Council of the
European Union

Brussels, 6 March 2020
(OR. en)

14335/17
DCL 1

FISC 261

DECLASSIFICATION

of document:	14335/17
dated:	14 November 2017
new status:	Public
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

Brussels, 14 November 2017
(OR. en)

14335/17

RESTREINT UE/EU RESTRICTED

FISC 261

NOTE

From:	Presidency
To:	Delegations
No. prev. doc.:	13228/17 FISC 223 RESTREINT UE/EU RESTRICTED
Subject:	Note to the Code of Conduct Group (Business Taxation)

Delegations will find attached the Presidency draft of the Council conclusions on the EU list of non-cooperative jurisdictions for tax purposes. Amendments made to the text that was set out in doc. 13228/17 EU RESTRICTED are marked accordingly.

DRAFT

COUNCIL CONCLUSIONS

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

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

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"), as set out in Annex IV hereto, and as further specified in Annexes V and VI;

3. TAKES STOCK 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 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;

5. WELCOMES the fact that most of these jurisdictions have chosen to participate in this process and dialogue, and have taken or undertaken **to take** active steps towards resolving the issues that the Code of Conduct Group has identified in the areas of tax transparency, fair taxation and implementation of anti-BEPS standards;

6. NOTES, nonetheless, that a number of jurisdictions have taken no meaningful action to effectively address the deficiencies and do not engage in a meaningful dialogue on the basis of the Criteria that could lead to such commitments.

7. IS CONVINCED that, in such a case, the tax legislation, policies~~,~~ **and** administrative practices of these jurisdictions result or may result in a loss of tax revenues for Member States and that such jurisdictions should therefore be strongly encouraged to make the changes needed to remedy this situation;

8. REITERATES that it is of crucial importance to provide efficient protection mechanisms to fight against the erosion of Member States' tax bases through tax fraud, evasion and avoidance;

9. ENDORSES, accordingly, the EU list of non-cooperative jurisdictions for tax purposes, as set out in Annex I, and CONFIRMS that jurisdictions will remain on this list until they meet the Criteria, for example, by fulfilling the recommendations on the steps to take in order to be de-listed;

10. DEEMS IT APPROPRIATE for the Code of Conduct Group to engage in discussions with the listed jurisdictions, with a view to agreeing and monitoring the steps that jurisdictions are expected to take in order to be removed from the list and ENCOURAGES these jurisdictions to swiftly take the action needed to meet the Criteria;

11. ~~OBSERVES~~**NOTES WITH SATISFACTION** that while the tax legislation, policies~~,~~ **and** administrative practices of some jurisdictions present concerns in the areas of tax transparency, fair taxation and implementation of anti-BEPS standards, **a number of** these jurisdictions***** have nevertheless made meaningful commitments at high political level to take the necessary steps to solve the outstanding issues by the agreed deadlines and so should not, at this stage, be placed on the list of non-cooperative jurisdictions. **The Code of Conduct Group should continue monitoring the actual implementation of the commitments made by these jurisdictions and should recommend at any time to update the list of non-cooperative jurisdictions for tax purposes based on the implementation of these commitments.**

**** NOTE: whether the registry of commitments made by jurisdictions should be public and included in a separate Annex of the Council Conclusions is subject to further negotiations***

11a. EXPRESSES its sympathy and support to the jurisdictions in the Caribbean region that were severely struck by devastating storms in September 2017, causing casualties and major damage to key infrastructure, and HOLDS THE VIEW that the screening process should be put on hold for these jurisdictions. Nevertheless, the Code of Conduct Group should, by February 2018, pursue further contacts with these jurisdictions, with the aim of addressing the concerns that have been determined during the screening process.

12. INSTRUCTS the Code of Conduct Group accordingly to engage in or continue discussions with relevant jurisdictions, to seek the necessary commitments to monitor whether these commitments are being met, and regularly to report back to the Council, as appropriate, with suggestions concerning modifications to the list of non-cooperative jurisdictions;

13. TAKES THE VIEW, as set out in Annex II, that effective and proportionate defensive measures, in both non-tax and tax areas could be applied by the EU and Member States vis-à-vis the non-cooperative jurisdictions, as long as they are part of such list;

14. RECOMMENDS that Member States take certain [co-ordinated]* defensive measures in the tax area as set out in Annex II hereto, in accordance with their national law and in accordance with the obligations under EU and international law ;

