Business Taxation)
Subject: (5th draft) Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes

Delegations will find attached a fifth compromise text in view of the meeting of the Code of Conduct (business taxation) on 27 February 2019.

New text compared to doc. 5787/19 EU RESTRICTED is marked **bold and underlined**, deletions are marked with ~~striketrough~~.

(5th DRAFT) COUNCIL CONCLUSIONS

on the revised EU list of non-cooperative jurisdictions for tax purposes

The Council:

1. RECALLS the Council Conclusions of 25 May 2016 on an external taxation strategy and measures against tax treaty abuse, 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, and the Council Conclusions of 5 December 2017 on the EU list of non-cooperative jurisdictions for tax purposes;
2. WELCOMES the work that the Code of Conduct Group on Business Taxation (“Code of Conduct Group”), supported by the General Secretariat of the Council and with the assistance of the **European** Commission services, has carried out in monitoring the implementation of commitments taken by jurisdictions to implement tax good governance principles and in taking stock of the work achieved by the relevant OECD fora;
3. WELCOMES the fact that most of these jurisdictions ~~had~~ **have engaged in an open and** constructive ~~way dialogue~~ with the Code of Conduct Group and resolved the deficiencies that had been identified in the areas of tax transparency, fair taxation and implementation of anti-BEPS standards by enacting the necessary ~~laws~~ **measures** within the agreed deadline;

Chair comment:

- Text clarifications and linguistic improvements
- *Paragraph 3: one delegation suggested to replace the word "deficiencies" by "concerns" with a view to the principle that tax is a sovereign matter, but the word "deficiencies" was the word used in the letters seeking commitment sent in 2017 as well as in most COCG documents since then and the Chair would therefore prefer to keep the wording unchanged.*

4. REGRETS at the same time that a number of jurisdictions have not enacted by the end of 2018 all the measures to which they had committed, whilst some jurisdictions have ~~still~~ not committed to implement any or some of the tax good governance principles for which it was determined that they are not compliant;

Chair comment:

- *The deletion of the word "still" is aimed at covering the situation whereby a jurisdiction would be recommended for EU listing because its commitment letter on a newly identified regime would not be deemed sufficient by the COCG.*

5. ENDORSES, accordingly, the revised EU list of non-cooperative jurisdictions for tax purposes set out in Annex I and ~~CONFIRMS that the jurisdictions included therein will remain listed until:~~

~~For jurisdictions listed since 5 December 2017: until they have provided a high level political commitment that is deemed sufficient by the Council;~~

~~For newly listed jurisdictions: until they have implemented all their commitments taken;~~

Chair comment:

- *One delegation requested to delete the two sub-indentations in order to stress the unitary character of the EU list of non-cooperative jurisdictions for tax purposes (alphabetical order, no subdivisions).*
- *The Chair agrees that this text is not essential since the justifications for listing that will be included in Annex I (the text below the name of the jurisdiction) will already make clear what each jurisdiction will need to do in order to get de-listed.*

6. CONSIDERS that reasons put forward by some jurisdictions for not fully enacting all of the measures to which they had committed, despite tangible efforts ~~by their governments~~, should **could** in some cases be viewed as justified and AGREES therefore that the deadline for meeting their commitments should be extended as set out in Annex II;

Chair comment:

- *Deletion of "by their governments" to reflect the fact that some jurisdictions faced a delay due to an absence of government.*
- *"Could": text clarification to underline the absence of automaticity.*
- *This paragraph should be read in conjunction with paragraph 7.*

7. TAKES THE VIEW, in particular, that ~~under certain safeguards determined by the Code of Conduct Group:~~
- a) **certain** developing countries should be given more time to reform their **harmful** preferential tax regimes covering manufacturing activities and similar non-highly mobile activities considering the heavier economic impact of these reforms on such countries;
 - b) jurisdictions that faced genuine institutional or constitutional issues that prevented them **from** fulfillment of their commitments in 2018 should also be given a reasonable deadline extension to complete their reforms **subject to the jurisdiction having provided adequate draft legislation;**
 - c) **jurisdictions that evidenced litigation risks in relation to the abolition of certain harmful preferential tax regimes should be granted an extended grandfathering period;**
 - d) **jurisdictions that are rated as partially compliant for exchange of information on request and are waiting for a supplementary review by the Global Forum should be granted an extension until the revised rating is available;**

