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REPORT

From: General Secretariat of the Council
To: Delegations
Subject: Code of Conduct Group (Business Taxation)
- Report to the Council

Delegations will find in the Annex a report to the Council, as approved by the Code of Conduct Group (Business Taxation). The approval by the Council will take place through the Council conclusions on fair and effective taxation (doc. 12979/20).

I. BACKGROUND

1. On 1 December 1997, the Council and the representatives of the Governments of the Member States, meeting within the Council, adopted a resolution on a Code of Conduct for business taxation. This resolution provides for the establishment of a group within the framework of the Council to assess tax measures that may fall within the Code, which was established on 9 March 1998.¹ It also provides that the Group "*will report regularly on the measures assessed*" and that "*these reports will be forwarded to the Council for deliberation and, if the Council so decides, published*" (paragraph H).
2. In its conclusions of 8 December 2015,² the Council expressed the wish to improve the visibility of the work of the Code of Conduct Group (hereafter "COCG" or "Group") and agreed "*that its results, in particular its 6-monthly reports, are systematically made available to the public*" (paragraph 16).

¹ 6619/98
² 15148/15

3. In its conclusions of 8 March 2016,³ the Council furthermore called "*for having more substantial 6-monthly Group reports to ECOFIN, reflecting the main elements and views, which were discussed under specific items and reporting also on the monitoring concerning (non-) compliance with agreed guidance*" (paragraph 16).
4. This report from the COCG encompasses the work of the Group in the second half of 2020 during the term of the German Presidency of the Council.

II. GENERAL ASPECTS

1. Organisation of work

5. In the second half of 2020, COCG work continued to be impacted by the ongoing COVID-19 public health crisis.
6. No physical meetings of COCG took place. Instead, the COCG held informal videoconferences of the main group on 8 July 2020, 13 October and on 13 November 2020; informal videoconferences of the subgroup on internal matters on 23 October and 3 November 2020. In addition, fiscal attachés met upon mandate by e-mail from COCG delegates on 15 July, 7 September and 21 September 2020 in order to discuss EU-RESTRICTED documents related to the EU list of non-cooperative jurisdictions for tax purposes and to finalise the bi-annual EU list update.
7. In July 2020, Mr Sebastian Walz (Germany) and Ms Ana Lebre Branco (Portugal) were confirmed respectively as the first and the second Vice-Chairs for the period up to the end of the German Presidency.
8. At the same meeting, in line with its new work package, the Group approved a work programme until the end of the German Presidency as set out in doc. 9531/20.

³ 6900/16

2. Impact of the COVID-19 crisis on the work ahead

9. In an effort to ensure continuity and credibility of COCG work in times of a global pandemic, COCG discussed working methods and priorities for the months ahead.⁴
10. The following orientations were agreed:
 - COCG should continue its work, taking advantage of the existing tools: informal written consultation, attachés meetings and videoconferences on a case by case basis in an epidemiological situation where physical COCG meetings with national delegates are not possible.
 - The February 2021 listing update is maintained.
 - Immediate work should focus in particular on monitoring existing commitments.

III. MANDATE REVISION

11. While noting the successful work of the COCG so far, the German Presidency in coordination with the Chair of COCG launched discussions on the revision of the mandate of COCG, in order to update the mandate where necessary.
12. The informal videoconference of the COCG mandated on 13 October 2020 the subgroup on internal matters to discuss the revision of the mandate on the basis of a draft revised text of a mandate.⁵ The subgroup met via videoconference on 23 October and 3 November 2020 and reported to the COCG of 13 November 2020.⁶

⁴ WK 12390/2020;

⁵ WK 10653/2020;

⁶ WK 12375/2020

13. The Group recommended the following text for Council conclusions⁷:

46. WELCOMES the discussion on the revision of the mandate which has started during the German Presidency; ENDORSES the way forward chosen for the ongoing discussions in the Code of Conduct Group (business taxation); REITERATES its readiness to continue to discuss the scope of the mandate as soon there are relevant developments at international level but no later than by the beginning of 2022 and AGREES that the ongoing discussion on the scope of the mandate should also cover features of tax systems that have general application and that may have harmful effects.

IV. STANDSTILL AND ROLLBACK REVIEW PROCESSES

14. A new call for standstill and rollback notifications of new preferential tax measures enacted by the end 2020 was launched in mid-November 2020.

1. Standstill review process

15. The following decisions were reached by the Group:

1. Amendments to the Denmark's rules on taxing investment vehicles (DK006) do not need to be assessed by the COCG.⁸
2. Poland's Co-operative compliance program for large taxpayers (PL014) does not need to be assessed by the COCG, but its effects should be monitored.^{9 10}
3. Cyprus's Notional interest deduction regime (CY020) is not harmful.¹¹

⁷ [ref to comprehensive taxation conclusions]

⁸ See Annex 1.

