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## NOTE

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From:	General Secretariat of the Council
To:	Council
Subject:	Follow-up to the Council conclusions of 8 November 2016 on "Criteria and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes" – State of play

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### I. INTRODUCTION

1. The ECOFIN Council, in its Conclusions of 25 May 2016 on "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 on an EU list of non-cooperative jurisdictions by September 2016, and to determine, on the basis of a first screening by the Commission, third Countries with which dialogues should start, 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".<sup>1</sup>

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<sup>1</sup> Doc. 9452/16 FISC 85 ECOFIN 502, point 10.

2. Following the preparatory work during the second semester of 2016, the ECOFIN Council, in the meeting of 8 November 2016, has agreed Conclusions on the criteria for and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes,<sup>2</sup> where it, *inter alia*, confirmed its priority commitment to continue the fight against tax fraud, evasion and avoidance, and against money laundering which erode Member States' tax bases. The Council also was of the view that co-ordinated policy efforts in this area at EU and global level, such as determining the objective criteria to identify non-cooperative jurisdictions for tax purposes, are part of effective measures that could be taken.
3. In its 8 November 2016 Conclusions the Council set out more specifically the criteria and guidelines for the process of screening jurisdictions with a view to establishing an EU list of non-cooperative jurisdictions for tax purposes. The Council mandated the Code of Conduct Group (Business Taxation), supported by the General Secretariat of the Council of the European Union, to conduct and oversee the analysis (the screening process). The European Commission services will assist the Code of Conduct Group (Business Taxation) by carrying out the necessary preparatory work for the screening process.
4. The Code of Conduct Group (Business Taxation) was also tasked by the Council with the following:
  - a) to finalise its work on the selection of jurisdictions for screening on the basis of the European Commission's Scoreboard;
  - b) to define, based on objective criteria, the duration of the reasonable timeframe, referred to in criterion 1.3;
  - c) to define the scope of application of criterion 2.2 and to evaluate, in the context of criterion 2.2, the absence of a corporate tax system or applying a nominal corporate tax rate equal to zero or almost zero as a possible indicator;

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<sup>2</sup> Doc. 14166/16 FISC 187 ECOFIN 1014.

- d) to further develop the appropriate arrangements on the practical methods and modalities on implementing the screening guidelines with a view to effective implementation of the screening process of jurisdictions with a view to the establishment by the Council of an EU list of non-cooperative jurisdictions for tax purposes;
- e) to continue exploring defensive measures at EU level to be endorsed by the Council, in line with the Council Conclusions of May 2016.

## **II. STATE OF PLAY**

- 5. Preparatory work referred to in point 4 above, which was required for launching the assessment exercise was carried out, in line with the request and the guidelines set by the Council.
- 6. In November 2016, the Code of Conduct Group (Business Taxation) concluded work on the selection of jurisdictions for screening. The selection used as a starting point the European Commission's Scoreboard that was published in September 2016.
- 7. The Code of Conduct Group (Business Taxation), at its meeting of 25 January 2017, has agreed on the text of template letters to be sent to the selected jurisdictions, as well as the common communication line (doc. 5674/17 FISC 26 ECOFIN 43 LIMITE). The letters were signed by the Chair of the Code of Conduct Group (Business Taxation) and sent by the General Secretariat of the Council, at the end of January 2017, in accordance with the mandate set out in 8 November 2016 Council conclusions.
- 8. At the meeting of the subgroup Code of Conduct Group (Business Taxation) on 16 December 2016 the duration of the reasonable timeframe, referred to in criterion 1.3, was defined (Annex I to this note).

9. Over the last few months, with a view to the effective implementation of the screening process the Code of Conduct Group has also developed a set of practical arrangements for the screening process in 2017 and basic guidance on how the screening criteria should be applied (the "screening rulebook"). Among other issues, the screening rulebook addresses the request of the Council that during the screening process particular account should be taken of the fact, that developing countries (provided that they do not rank high in terms of financial activity and do not have financial centers) may lack the capacity to implement the tax transparency standards and anti-BEPS minimum standards according to the same timeline as developed countries.
10. The scope of application of criterion 2.2 was discussed in a number of meetings of the Code of Conduct Group (Business Taxation) and its relevant subgroup. Following the High Level Working Party on Tax Questions (HLWP) meeting on 3 February 2017 and the meeting of Fiscal Attachés on 9 February 2017, one delegation maintained a scrutiny reserve on the text clarifying the scope of application of criterion 2.2 set out in Annex II to this note. At the meeting of the Committee of Permanent Representatives of 15 February 2017, this delegation lifted its scrutiny reserve on Annex II to this note, indicating that it intends to make a statement for the minutes of the Council meeting. The parliamentary scrutiny reserve by another delegation was lifted in the meantime.

### **III. FURTHER WORK IN THE COUNCIL**

11. In conducting and overseeing the screening process, the Code of Conduct Group (Business Taxation) will continue, where relevant, to refine, based on objective criteria, further practical considerations (incl. the screening rulebook) in giving effect to the November 2016 ECOFIN Council Conclusions.
12. In order to ensure a smooth functioning of the screening process, experts panels set up for this analysis and working under the aegis of the Code of Conduct Group (Business Taxation) will engage in the technical dialogue with the respective jurisdictions in order to seek clarification of specific aspects and relevant commitments. This work will lead to determining the situation (facts) in the jurisdictions concerned with regard to the screening criteria

13. Following a balanced review of all information collected in the screening process, the Code of Conduct Group will report to the Council on those jurisdictions that do not comply with the screening criteria which, in the view of the Code of Conduct Group, 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.
14. This report will be presented, in co-ordination with the HLWP, 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).
15. Once the Council endorses the EU list of non-cooperative jurisdictions, the Chair of the Code of Conduct Group will send letters to the listed jurisdictions without delay, with clear explanation of the reasons for such listing and which steps a jurisdiction concerned is expected to take, if it wishes to be de-listed.
16. In the meantime, the Code of Conduct Group (Business Taxation) and its relevant subgroup, in co-ordination with the HLWP, is expected, as requested by the Council, to "continue exploring defensive measures at EU level to be endorsed by the Council, in line with the Council Conclusions of May 2016".

#### **IV. THE WAY FORWARD**

17. Against this background, the Council is invited to take note of the state of play on this dossier and endorse this report.

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**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.

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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).<sup>3</sup>
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<sup>4</sup>, because of the "absence of a corporate tax system or applying a nominal corporate tax rate equal to zero or almost zero"<sup>5</sup>, 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<sup>6</sup> has been met.

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<sup>3</sup> "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)

<sup>4</sup> "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)

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

<sup>6</sup> 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.*"

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.
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