Chair comments:

- *The Chair would prefer to maintain the explanation of the principles in the Council conclusions rather than in Annex II in order to maintain the factual style of the latter.*
- *Several delegations have furthermore insisted on the importance of being as transparent and clear as possible in the conclusions on the reasons for listing or not listing certain jurisdictions. For this reason two additional sub-paragraphs were added.*

8. EXPRESSES its satisfaction that many jurisdictions under criterion 2.2 have enacted the required reforms in 2018 and are therefore removed from Annex II, but ASKS the Code of Conduct Group to monitor ~~annually that~~ **the proper enactment of** their legislative and enforcement provisions **on an annual basis** ~~are being adequately administered at a systemic level;~~

9. **ACKNOWLEDGES that further work will be needed to define acceptable economic substance requirements for collective investment funds under criterion 2.2 and INVITES the Group to provide guidance to the jurisdictions concerned and seek in due time the necessary commitments from these jurisdictions, as appropriate;**

Chair comments:

- *Text clarification and linguistic improvement*
- *The modalities of this monitoring can be decided at a subsequent stage but the principle should be set out clearly in the Council conclusions since these jurisdictions would be taken off completely from Annex II and the mandate to monitor these aspects would then be unclear.*
- *New paragraph on CIVs: see the Chair's note on the remaining open issues in relation to the draft assessments.*

10. NOTES WITH CONCERN the replacement of harmful preferential tax regimes by measures of similar effect in certain jurisdictions, ~~REQUESTS~~ **REGRETS that all/some/one of these jurisdiction(s) have/has not taken a sufficient** ~~the publication of the letters seeking commitment and commitment letters received from these jurisdictions in return, and~~ ~~UNDERLINES that failure to amend or abolish these measures by the end of 2019]~~ **should result in the EU listing of the concerned jurisdictions and STRESSES that no further replacement with measures of similar effect or delays will be accepted when assessing at the beginning of 2020 whether the requested commitments will have been implemented;**

Chair comments:

- *The middle part of the paragraph will be obsolete by the time the Council conclusions are adopted and it can therefore be deleted.*
- *Adjustment of the text to the situation when the Council will adopt the revised EU list and simplification of the paragraph (the fact that the jurisdictions that sent a sufficient commitment and are for this reason included in Annex II would be listed if they don't meet their commitment does not need to be recalled).*
- *Under the current proposal (also as tabled at the last meeting on 30/01), a jurisdiction that refuses its consent to publish its commitment letter would not be listed for that reason.*
- *The additional wording at the end of the paragraph comes from the agreed letters seeking commitment and was added at the request of one delegation.*

11. INVITES **NOTES** the Code of Conduct Group to **will** continue seeking commitments from the remaining jurisdictions that have not yet committed to address the deficiencies identified since the Council conclusions of 5 December 2017;

Chair comments:

- See comment under paragraph 4. It is furthermore only a continuation of existing practice.
- One delegation queried about the reason why the former paragraph about the Namibia precedent was deleted. As indicated in the 4th compromise text, this is because it would anyway de facto apply to a very limited number of jurisdictions in respect of criterion 2.1 (Samoa and US Virgin Islands), whilst a case by case assessment possibly resulting in a different assessment could be followed in these cases. These considerations are anyway too detailed for the purpose of these Council conclusions.

12. INVITES **NOTES that** the Code of Conduct Group to **will** continue monitoring the effective implementation by end 2019 of the commitments made by developing countries without a financial centre in respect of tax transparency and implementation of anti-BEPS minimum standards, as well as the implementation of the relevant transparency and anti-BEPS minimum standards in jurisdictions that cannot or do not wish to join the Global Forum or OECD BEPS Inclusive Framework;

Chair comments:

- It is also a continuation of existing practice.

