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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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General Secretariat

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NOTE

From:	Presidency
To:	Delegations
Subject:	State of play of the process leading to establishment of the EU list of non-cooperative jurisdictions for tax purposes

1. The ECOFIN Council, in its Conclusions of 25 May 2016 on an "External Strategy for Effective Taxation and Commission Recommendation on the implementation of measures against tax treaty abuse" invited "*the Code of Conduct Group to start work […], with a view to establishing an EU list of non-cooperative jurisdictions and exploring defensive measures at EU level to be endorsed by the Council in 2017. Those defensive measures could be considered to be implemented in the tax as well as in the non-tax area.*"[1].

2. In its 8 November 2016 Conclusions[2] the Council set out the criteria on tax transparency, fair taxation and implementation of anti-BEPS standards, as well as the guidelines for the process of screening jurisdictions with a view to establishing an EU list of non-cooperative jurisdictions for tax purposes.

[1] Doc. 9452/16 FISC 85 ECOFIN 502, point 10.
[2] The official publication of these Council Conclusions can be found in the *Official Journal of the European Union*: OJ C 461, 10.12.2016, page 2.

3. Since then, the Code of Conduct Group (Business Taxation) (COCG) and Council Presidency, chairing the Code of Conduct Group subgroup on third countries[3] have worked intensely on this dossier.

4. The COCG, in line with the mandate (the Guidelines[4]) by the Council, finalised the preparatory work, launched an assessment ("screening") exercise on a number of jurisdictions on the basis of the Commission's Scoreboard, and invited these jurisdictions to engage in the process of analysis of their tax systems against the criteria, set out in the Council conclusions of 8 November 2016, concerning the areas of tax transparency, fair taxation and implementation of anti-Base Erosion and Profit Shifting (anti-BEPS) measures.

5. The expert panels, set up by the COCG, have conducted the "screening" on the basis of the publically available sources as well as information provided by the jurisdictions concerned, as most of the jurisdictions chose to engage in this process and respond to the queries by the COCG experts.

6. In October 2017, in line with point 7 of the Guidelines, the expert panels presented the outcome of this work to the COCG, in the form of individual jurisdiction sheets, containing factual information, pertinent to the screening criteria, as well as the draft recommendations to address the deficiencies identified.[5]

[3] Doc. 6674/16 FISC 33 ECOFIN 189.
[4] See doc. 14166/16, point 7 of the "Guidelines for the process of screening of jurisdictions with a view to establishing an EU list of non-cooperative jurisdictions for tax purposes" (as endorsed by ECOFIN of 8 November 2017)
[5] Doc. 12831/17 EU RESTRICTED; doc. 12939/17 EU RESTRICTED; doc. 13015/17 EU RESTRICTED; doc. 13182/17 EU RESTRICTED; doc. 13235/17 EU RESTRICTED.

7. At its meeting of 17 October 2017 the COCG endorsed this analysis and agreed that letters should be sent to all jurisdictions concerned to inform them of the results of this work and, where relevant, seek high level political commitment from the jurisdictions to address the identified concerns.

8. The COCG also reached agreement on the templates, which are the basis of the letters to be sent to all the jurisdictions that were screened, including those where no issue was determined by the COCG, as well as to the jurisdictions where concerns were found and from which commitments to address these concerns should be sought. The letters are signed by the Chair of the COCG.

9. Letters seeking for high level political commitment to address the concerns determined by the COCG were sent[6] to the jurisdictions concerned setting a deadline for replies at 17 November 2017.

10. Notably, an important part of the work of COCG evolved around the screening criterion 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*."). The scope of this criterion was further specified by the COCG, as mandated by the Council, specifically on how the absence of a corporate tax or applying a nominal corporate tax rate equal to zero or almost zero by a jurisdiction should be assessed, while the Council has also agreed that the absence of a corporate tax or applying a nominal corporate tax rate equal to zero or almost zero can not alone be a reason for concluding that a jurisdiction does not meet the requirements of criterion 2.2.