⁹ Furthermore, the Group invited the Commission to explore and suggest clarifications of the criteria for analyzing corporate compliance programs (CCPs) and invited delegations to inform the Commission about similar CCP regimes in the MS.

¹⁰ See agreed description in Annex 2.

¹¹ See agreed description and final assessment in Annex 3 to the present report.

16. The standstill review of Romania's profit tax exemption for companies with innovation and R&D activities (RO008) is kept on hold until the relevant national legislation is adopted: this regime is currently not applied because the subsequent administrative acts have so far not been adopted.

2. Rollback review process

17. At its meeting of 13 October 2020, the Group reviewed the state of play concerning the rollback of Lithuania's holding company regime (LT008) and Poland's Investment Zone (PL013), the process of which is still ongoing.

3. Monitoring of the actual effects of individual measures

18. The Code of Conduct Group considered the effects of the six measures in respect of which an annual monitoring was decided in the past:

- Luxembourg's Intra-Group Financing- safe harbour rule (LU016)
- Lithuania's extension of CIT tax incentives in SEZ (LT006)
- Greece Patent tax incentive (EL015)
- Portugal's Notional interest deduction regime (PT018)

19. The Group concluded that the aforementioned measures have not affected the business location among Member States in a significant way, but the monitoring should continue.¹²

20. In respect of Italy's old intellectual property regime (IT017), it could not be analyzed by the Group as by mid-2020 Italy has only shared partial data on the use of this regime and some further clarifications were necessary.

¹² See Annex 4

V. COCG GUIDANCE NOTES

21. The Group agreed the draft assessment on the monitoring of the implementation of the 2016 COCG guidelines on the conditions and rules for the issuance of tax rulings'. The COCG thus concluded that all Member States are compliant with the 2016 Guidelines.¹³
22. Furthermore, on 29 October 2020 the Group agreed on the questionnaire for monitoring of the implementation of the 2017 Guidance on tax privileges related to special economic zones presented at the COCG subgroup on internal issues meeting on 23 October 2020. Responses from the Member States are requested by 31 March 2021. The Group will continue the monitoring of the implementation of this guidance during 2022.

VI. OTHER

23. Malta informed the Group about ongoing work in relation to the Global Forum.

¹³ See Annex 5.

VII. THE EU LIST OF NON COOPERATIVE JURISDICTIONS FOR TAX PURPOSES

1. Revision of the EU list of non-cooperative jurisdictions for tax purposes

24. In its conclusions of 17 June 2020 the ECOFIN Council, while acknowledging the impact of COVID-19 public health emergency, decided that the update of the EU list at the ECOFIN Council meeting in October 2020 should be maintained mainly in order to:
1. delist jurisdictions that completed their commitments;
 2. extend Annex II deadlines where needed (in particular those expiring end August 2020); and
 3. take into consideration the new Global Forum peer review assessments under criterion 1.2.
25. In the light of certain instances of non-COVID 19 related to possible backtracking by certain jurisdictions (Bahrain and Bermuda with regard to economic substance requirements), the October 2020 listing update was extended to also cover such issues. However, the jurisdictions concerned timely addressed the concerns and therefore were not listed under criterion 2.2.
26. Certain elements of the revised list were already agreed at the meeting of the Fiscal Attachés on 15 July 2020. In addition, the Fiscal Attachés met on 7 and 21 September 2020 to examine the revised EU list in its totality and reached agreement on all points. The revised list was approved by the Council by written procedure on 6 October 2020 and published in the Official Journal of the European Union on 7 October 2020.¹⁴

¹⁴ OJ C 331, 7.10.2020 p. 3-5.

27. As a result of this revision, two jurisdictions (Anguilla and Barbados) were added to the EU list of non-cooperative jurisdictions for tax purposes, two were removed (Cayman Islands and Oman) whilst 10 jurisdictions remained listed (American Samoa, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands and Vanuatu), bringing the total number of jurisdictions on the EU list to 12 jurisdictions.¹⁵
28. Mongolia and Bosnia and Herzegovina having deposited the instruments of ratification of MAC as amended, respectively on 19 February 2020 and 21 September 2020, were removed from section 1.3 of Annex II.
29. It was also agreed to extend the deadlines for the signature and ratification of MAC respectively to 31 December 2020 and 31 December 2021 as well as for Namibia and Saint Lucia as regards their commitments under criterion 2.1 to 31 December 2020. These changes are reflected in Annex II. Other deadlines remain unchanged.