13. WELCOMES the work of the Code of Conduct Group in reviewing newly identified preferential regimes in some jurisdictions and in monitoring the commitments taken by these jurisdictions to remove the harmful features of these regimes ~~by the end of the calendar year following these commitments;~~

Chair comment:

- *One delegation suggested to determine a reasonable timeframe on a case by case basis but the Chair would prefer to main the existing rule, so as to ensure equal treatment.*
- *Nevertheless the specific case of the replacement of harmful tax regimes by measures of similar effect (in this case the deadline is end of 2019, instead of end of 2020) needs to be acknowledged. The Chair proposes in this respect to make the text more general rather than more detailed. The deadlines are anyway clearly set out in Annex II.*

14. ENDORSES the state of play with respect to commitments taken by cooperative jurisdictions to implement tax good governance principles, as set out in Annex II;

Chair comments:

- *One delegation suggested that the Council should only note/present Annex II, but the Chair would prefer to keep the existing wording, also considering the past COCG agreed practice of regularly asking ECOFIN to approve updates not only of Annex I but also of Annex II.*

~~WELCOMES the fact that these Council conclusions are being taken into account by the European Commission in the implementation of EU financing and investment operations;~~

Chair comment:

- *The paragraph was moved below: see new paragraph 19.*

15. INVITES the Code of Conduct Group **and its** Chair, supported by the General Secretariat of the Council and with the technical assistance of the Commission services, to continue the interactions and dialogues with the relevant jurisdictions, including with respect to the end of the general "two out of three" approach at the end of June 2019, ~~where appropriate in coordination with the High Level Working Party on tax issues (HLWP);~~

Chair comment:

- *It is important to maintain the possibility for dialogue with jurisdictions, in line with the February 2018 Procedural guidelines for carrying out the monitoring process.*

16. CONFIRMS that the Code of Conduct Group can recommend to the Council at any time to update, but at least once a year ~~in July~~ **but as from 2020 no more than twice a year**, the EU list set out in Annex I, as well as the state of play set out in Annex II on the basis of any new commitment taken or of the implementation thereof;
17. CONSIDERS that these modifications could take effect on 1 January of the year following the annual update in July **within a period of six months following their publication in the Official Journal of the EU** in respect of existing national and possible future co-ordinated defensive measures in the tax area against listed jurisdictions;

Chair comments:

- *Paragraphs 16-17: compromise wording proposal.*
- *Some delegations suggested to delete "in the tax area" in paragraph 17 but this would bring confusion in respect of paragraph 19: several defensive measures in the non-tax area (of a legislative nature) are indeed already in force and Council conclusions (non-legislative) cannot influence their enforcement mechanisms.*

18. ~~WELCOMES~~ **RECALLS** the extensions of the geographical scope of the EU screening exercise to other jurisdictions agreed in 2018 and INVITES the Code of Conduct Group to review the economic data used for selecting jurisdictions in 2020, for application as from 2021;

19. Equally **WELCOMES CONFIRMS** the agreements reached in respect of coordinated defensive measures in the non-tax area vis-à-vis the non-cooperative jurisdictions since the Council conclusions of 5 December 2017¹, as well as on the **start of application of** future criterion 3.2 (implementation of the country by country reporting - CBCR minimum standard); **and** **REITERATES** its invitation to the Code of Conduct Group to finalise discussions in respect of future criterion 1.4 (transparency of ultimate beneficial ownership);

Chair comments:

- *"Recalls": this is self-explanatory (the Council already agreed to these)*
- *Criterion 3.2 is not a "future" criterion anymore.*
- *Merger of former paragraphs 19 and 20 since they bot concern future criteria.*
- *The text on defensive measures in the non-tax area has been moved below.*

20. **WELCOMES the fact that Annex I of these Council conclusions is being taken into account by the European Commission in the implementation of EU financing and investment operations, as well as the agreements reached in respect of coordinated defensive measures in the non-tax area vis-à-vis the non-cooperative jurisdictions since the Council conclusions of 5 December 2017²:**

¹ Regulation (EU) 2017/2402 on a general framework for securitisation, Regulation (EU) 2017/2396 on the European Fund for Strategic Investments, Regulation (EU) 2017/2396 on the European Fund for Strategic Investments and on the European Investment Advisory Hub, Decision (EU) 2018/412 on granting an EU guarantee to the European Investment Bank against losses under financing operations supporting investment projects outside the EU, and Regulation (EU, Euratom) 2018/1046 on the financial rules applicable to the EU general budget.

