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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.



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NOTE

From: Finnish Presidency
To: Code of Conduct Group (Business Taxation)
Subject: Further coordination of defensive measures in the tax area

Delegations will find attached a document from the Presidency in view of the Code of Conduct Group (Business Taxation) on 14 November 2019.

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FURTHER COORDINATION OF DEFENSIVE MEASURES IN THE TAX AREA

PRESIDENCY COMPROMISE PROPOSAL

INTRODUCTION

1. The purpose of the present document is to update the Code of Conduct Group on the state of play of ongoing work on the draft "Guidance on defensive measures in the tax area towards non-cooperative jurisdictions."
2. The COCG continued its work on further co-ordination of defensive measures, as it has been requested by ECOFIN Council, in its Conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes of 12 March 2019, "*to finalise discussions on further coordinated defensive measures, without prejudice to Member States' obligations under EU and international law*"¹. This request was also reiterated by the Council in its 14 June 2019 conclusions².
3. During the term of the Finnish Presidency, discussions on further coordinated defensive measures resumed in July 2019 at the COCG and its subgroup on external issues.
4. Delegations will find in the Annex to this document the updated Presidency compromise of the draft Guidance. The attached text contains a number of amendments, which are made by the Presidency in order to address the remaining concerns of delegations that were expressed at the last meeting of the Subgroup on external issues that took place on 4 November 2019.
5. On the basis of bilateral contacts, the Presidency hopes that the attached text should strike the right balance and, in the spirit of compromise, be acceptable to all delegations.

¹ Council conclusions of 12 March 2019 point 20, doc. 7441/19.

² Council conclusions of 14 June 2019, point 16, doc. 10340/19.

6. Against this background, the Presidency suggests that all delegations lift their remaining reserves and reach agreement on the attached draft Guidance at the meeting of the COCG on 14 November. This will permit to annex the agreed Guidance to the regular semi-annual COCG report to ECOFIN, which will then be expected to endorse this Guidance, as a "no discussion" item, together with the draft Council conclusions on the progress achieved by the Code of Conduct (Business Taxation) Group during the Finnish Presidency.

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(Draft) Guidance on defensive measures in the tax area towards non-cooperative jurisdictions**I. GENERAL**

1. The Council, in its Conclusions of 12 March 2019 on the revised EU list of non-cooperative jurisdictions for tax purposes welcomed the fact that the list "*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 2017*".
2. In the conclusions, the Council also:
 - i) reiterated 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 law³, and
 - ii) invited (along the lines of point 19 of the Council conclusions of 5 December 2017) "*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 [...] without prejudice to the respective spheres of competence of the Member States and of the Union as resulting from the Treaties*"⁴

³ This point was also reiterated by the Council in its 14 June 2019 conclusions (point 16 concerning progress achieved by the Code of Conduct Group (doc. 10340/19)./

⁴ Council conclusions of 12 March 2019, points 19 to 21 ([doc. 7441/19](#)).

3. The objective of this Guidance is to set out the principles of co-ordination of actions by Member States in this area, whilst providing further details as regards the proposed defensive measures of a legislative nature to be applied, in accordance with EU and national law, including international obligations, to non-cooperative jurisdictions as long as they are listed by the EU.
4. The list of non-cooperative jurisdictions and the defensive measures, when applicable, encourage a positive change, as they have the preventive effect of sending a strong signal to the jurisdictions concerned. Placement of non-cooperative jurisdictions on the list for the tax purposes has proven to have a dissuasive effect that encourages compliance with the tax good governance principles (the Criteria), as well as other relevant international standards.
5. It is important that all Member States provide for in their national legislation efficient protection mechanisms that help to fight against the erosion of Member States' tax bases through tax fraud, evasion and abuse.
6. Therefore effective and proportionate defensive measures of a legislative nature in the tax area should be taken by the Member States, in accordance with their national law, in addition to the non-tax measures already taken by the EU, to effectively discourage non-cooperative practices in the jurisdictions concerned. Member States have already agreed to apply at least one of the administrative measures in the tax area as listed in Annex III of the Council conclusions of 5 December 2017.
7. It should be noted that this Guidance is without prejudice to the respective spheres of competence of Member States to apply additional measures or maintain lists of non-cooperative jurisdictions at national level with a broader scope.
8. While, in the absence of EU legislation, the exact configuration, as well as assessment of the effectiveness and proportionality of legislative and non-legislative defensive measures is left to the competence of Member States, it is important that taxation systems and administrative practices of Member States contain an appropriate mix of minimum level measures that ensure these objectives are reached.