¹⁵ 11054/20 REV 1 and 12713/20 +ADD 1-15;

2. Monitoring the implementation of commitments taken by jurisdictions

General overview

30. As of October 2020, the implementation of a total of 14 commitments¹⁶ taken at high political level by 13 jurisdictions¹⁷ remains to be monitored by the Group. These are recorded in Annex II of the revised Council conclusions:

Criterion	Number of jurisdictions committed
1.1	1
1.2	2
1.3	6
2.1	5

31. Furthermore, a total of 12 harmful tax regimes¹⁸ remain to be rolled back under criterion 2.1, 9 of which are under monitoring by the COCG¹⁹ and 3 by the OECD FHTP²⁰. A detailed overview may be found in the compilation²¹ of preferential regimes and measures examined by the COCG under criteria 2.1 and 2.2.

¹⁶ This figure adds up the number of jurisdictions committed under each criterion (see table).

¹⁷ Australia, Botswana, Eswatini, Jordan, Maldives, Morocco, Namibia, Saint Lucia, Thailand and Turkey.

¹⁸ These figures don't include the harmful tax regimes of the US Virgin Islands (3) and Samoa (1), for which no sufficient high-level commitments to be monitored have been received yet.

¹⁹ Regimes FJ001, FJ002, FJ003, LC005, NA001, NA002, SC010, SC011 and TT001.

²⁰ Regimes AU001, JO002 and MA006.

²¹ 8603/20.

Procedural and political aspects of the monitoring process

32. The Chair of the COCG continued to conduct political and procedural dialogue with relevant international organisations and jurisdictions, where necessary.
33. The Chair participated in the virtual FHTP meeting on 19-20 October 2020 and intervened in order to provide an overview of the COCG recent work.
34. The COCG Chair received a number of letters from jurisdictions and also held telephone conferences at political level with a number of them. Delegations were kept informed about these interactions, and response letters signed by the Chair were agreed by the Group.

4. Screening and scoping issues

Future criterion 1.4 (beneficial ownership)

35. The EU listing criteria approved by the ECOFIN Council in November 2016 (doc. 14166/16) included the following reference: "*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*".
36. The Fiscal Attachés examined on 7 September 2020 a compromise prepared by the previous Presidency (Croatia). Due to COVID-19 it was not possible to have further discussions on this and the Group will need to come back to this in 2021.

Monitoring of regimes under criterion 2.1

37. The Group agreed on a way forward as regards the monitoring of regimes under criterion 2.1. As **regards monitoring of regimes in the scope of the FHTP**, it was agreed that the COCG would apply the same approach in the monitoring phase, taking stock of the FHTP's monitoring both in terms of requirements and process, where it is relevant for the EU listing purposes.

38. Concerning **tax regimes outside the scope of the FHTP**, a distinction was drawn between four situations:

1) preferential tax regimes out of scope of the FHTP that cover manufacturing activities: delegations agreed that manufacturing regimes that were assessed as compliant with criterion 2.1 do not need to be monitored for the implementation of substance requirements.

2) preferential tax regimes that are *de facto* ring-fenced: as regards *de facto* ring-fencing in the scope of monitoring regimes covering non-manufacturing activities, the Group still needs to take a decision on this.

3) general features of the tax systems that are outside the scope of the FHTP: delegations agreed to include jurisdictions with foreign source income exemption (FSIE) regimes in the scope of the monitoring.

4) preferential tax regimes in jurisdictions that are not Inclusive Framework members: delegations agreed to include tax regimes covering non-manufacturing activities in non-Inclusive Framework members in the scope of the monitoring mechanism for future reference, as there are now no relevant cases to monitor.

Foreign source income exemption regimes

39. The ECOFIN Council approved in October 2019 a guidance on foreign source income exemption (FSIE) regimes in the framework of the EU listing exercise (criterion 2.1). This guidance acknowledges that FSIE regimes are a legitimate approach to prevent double taxation but identifies potentially harmful elements that could be present in such regimes.

40. In December 2019, the COCG Chair wrote to thirteen jurisdictions to inform them that a regime of this kind was identified in their jurisdiction. The Commission services followed up with a questionnaire to nine jurisdictions in February 2020 with a deadline of 20 March 2020 to reply. It was agreed to screen four jurisdictions at a later stage. It is worth recalling that four other jurisdictions' FSIE regimes were already assessed in 2019 and that the dialogue is still ongoing with two of them on this regime.
41. All the jurisdictions that have been contacted responded to the questionnaire. The Commission services have analysed the replies and has prepared an overview of the work carried on so far in a progress report. Due to COVID-19 there has not been an opportunity to examine that progress report and decide on the way forward.