> **** NOTE: whether the word "co-ordinated" stays in this point depends on the outcome of discussions on Annex II***

15. BELIEVES that the list of non-cooperative jurisdictions and the defensive measures, when applicable, will have the effect of sending a strong signal to the jurisdictions concerned, thus encouraging a positive change leading to the removal of jurisdictions from the list;

16. CONFIRMS that these actions collectively taken by the EU Member States are in line with the agenda promoted by the G20, the OECD and other international fora;

17. RECALLS the agreement of the Council on the approach to the absence of a corporate tax system or applying a nominal corporate tax rate equal to zero or almost zero in the context of the criterion that requires a jurisdiction not to facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction, as set out in Annex VI;

18. RECALLS that, in line with the Council Conclusions of 8 November 2016, 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 with a broader scope;

19. CONFIRMS that a decision on modification of the list will be taken by the Council, on the basis of the relevant factual information made available to the Council by the Code of Conduct Group;

20. NOTES that the list of non-cooperative jurisdictions should be updated at least once per calendar year, and the situation should be continuously monitored in the listed jurisdictions, as well as in other jurisdictions covered by the 2017 screening exercise. On the basis of criteria agreed by the Council, monitoring could be extended, by the Code of Conduct Group, to other jurisdictions;

21. INVITES the Code of Conduct Group to continue dialogue with relevant jurisdictions to promote tax transparency, fair taxation and implementation of anti-BEPS standards; and to continue the work on analysis of defensive measures that could be further defined and applied to non-cooperative jurisdictions in a co-ordinated manner, without prejudice to Member States' obligations under EU and international law;

22. 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 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;

23. DEEMS IT APPROPRIATE, in this context, to determine the Guidelines for further work in this area, as set out in Annex III;

24. CONFIRMS that the Criteria will be regularly updated, by the Council, as necessary, taking into account international developments and having regard to the evolution of international standards and TAKES THE VIEW that future assessment and dialogue with the jurisdictions concerned should be based on those standards bearing in mind the importance of continued and rapid progress by all relevant jurisdictions in these areas.

ANNEX I

The EU list of non-cooperative jurisdictions for tax purposes

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:

[…]

ANNEX II

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 the Criteria, as set out in Annex IV hereto, and as further specified in Annexes V and VI, as well as other relevant international standards.

2. It is ~~of crucial importance~~ **nevertheless important** to provide efficient protection mechanisms to fight against the erosion of Member States' tax bases through tax fraud, evasion and avoidance, and consequently, to apply effective ~~countermeasures~~ **and proportionate defensive measures**, at the EU and national level, to the jurisdictions in the EU list of non-cooperative jurisdictions for tax purposes.

3. A number of defensive measures in non-tax area at EU level are linked to the EU list of non-cooperative jurisdictions for tax purposes and set out in Part A of this Annex.

4. Moreover, certain defensive measures in tax area [should]* be taken by the Member States, in accordance with their national law, in addition to the non-tax measures taken by the EU, to effectively discourage non-cooperative practices in the jurisdictions placed on the list.

**** NOTE: whether the word "should" is replaced by "could" depends on the degree of co-ordination on defensive measures agreed by the MS***

5. A list of such measures in tax area is set out in Part B of this Annex. As these measures should be compatible with the national tax systems of the EU Member States, the implementation of these measures is left to the competence of the Member States.

6. 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 with a broader scope.

A. 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 on the compliance by the jurisdictions to the Criteria as a result of such measures should be monitored by the Code of Conduct Group, as well as by the HLWP in the context of implementation of the EU external strategy on taxation.

[B. DEFENSIVE MEASURES IN TAX AREA*

NOTE: whether MS would unanimously accept the split of part B into B.1. and B.2. and could agree on political commitment to co-ordinate, to a certain degree, tax measures at national level is subject to further negotiations.