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9. Together with the list itself, the defensive measures should have the effect of encouraging a positive change leading to the removal of jurisdictions from the list.⁵ The defensive measures would not have any dissuasive effect if the taxation would be the same whether it were a listed or non-listed jurisdiction. Therefore, defensive measures in tax area included in this Guidance should be specific measures that are different from the general administrative practices and tax rules in the Member States.

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⁵ Council conclusions of 5 December 2017, paragraph 20.

II. DEFENSIVE ADMINISTRATIVE MEASURES

10. To ensure coordinated action, Member States should apply appropriate administrative measures that aim to prevent using the legislation, policies and administrative practices of ~~tax systems of the~~ listed jurisdictions for aggressive tax planning, evasion or abuse.
11. As already agreed in the Council Conclusions of 5 December 2017, Member States should continue to ensure that they apply at least one of the following administrative measures in the tax area, thus attaching greater importance to audit and control of such arrangements:
- 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.

III. DEFENSIVE MEASURES OF A LEGISLATIVE NATURE

12. The Council recommended in its conclusions of 5 December 2017 a number of types of defensive measures of a legislative nature in the tax area that could be applied by the Member States, without prejudice to the respective spheres of competence of the Member States to apply additional measures.
13. In line with the Council recommendation that Member States take certain co-ordinated defensive measures in the tax area, in accordance with their national law and in accordance with the obligations under EU and international law, and for the purposes of achieving the objectives of this Guidance, every Member State should apply at least one of the specific legislative measures which are described in more detail in this Chapter III. A Member State could also apply these measures in a more targeted manner, specifically addressing the issues of non-compliance with the EU tax good governance ~~EU listing~~ criteria, ~~on the criteria for which~~ a ~~each~~ jurisdiction is listed.

14. Whichever the measure chosen, it is appropriate that the Member State concerned ensures that the measure has the effect of encouraging a positive change leading to the removal of jurisdictions from the list. The measure would be considered to have this effect when it is applied in a situation linked to a listed jurisdiction and not applied **either** once the specific reason for listing of that jurisdiction is resolved **or as soon as possible thereafter**. ~~The Member States~~ could extend the application of the defensive measures to ~~also cover~~ jurisdictions on its national list, or, in the absence of such a list, ~~to cover~~ the corresponding issues of non-compliance with EU **tax good governance** listing criteria. **Moreover, removal of a jurisdiction from the EU list does not exclude the possibility of applying defensive measures in case a jurisdiction remains on the national list of a Member State.**
15. Where applicable and in accordance with national law, the Member State could also apply a reversal of the burden of proof and special documentation requirements to reinforce the effect of any of the defensive measures. Nevertheless, application of any defensive measures of legislative nature is without prejudice to provisions of national law that allow the taxpayer to provide counter-evidence.
- a) **Non-deductibility of costs**
16. Member States that opt for this measure should deny deduction of costs and payments that otherwise would be deductible for the taxpayer when these costs and payments are treated as directed to entities or persons in listed jurisdictions. The measure should include for example interests, royalties and other concessions on intellectual property (IP) assets and service fees.