² Regulation (EU) 2017/2402 on a general framework for securitisation, Regulation (EU) 2017/2396 on the European Fund for Strategic Investments, Regulation (EU) 2017/2396 on the European Fund for Strategic Investments and on the European Investment Advisory Hub, Decision (EU) 2018/412 on granting an EU guarantee to the European Investment Bank against losses under financing operations supporting investment projects outside the EU, and Regulation (EU, Euratom) 2018/1046 on the financial rules applicable to the EU general budget.

21. ~~Equally~~ REITERATES **at the same time** its invitation to the Code of Conduct Group to finalise discussions on further coordinated defensive measures, without prejudice to Member States' obligations under EU and international law;

Chair comment:

- *Paragraph 19: new compromise text in the first part of the sentence as several delegations could not support the previous compromise text in former paragraph 14;*
- *The paragraphs that dealt with defensive measures have been brought together for better readability sake.*

22. INVITES the EU institutions and Member States, as appropriate, to take the revised EU list of non-cooperative jurisdictions for tax purposes **set out in Annex I** into account in foreign policy, economic relations and development cooperation with the relevant third countries, to strive for a comprehensive approach as regards to the issue of compliance with the Criteria, without prejudice to the respective spheres of competence of the Member States and of the Union as resulting from the Treaties;

Chair comment:

- *Text clarification at the request of one delegation.*

23. REITERATES that the Code of Conduct Group, supported by the General Secretariat of the Council **and with the technical assistance of the European Commission services**, should continue to conduct and oversee the EU screening, listing and monitoring processes, in coordination with the High Level Working Party on tax issues (HLWP). ~~The Commission services will continue to assist the Code of Conduct Group by carrying out the necessary preparatory technical work in accordance with the roles as currently defined under the Code of Conduct for Business Taxation.~~

Chair comment:

- *Text simplification*

The EU list of non-cooperative jurisdictions for tax purposes*Chair comment:*

- *The final list submitted to Coreper/ECOFIN will be in alphabetical order without any subdivision.*

1. [Name of jurisdiction]

Situation 1 (jurisdictions that are already listed): [Name of jurisdiction] [does not apply any automatic exchange of financial information], [does not cover all EU Member States for the purpose of automatic exchange of information], [is not a Member of the Global Forum on Transparency and Exchange of Information for Tax Purposes], [does not have a rating of at least “Largely Compliant” by the Global Forum on Transparency and Exchange of Information for Tax Purposes for Exchange of Information on Request], [has not signed and ratified (, including through the jurisdiction they are dependent on,) the OECD Multilateral Convention on Mutual Administrative Assistance as amended], [has harmful preferential tax regimes], [facilitates offshore structures and arrangements aimed at attracting profits without real economic substance], [is not a member of the Inclusive Framework and/or did not commit to apply the BEPS minimum standards] and did not commit to addressing these issues.

[Furthermore, (name of jurisdiction) committed to comply with criterion/criteria (X.X) by the end of 2018 but has not resolved this/these issue(s).]

Situation 2 (newly listed jurisdictions): [Name of jurisdiction] [does not apply any automatic exchange of financial information], [does not cover all EU Member States for the purpose of automatic exchange of information], [is not a Member of the Global Forum on Transparency and Exchange of Information for Tax Purposes], [does not have a rating of at least “Largely Compliant” by the Global Forum on Transparency and Exchange of Information for Tax Purposes for Exchange of Information on Request], [has not signed and ratified (, including through the jurisdiction they are dependent on,) the OECD Multilateral Convention on Mutual Administrative Assistance as amended], [has not amended or abolished its harmful preferential tax regimes], [has replaced a harmful preferential tax regime by a measure of similar effect and did not commit to amend or abolish it by the end of 2019], [facilitates offshore structures and arrangements aimed at attracting

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profits without real economic substance], [is not a member of the Inclusive Framework or does not apply the BEPS minimum standards] and has not resolved this/these issue(s) by the end of 2018.