B.1. To ensure co-ordinated action, Member States should apply at least [one]** of the following [administrative]*** measures in tax area:

a) Reinforced monitoring of certain transactions;

b) Increased audit risks for taxpayers benefiting from the regimes at stake;

c) Increased audit risks for taxpayers using structures or arrangements involving these jurisdictions.

d) […]

*** NOTE: whether MS would undertake more than one measure from the list in B.1 is subject to further negotiations.***

**** NOTE: whether the word "administrative" stays or is replaced by "defensive measures of administrative or legislative nature in tax area" depends on whether MS will agree on other types of tax-area measures being added to part B.1.***

B.2. Without prejudice to the respective spheres of competence of the Member States to apply additional measures, defensive measures of legislative nature in tax area that could be applied by the Member States are:

a) Non-deductibility of costs;
b) Controlled Foreign Company (CFC) rules;
c) Withholding tax measures;
d) Limitation of participation exemption;
e) Switch-over rule;
f) Reversal of the burden of proof;
g) Special documentation requirements;
h) Mandatory disclosure by tax intermediaries of specific tax schemes with respect to cross-border arrangements;

B.3. ~~It is recommended that~~**Member States could consider using the EU list of non-cooperative jurisdictions for tax purposes as a tool to facilitate the operation of relevant anti-abuse provisions**, when implementing Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market~~, Member States, where appropriate, use the EU list of non-cooperative jurisdictions for tax purposes as a tool to facilitate the operation of relevant anti-abuse provisions set out in national law in accordance with that Directive~~.

For example, where, in accordance with that Directive, Member States, in transposing CFC rules into their national law, use "black" lists of third countries, such lists could cover at least the jurisdictions listed in the EU list of non-cooperative jurisdictions for tax purposes.

ANNEX III

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

1. REVISION 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 at least once a year and endorsed on the basis of the 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 co-ordination with the HLWP, and prepared by the Committee of Permanent Representatives.

1.4. As soon as a jurisdiction is placed on the list, it will 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. As soon as a jurisdiction is removed from the list, it will be swiftly informed of its removal by the letter signed by the Chair of the Code of Conduct Group, 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 the defensive measures in tax area should start or cease to apply depending on the nature of the measure, without prejudice to the respective spheres of competence of the Member States, such as adjustment of national legislation on application of defensive measures taken at national level.

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

2.1. Commitments officially taken by jurisdictions to implement recommendations requested by the Council 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. 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.

2.3. For jurisdictions that present concerns by not fulfilling the requirements of the Criteria, the Code of Conduct Group should continue to seek their high level political commitment, with a concrete timeframe, and effectively address the concerns identified in screening process.

2.4. In particular, bilateral discussions should aim at:

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.

2.5. In monitoring commitments, 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 continue promoting globally the Criteria 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.

2.7. Where relevant, if decided by the Code of Conduct Group on the basis of criteria agreed by the Council, monitoring could extend to jurisdictions that were outside the scope of the 2017 screening exercise.

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 Code of Conduct Group should continue developing appropriate practical arrangements on implementing of these Guidelines.

2.10. 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).

2.11. Following a balanced review of all collected information, the Code of Conduct Group shall report to the Council at least once a year, 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 swiftly remove them from such list, if they fulfil the conditions.

2.12. General Secretariat of the Council will continue to serve as a focal point in order to facilitate the process described in this document.

ANNEX IV

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 taxation[1], 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 assessment[2] 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.

ANNEX V

Criterion 1.3 (the duration of the reasonable timeframe)

1. In line with point 13 of the Guidelines for the process of screening of jurisdictions annexed to the Council Conclusions, the Code of Conduct Group should define, based on objective criteria the duration of the reasonable timeframe, referred to in criterion 1.3.

2. For the purposes of application of criterion 1.3, the duration of the reasonable timeframe, referred to in criterion 1.3, will be construed as follows:

3. With respect to criterion 1.3(i) (sub-point relating to sovereign states), "within a reasonable timeframe" refers to the entry into force of the OECD Multilateral Convention on Mutual Administrative Assistance (MCMAA), as amended, for a given jurisdiction and not to the commitment.

4. With respect to criteria 1.3(i) and 1.3(ii) (sub-points relating to non-sovereign jurisdictions), "within a reasonable timeframe" refers, respectively, to the entry into force of the MCMAA, as amended, for the jurisdiction, and to the entry into force for the jurisdiction of a network of exchange agreements sufficiently broad to cover all Member States.

5. The duration of the reasonable timeframe, for these three points will be identical to the deadline applied in criterion 1.3(ii) in relation to sovereign states: 31 December 2018 (i.e. the same deadline which applies to the entry into force for a sovereign third jurisdiction of a network of exchange arrangements, which is sufficiently broad to cover all Member States).