b) Controlled Foreign Company (CFC) rules

17. Member States that opt for this measure should include in the tax base of the taxpayer the income of an entity resident or a permanent establishment situated in a listed jurisdiction. Member State could apply this measure in accordance with to the rules laid down in articles 7 and 8 of the Anti-Tax Avoidance Directive (EU) 2016/1164.
18. The rules of the Anti-Tax Avoidance Directive (ATAD) operate without a link to the EU-list. After having implemented the ATAD based CFC-rules all Member States should apply those rules on a worldwide basis. A Member State that wishes to use these rules for the purposes of a defensive measure would need to adjust the rules to ensure the rule has the required effect as explained in paragraph 14. The details of this adjustment would depend highly on the national implementation of the CFC-rules in that Member State. These adjustments could include for example, not applying exemptions based on ATAD Article 7(3) or (4) when these are applied to non-listed jurisdictions, including all income of the controlled foreign company in a listed jurisdiction instead of applying ATAD Article 7(2)(a) or (b), applying a lower ownership threshold or a higher effective tax rate test than the one applied for non-listed jurisdictions. Member State that maintains a list in conjunction with CFC-rules, could apply the rules applied to listed jurisdictions as a defensive measure for the purposes of this Guidance.

c) Withholding tax measures

19. Member States that opt for this measure should apply withholding tax at a higher rate for example on payments such as interest, royalties, service fee or remuneration, when these payments are treated as received in listed jurisdictions.
20. Alternatively or in combination with this measure Member States could consider applying specific targeted withholding tax on such payments.

d) Limitation of participation exemption on profit distribution

21. Member States, which have rules that permit excluding or deducting dividends or other profits received from foreign subsidiaries (e.g. holdings), could deny or limit such participation exemptions if the dividends or other profits are treated as received from a listed jurisdiction.
22. Member States that opt for this measure should recognize situations where they apply rules on limitation of participation exemption on profit distribution laid down in Articles 1(2) and 4(1)(a) of the parent-subsidiary Directive (Council Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States as amended with Directives (EU) 2015/121 and 2014/86/EU) or equivalent domestic rules. Limitation of participation exemption on profit distribution that is based on the Directive as well as similar domestic rules that apply independently of the EU-list would not be considered as a defensive measure for the purposes of EU listing process. Limitation of participation exemption applied to profits from entities in listed jurisdictions should be more stringent towards taxpayers as compared to the rules otherwise applicable, which would entail that the thresholds, as described below, for applying these rules would be lower in case of listed jurisdictions.
23. As a minimum, Member States that opt for this measure should not apply similar restrictions on the limitation as those laid down in the parent-subsidiary Directive Articles 1(2) and 4(1)(a) or possible limitations in equivalent domestic rules to the profit arising from entities in listed jurisdictions.
24. Member States could also consider applying other rules that are stricter towards taxpayer as compared to the limitation laid down in the parent-subsidiary directive or similar domestic rules.

IV. WAY FORWARD AND FURTHER WORK IN THE CODE OF CONDUCT GROUP

25. Member States should ensure that at least one of the defensive measures described in Chapter III of this Guidance is applied from 1 January 2021 at the latest. In case of listing or delisting, Member States should ensure that **defensive** these measures are applied accordingly, as soon as possible, depending on the nature and content of each measure and the rules on enactment of laws in the Member State.
26. Member States should regularly update the Code of Conduct Group on the state of play of defensive measures that they apply under this Guidance. In this context, it is important to recall that any defensive measures should be compatible with the national tax systems of the Member States and without prejudice to the respective spheres of their competence and their obligations under EU and international law. Therefore ensuring effectiveness and implementation of the defensive measures described in this Guidance is within the competence of each Member State.
27. **Taking into account updates of the EU tax good governance standards (the Criteria), the specific risks that arise from non-compliance with such standards, as well as the international developments, most notably in the OECD, the Code of Conduct Group will assess the need for further coordination of defensive measures in the tax area and the need to apply defensive measures in a more targeted manner, without prejudice to Member States' obligations under EU and international law. Therefore the Code of Conduct Group should resume reviewing the work on legislative defensive measures in the tax area in 2022 at the latest. In this context, and to the extent it is necessary to ensure compliance with paragraph 25 of this Guidance, the Guidelines on working methods for an effective monitoring of Member States' compliance with agreed guidance will be applied, in order to ensure that the Code of Conduct Group takes informed decisions, as appropriate.**
29. In coordination with the High Level Working Party (Taxation), relevant results of this work should be brought to the attention of the Council, for consideration and political guidance, where appropriate.