Monitoring of jurisdictions under criterion 2.2

42. The Group agreed on the way forward as regards the monitoring jurisdictions under criterion 2.2 of the EU list. It was agreed that the Commission services would work with the FHTP Secretariat to adjust the questionnaire under the FHTP standard for no/nominal tax jurisdictions, in particular as regards high-risk IP scenarios, outsourcing safeguards and the Fully Equipped Monitoring Mechanism (FEMM), with an aim to facilitating a coordinated process for monitoring the jurisdictions concerned. Delegations also supported coordinating the EU timelines with those of the FHTP in that regard, to the extent possible. As regards jurisdictions that are not in the scope of the FHTP, it was agreed to use the same questionnaire and timeline for monitoring these jurisdictions. This annual process and questionnaire for monitoring was discussed by the FHTP at its 19-20 October meeting and an agreement is expected to be reached at a later stage.

Follow-up scoping issues under criterion 2.2

43. The ECOFIN Council endorsed in December 2019 the activity-based approach for partnerships under criterion 2.2, set out in annex to the Group's 6-month report, as well as a common approach for activating exchange of information with jurisdictions under criterion 2.2.
44. In December 2019, the Commission services wrote to the 2.2 jurisdictions concerned to inform them of this decision and share with them the questionnaire. Jurisdictions were asked to reply by 15 February 2020. All jurisdictions replied and the Commission services sent follow-up questions where needed.
45. On 21 September 2020 the Fiscal Attachés examined a progress report on partnerships under criterion 2.2 and agreed on the way forward.
46. The Member States concluded that Anguilla, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Guernsey, Isle of Man and Jersey should extend their economic substance requirements to all relevant partnerships which were identified to fall out of the scope of existing legislation.
47. It was also agreed that without this was already covered by the commitment of the jurisdictions concerned to comply with the scoping paper for criterion 2.2. and a new commitment was not required. The following timeline should apply to the relevant jurisdictions to adopt and put into effect the necessary amendments to their legal framework so that this could be taken into account in the October 2021 listing update:
 - (a) by 30 June 2021 for the adoption of necessary amendments;
 - (b) by 1 July 2021 for the entry into force with a maximum 6-month transition period for existing entities.

Impact of COVID19 on substance requirements under criterion 2.2

48. The Fiscal Attachés meeting of 26 May 2020 took note of the fact that certain substance requirements are being temporarily adapted by some jurisdictions under criterion 2.2, due to COVID-19 related restrictions (e.g. on travelling and physical meetings).
49. The Commission services collected information and assessed the situation with the jurisdictions concerned and reported back to the meeting of Fiscal Attachés on 15 July 2020.
50. The Group agreed that some adaptation is acceptable under the circumstances but that any relevant guidance released by the jurisdictions concerned should reflect a number of elements to ensure that there are no concerns under criterion 2.2. At that stage guidance released was not final to allow assessment by the Group but is expected to be final by end of 2020. Hence the Group agreed to proceed with such assessment in 2021, taking into account the aforementioned elements and in liaison with the OECD FHTP.
51. Follow-up discussions on this issue will be required during the incoming Presidency.

Implementation of the new criterion 3.2

52. In 2019, the COCG agreed on a general approach for assessing compliance with criterion 3.2 on country-by-country reporting (CbCR), in particular for jurisdictions that joined the Inclusive Framework before the end of 2017. The assessment would comprise two main elements:
 - Jurisdictions should have arrangements (multilateral or bilateral qualifying competent authority agreement) in place to exchange CbCR reports with all Member States with whom they already have an international agreement in effect (MAC or bilateral DTC/TIEA that provides for the automatic exchange of tax information) by the end of 2019.
 - Jurisdictions should be assessed positively in the Inclusive Framework's Phase 3 peer reviews, due in the second half of 2020.

53. It was furthermore agreed that the COCG would make an assessment on this basis as soon as the Inclusive Framework's Phase 3 peer review report is published. Jurisdictions found to be non-compliant would be asked to commit to fulfil the criterion by a certain deadline, still to be decided by COCG.
54. Phase 3 peer review reports were released on 28 September 2020. The COCG has discussed the way forward at the Fiscal Attachés meetings of 15 July and 21 September 2020. In line with the Council decision of June 2020, no commitments have been sought yet from any jurisdiction under the new criterion 3.2 and for this reason it is not covered by Annex II yet. The final decision is still pending due to COVID-19.

Follow-up to the G20 listing process

55. The Group examined the criteria under COCG and G20 and the discrepancies between the two processes.
56. This issue will require follow-up in 2021 during the next Presidency.

Review of the economic data used for selecting jurisdictions

57. The ECOFIN Council invited in March 2019 *"the Code of Conduct Group to review the economic data used for selecting jurisdictions in 2020, for application as from 2021"*. This invitation was reiterated in February 2020 with a view *"to focus on the most relevant jurisdictions"*.
58. An exchange of views on this issue was organized at the COCG meeting of 2 March 2020. On this occasion, the Commission services confirmed that they would present an update of the 2016 Scoreboard, to assist this discussion, in the second half of 2020.
59. This issue will require follow-up in 2021 during the next Presidency.