[6] The relevant parts of these letters sent out to jurisdictions, setting out the commitments sought by the Code of Conduct Group are reproduced in the Annex I to doc. 13890/17 EU RESTRICTED.

11. Work on template letters to jurisdictions concerned by the analysis under criterion 2.2 and/or those affected by natural disasters (September 2017 tropical storms) was completed by the COCG Subgroup, chaired by the Presidency[7] and these letters are in the process of being sent.

12. The COCG agreed to put on hold the screening process to the jurisdictions that were affected by natural disasters. The letters will nevertheless clarify that these jurisdictions will be asked to address the concerns identified as soon as the situation improves, with the view to resolving these concerns by the end of 2018. By February 2018, the COCG will therefore contact these jurisdictions to prepare the next steps of co-operation.

13. Jurisdictions where concerns with regard to criterion 2.2 were determined are being invited to discuss with the COCG what further steps could be taken to ensure that businesses have sufficient economic substance.

14. In view of the Presidency, a clear message is conveyed to the jurisdictions concerned that they are expected to make concrete progress in the areas where the concerns were identified and that only appropriate solutions that will solve the problem identified can be considered adequate. The substance requirement will be a central part in the discussions with them, although not limited to it. The individual discussions with each jurisdiction concerned should indeed take up all specific problems that were identified by the COCG as well as Member States and address them in a clear manner.

15. As a next step, on the basis of the State of play endorsed by the ECOFIN Council on 21 February 2017[8], following a balanced review of all information collected in the screening process, the COCG has to report to the Council on those jurisdictions that do not comply with the screening criteria which, in the view of the COCG, the Council would decide, as appropriate, to include in the list of non-cooperative jurisdictions. It is noted that this decision will be taken by consensus.[9]

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7 See doc. 13949/17 FISC 249 EU RESTRICTED.
8 Doc. 6325/17 FISC 45 ECOFIN 93 LIMITE
9 Doc. 10397/17 FISC 141 ECOFIN 551 CO EUR-PREP 32, paragraph 90.

16. This report is expected to be presented, in co-ordination with the High Level Working Party on Tax Questions, to the Council in due time, so that the EU list of non-cooperative jurisdictions could be endorsed by the Council by the end of 2017 (as resolved in the Council Conclusions of 8 November 2016).[10]

17. The Presidency is also continuing its work on the draft of the Council conclusions on the EU list of non-cooperative jurisdictions for tax purposes.[11] The draft text, which provides the framework for setting out the EU list, the defensive measures in non-tax area[12] and outlines the principal aspects of further work on how the commitments of jurisdictions to comply with the screening criteria should be monitored. Essentially, a couple of issues remain to be resolved in the run up to December 2017 ECOFIN meeting: whether Member States could agree on a political commitment to co-ordinate, to a certain degree, tax measures to be taken towards listed jurisdictions and whether a registry of jurisdictions which committed to resolve the concerns determined by the COCG should be public.

18. The Presidency holds an optimistic view that these open issues are going to be solved in time for ECOFIN Council reaching an agreement at its December 2017 meeting, so that the work on the EU list of non-cooperative jurisdictions for tax purposes is completed within the agreed timeline.

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[10] Doc. 10397/17 FISC 141 ECOFIN 551 CO EUR-PREP 32, paragraph 91.

[11] The latest text is set out in doc. 13228/17 FISC 223 EU RESTRICTED.

[12] While exploring options for defensive measures to be considered in non-tax area, delegations took note of the ongoing negotiations on a number of EU legislative files (2016/0275 (COD); (2016/0276 (COD); (2016/0282 (COD), (2016/0107(COD)), where, in certain provisions, a link with the future common list of non-cooperative jurisdictions could be designed, if an agreement on a compromise text is reached by all parties to negotiations in the relevant fora.

19. The dialogue with relevant jurisdictions to promote tax transparency, fair taxation and implementation of anti-BEPS standards and the process of promoting the standards in the areas of tax transparency, fair taxation and implementation of anti-Base Erosion and Profit Shifting (anti-BEPS) measures will continue and the COCG will act in co-ordination 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.