6. Without prejudice to the deadline of 31 December 2018, the reasonable timeframe should not extend beyond the time required for:

   a) the completion of the procedural steps according to national law,

   b) adoption and entry into force of any required amendments to national law; and

   c) any other objective deadlines that formal commitment could entail (for example: for a jurisdiction which expresses its consent to be bound by the MCMAA, it enters into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval).

7. The duration of the reasonable timeframe can only be extended by a consensus of a Code of Conduct Group for a specific non-sovereign jurisdiction, only in duly justified cases.

ANNEX VI

Scope of criterion 2.2

1. For the purposes of application of criterion 2.2, the absence of a corporate tax or applying a nominal corporate tax rate equal to zero or almost zero by a jurisdiction should be regarded as within the scope of Paragraph A of the Code of Conduct for Business Taxation of 1 December 1997 (Code of Conduct).[3]

2. In this respect, where criterion 2.1 is inapplicable solely due to the fact that the jurisdiction concerned does not meet the gateway criterion under Paragraph B of the Code of Conduct [4], because of the "absence of a corporate tax system or applying a nominal corporate tax rate equal to zero or almost zero"[5], then the five factors identified in paragraph B of the Code of Conduct should be applied by analogy to assess whether the criterion 2.2[6] has been met.

3. In the context of criterion 2.2 the fact of 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.

4. A jurisdiction should be deemed as non-compliant with criterion 2.2 if it refuses to engage in a meaningful dialogue or does not provide the information or explanations that the Code of Conduct Group may reasonably require or otherwise does not cooperate with the Code of Conduct Group where it needs to ascertain compliance of that jurisdiction with criterion 2.2 in the conduct of the screening process.

---

3 "Without prejudice to the respective spheres of competence of the Member States and the Community, this code of conduct, which covers business taxation, concerns those measures which affect, or may affect, in a significant way the location of business activity in the Community." (OJ C 2, 06.01.1998, p. 3)

4 "Within the scope specified in paragraph A, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code. Such a level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor." (OJ C 2, 06.01.1998, p. 3)

5 This may operate by virtue of the nominal tax rate, the tax base or any other relevant factor.

6 Criterion 2.2 reads as follows: *"The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction."*

Terms of reference for the application of the Code test by analogy

A. General framework

1. Criterion from ECOFIN Council Conclusion on 8th November 2016

The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.

2. Scope of Criterion 2.2 (ECOFIN February 2017)

1. For the purposes of application of criterion 2.2, the absence of a corporate tax or applying a nominal corporate tax rate equal to zero or almost zero by a jurisdiction should be regarded as within the scope of Paragraph A of the Code of Conduct for Business Taxation of 1 December 1997 (Code of Conduct).[7]

2. In this respect, where criterion 2.1 is inapplicable solely due to the fact that the jurisdiction concerned does not meet the gateway criterion under Paragraph B of the Code of Conduct[8]*, because of the "absence of a corporate tax system or applying a nominal corporate tax rate equal to zero or almost zero"*[9]*, then the five factors identified in paragraph B of the Code of Conduct should be applied by analogy to assess whether the criterion 2.2*[10] *has been met.*

---

7 *"Without prejudice to the respective spheres of competence of the Member States and the Community, this code of conduct, which covers business taxation, concerns those measures which affect, or may affect, in a significant way the location of business activity in the Community." (OJ C 2, 06.01.1998, p. 3)*

8 *"Within the scope specified in paragraph A, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code. Such a level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor." (OJ C 2, 06.01.1998, p. 3)*

9 *This may operate by virtue of the nominal tax rate, the tax base or any other relevant factor.*

10 *Criterion 2.2 reads as follows: "The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction."*

4. In the context of criterion 2.2 the fact of absence of a corporate tax or applying a nominal corporate tax rate equal to zero or almost zero cannot alone be a reason for concluding that a jurisdiction does not meet the requirements of criterion 2.2.

5. A jurisdiction should be deemed as non-compliant with criterion 2.2 if it refuses to engage in a meaningful dialogue or does not provide the information or explanations that the Code of Conduct Group may reasonably require or otherwise does not cooperate with the Code of Conduct Group where it needs to ascertain compliance of that jurisdiction with criterion 2.2 in the conduct of the screening process.