[For developing countries without a financial centre that would not have met their commitment on criterion 2.1: (Name of jurisdiction)'s commitment to comply with criterion/criteria (X.X) by the end of 2019 will continue to be monitored.]

Chair comment:

- *One delegation noted that developing countries without a financial centre that have not met their commitment on criterion 2.1 should still be considered as cooperative.*
- *Leaving aside the specific case of Palau, one case where this paragraph would apply is Fiji and the Chair would therefore not recommend to follow this approach since this jurisdiction was clearly non-cooperative and the COCG has already endorsed on 30/01 the Commission services' progress report concerning this jurisdiction (which proposed EU listing).*

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**State of play of the cooperation with the EU with respect to commitments taken to implement
tax good governance principles**

1. Transparency

1.1 Commitment to implement the automatic exchange of information, either by signing the Multilateral Competent Authority Agreement or through bilateral agreements

The following jurisdictions are committed to implement automatic exchange of information by end 2019:

[list]

1.2 Membership of the Global Forum on transparency and exchange of information for tax purposes ("Global Forum") and satisfactory rating in relation to exchange of information on request

Chair comment:

- *Text clarification.*

The following jurisdictions, which ~~were~~ committed to have a sufficient rating by end 2018, are waiting for a supplementary review by the Global Forum:

[list]

The following jurisdictions are committed to become member of the Global Forum and/or have a sufficient rating by end 2019:

[list]

1.3 Signatory and ratification of the OECD Multilateral Convention on Mutual Administrative Assistance (MAC) or network of agreements covering all EU Member States

The following jurisdictions are committed to sign and ratify the MAC or to have in place a network of agreements covering all EU Member States by end 2019:

[list]

2. Fair Taxation

2.1 Existence of harmful tax regimes

The following jurisdictions, which ~~were~~ committed to amend or abolish their harmful manufacturing tax regimes covering (or the manufacturing activities and similar non-highly mobile activities part thereof) by end 2018 and demonstrated tangible progress in initiating these reforms in 2018, were granted further time to adapt their legislation:

[list, including the new agreed deadline (between brackets) for each jurisdiction]

The following jurisdictions, which ~~were~~ committed to amend or abolish their harmful tax regimes by end 2018 and ~~face~~ but were prevented from doing so due to genuine institutional or constitutional issues that prevented the completion of these reforms despite tangible progress in 2018, were granted further time to adapt their legislation:

[list, including the new agreed deadline (between brackets) for each jurisdiction]

Chair comment:

- *Linguistic amendments.*
- *Alignment of the wording with paragraph 7 of the draft Council conclusions.*

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The following jurisdiction is committed to amend or abolish the identified harmful tax regimes by 9 November 2019:

Namibia

The following jurisdictions are committed to amend or abolish harmful tax regimes by end 2019:

[list]

The following jurisdictions are committed to amend or abolish harmful tax regimes by end 2020:

[list]

[2.2. Existence of tax regimes that facilitate offshore structures which attract profits without real economic activity

The following jurisdictions ~~to~~ are committed to addressing the concerns relating to economic substance by end 2019:

[list]]

Chair comment:

- *Typo correction.*

3. Anti-BEPS Measures

3.1 Membership of the Inclusive Framework on BEPS or commitment to implementation of OECD anti-BEPS minimum standards

The following jurisdictions are committed to become member of the Inclusive Framework on BEPS or implement OECD anti-BEPS minimum standards by end 2019:

[list]

The following jurisdictions are committed to become member of the Inclusive Framework on BEPS or implement OECD anti-BEPS minimum standards if and when such commitment will become relevant:

[list]

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