3. General remarks

- Scope of Criterion 2.2 as defined by ECOFIN considers the absence of a corporate tax rate or a nominal tax rate equal to zero or almost zero in a jurisdiction as a "measure" significantly affecting the location of business activities (Paragraph A of the Code of Conduct).
- To this extent, Criterion 2.2 is aimed at verifying whether this "measure" facilitates offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.
- Criterion 2.2 applies only when the standard code assessment (i.e. criterion 2.1) cannot be applied because of the absence in a third country jurisdiction of a corporate tax system or because the jurisdiction applies a nominal corporate tax rate equal to zero or almost zero.
- Criterion 2.2 assesses the legal framework and certain economic evidences of a jurisdiction with regard to the five criteria established under paragraph B of the Code of Conduct to be interpreted by analogy.
- Advantages granted by a third country jurisdictions influencing in a significant way the location of business activities have to be seen in connection with a nominal corporate tax rate equal to zero or almost zero as well as in connection with the absence of corporate taxation, to the extent in both cases the standard Code of Conduct test could not be applied. These latter features have in fact to be considered *per se* as advantages to be assessed under this code test.

- In general terms, any guidance developed by the COCG over the years for assessing tax measures within the scope of the 1998 Code of Conduct should be applied consistently and by analogy for the purpose of this test[11].
- A jurisdiction can only be deemed to have failed the assessment under this criterion when 'offshore structures and arrangements attracting profits which do not reflect real economic activity in the jurisdiction' are due to rules or practices, including outside the taxation area, which a jurisdiction can reasonably be asked to amend, or are due to a lack of those rules and requirements needed to be compliant with this test that a jurisdiction can reasonably be asked to introduce.
- The introduction of a CIT system or a positive CIT rate is not amongst the actions that a third country jurisdiction can be asked to take in order to be in line with the requirements under this test, since the absence of a corporate tax base or a zero or almost zero level tax rate cannot by itself be deemed as criterion for evaluating a jurisdiction as non-compliant.
- Nonetheless, criterion 2.2 implies automatic non-compliance for those jurisdictions that refuse to cooperate with the EU for the assessment of their legal framework.

B. Gateway test

1. **Gateway criterion as it reads now in the Code of Conduct**

"Within the scope specified in paragraph A, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this Code."

2. **Guidelines for application by analogy**

- The functioning of the Gateway test seems rather clear from the definition of scope of Criterion 2.2 as agreed by Ecofin in February this year.

[11] See doc. 14039/98 of 11 December 1998 "Code of Conduct (Business Taxation) – Interpretation of Criteria" and its further updates.

- In particular, this test is satisfied when "*criterion 2.1 is inapplicable solely due to the fact that the jurisdiction concerned does not meet the gateway criterion under Paragraph B of the Code of Conduct, because of the "absence of a corporate tax system or applying a nominal corporate tax rate equal to zero or almost zero"*

C. Criteria 1 and 2

1. **Criterion 1 of the current Code Criteria as it is now**

   "*Whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents*"

2. **Criterion 2 of the current Code Criteria as it is now**

   "Whether advantages are ring-fenced from domestic market, so they do not affect the national tax base"

3. **Guidelines for application by analogy**

- For the purpose of applying criterion 2.2., "advantages" should be understood as the existence of zero or almost zero taxation or the absence of CIT.

- Factor 1 as well as factor 2 of the current code criteria contain two main elements: (a) legal ring-fencing and (b) de-facto ring-fencing.

- De jure ring-fencing occurs when advantages are only granted to non-residents by the laws and regulations governing the establishment and operations of businesses in a given jurisdiction.

- Where there is no an effective CIT-system in place, it should be then assessed whether aspects of the legal framework, including non-CIT aspects, effectively provide for a ring-fenced scenario.

- An example of that would be non-tax requirements for companies to allow for the residence or for the access to the domestic market of the tested jurisdiction.

- For this purpose, any measure leading to a different treatment between domestic companies and companies held by non-residents or whose activities are disconnected from the domestic market shall be assessed.

- If for instance a jurisdiction grants "advantages" to a company only if it abstains from activities in the local economy (criterion 2) or only to the extent such activities are dependent on a specific business license (criterion 1 and 2) or only to the extent the activities are undertaken by non-residents (criterion 1), this could be assessed as a possible feature of a ring fencing system in place. By analogy this could also be relevant for other taxes (i.e. other than CIT).

- De-facto ring-fencing usually refers to a situation whereby the advantage is not explicitly granted by a country only to non-residents although, in fact, it is enjoyed only or almost only by non-residents.

- As to the de-facto ring-fencing, it is usually considered how many of the taxpayers benefitting from the advantage are in fact non-residents. If, for instance all or nearly all of the subjects benefitting from zero taxation are non-residents (including domestic companies with foreign shareholding), sub-criteria 1 (b) as well as 2 (b) would be considered as met (i.e. the jurisdiction would be deemed to be non-compliant under this step of the Code test).

D. Criterion 3

1. Criterion 3 of the current Code Criteria as it is now

"Whether advantages are granted even without any real economic activity and substantial economic presence with the Member State offering such tax advantages"

2. Guidelines for application by analogy

In order to evaluate whether advantages are granted even without any real economic activity and substantial economic presence, it has to be ascertained:

- whether a jurisdiction does require a company or any other undertaking (e.g. for its incorporation and/or its operations) the carrying out of real economic activities and a substantial economic presence:
    - "Real economic activity" relates to the nature of the activity that benefits from the non-taxation at issue.
    - "Substantial economic presence" relates to the factual manifestations of the activity that benefits from the non-taxation at issue.
    - By way of example and under the assumption that, in general, elements considered in the past by the COCG are relevant also for this analysis, the current assessment should consider the following elements taking into account the features of the industry/sector in question: adequate level of employees, adequate level of annual expenditure to be incurred; physical offices and premises, investments or relevant types of activities to be undertaken.
- whether there is an adequate de jure and de facto link between real economic activity carried on in the jurisdiction and the profits which are not subject to taxation;
- whether governmental authorities, including tax authorities of a jurisdiction, are capable of (and are actually doing) investigations on the carrying out of real economic activities and a substantial economic presence on its territory, and exchanges of relevant information with other tax authorities;
- whether there are any sanctions for failing to meet substantial activities requirements.

E. Criterion 4

1. Criterion 4 of the current Code Criteria as it is now

"Whether the rules for profit determination in respect of activities within a multinational group of companies depart from internationally accepted principles, notably the rules agreed upon within the OECD"

2. Guidelines for application by analogy

- In assessing the adherence of profit determination rules to internationally agreed standards (e.g. OECD TP Guidelines or other similar accounting standards) first of all it should be verified if and to what extent this analysis is relevant for jurisdictions not applying a CIT system.

- To this aim it seems relevant to consider that a jurisdiction not applying a CIT system should not negatively affect a proper allocation of profits departing from internationally agreed standards. Jurisdictions should take appropriate steps in ensuring taxing countries are able to exercise their taxing rights i.e. via CBCR, transparency and other modes of information sharing.

- Where relevant, it should be ascertained if OECD's agreed principles or similar accounting standards for the determination of profits have been endorsed in a given jurisdiction.

- To this regard, it is critical to ascertain how these rules are implemented and consolidated in the jurisdictions concerned. In the absence of corporate income taxation in a given jurisdiction, also alternative transfer pricing rules can be taken into account, verifying whether they are comparable and compatible with internationally agreed principles (for instance a fair market value approach under international accounting principles).

- This Criterion shall prevent from allowing multinational companies to use transfer pricing rules departing from the OECD Transfer Pricing Guidelines in order to allocate their profits to zero tax jurisdictions.

- Answers to questions from 2.9 to 2. 12 should give sufficient information on how profits are determined highlighting any important department from internationally agreed standards.

F. Criterion 5

1. Criterion 5 of the current Code Criteria as it is now

"*Whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way*"

2. Guidelines for application by analogy

- Criterion 5 shall evaluate whether certain features of a legal system, including the establishment of a business on its territory, lack sufficient level of transparency.
- More specifically, it has to be assessed whether any elements of the legal system, including the granting of tax residence or the setting up of companies can be granted on a discretional basis or whether it is bound by the law, verifying whether any legal provision, including non-tax provisions, can be deemed to be discretionary in matters related to the setting up of a company in that jurisdiction.
- This factor shall prevent a jurisdiction from having an insufficient level of transparency within its regulatory framework, considering that advantages as considered in this Code test stem from the registration of a company in a jurisdiction.
- Answers to questions from 2.13 to 2. 16 should give sufficient information on how transparency is ensured in a jurisdiction on certain steps to be undertaken by companies in order to benefit from the advantages provided therein.