

Brussels, 12 June 2017  
(OR. en)

10046/17

FISC 132  
ECOFIN 506

**'I/A' ITEM NOTE**

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From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
Subject:	ECOFIN Report to the European Council on tax issues = Endorsement

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1. The Council (ECOFIN) was invited to report back to the European Council on various tax issues as mentioned, in particular in its conclusions of March and June 2012, May 2013 and December 2014.
2. A draft ECOFIN Report to the European Council on Tax issues was prepared and agreed in the Council High Level Working Party on Tax issues (HLWP) on 6 June 2017, for submission to the Council via Coreper.
3. The Permanent Representatives Committee is therefore invited to:
  - confirm the agreement on the report reached at the HLWP (as set out in the Annex);
  - forward the draft Report to Council (ECOFIN) of 16 June 2017 for endorsement, on the understanding that factual updates (concerning parts in square brackets) would be reflected in the version forwarded to the June 2017 European Council.

**ECOFIN REPORT TO THE EUROPEAN COUNCIL ON TAX ISSUES**

1. This report provides an overview of the progress achieved at the Council during the term of the Maltese Presidency, as well as overview of the state of play on the most important dossiers under negotiations in the area of taxation.
2. The report covers various issues mentioned in the European Council Conclusions of 1/2 March 2012<sup>1</sup> devoted to growth, as well as in the European Council Conclusions of 28/29 June 2012<sup>2</sup>, 22 May 2013<sup>3</sup>, 24/25 October 2013<sup>4</sup>, 19/20 December 2013<sup>5</sup>, 20/21 March 2014<sup>6</sup>, 26/27 June 2014<sup>7</sup> and 18 December 2014<sup>8</sup> and the relevant Council Conclusions in the VAT area of 2012<sup>9</sup> and of 2016<sup>10</sup>. It gives an overview on the state of play of relevant Council work.
3. In line with the request from the European Council on 18 December 2014<sup>11</sup>, during the Maltese Presidency the Council has continued to focus its work on the fight against tax avoidance and aggressive tax planning, both at the global and EU levels. This has been done, in particular, on the basis of a Presidency roadmap on further work related to unfair tax competition, base erosion and profit shifting in the EU context (hereinafter – EU-BEPS), updated on 6 February 2017 (doc. 5988/17 FISC 33). In carrying out this work, the Presidency has paid particular attention to consistency between EU work and OECD actions in the area of BEPS.

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<sup>1</sup> EUCO 4/3/12 REV 3 (items 9 and 21).

<sup>2</sup> EUCO 76/12, 28/29 June 2012.

<sup>3</sup> EUCO 75/1/13 REV 1, 22 May 2013.

<sup>4</sup> EUCO 169/13, 24/25 October 2013.

<sup>5</sup> EUCO 217/13, 19/20 December 2013.

<sup>6</sup> EUCO 7/1/14 REV 1, 20/21 March 2014.

<sup>7</sup> Doc. EUCO 79/14 CO EUR 4 CONCL 2, point 2.

<sup>8</sup> Doc. EUCO 237/14 CO EUR 16 CONCL 6, point 3.

<sup>9</sup> Docs 9586/12 FISC 63 OC 213 and 14877/12 ECOFIN 864 FISC 136 OC 579.

<sup>10</sup> Doc. 9494/16 FISC 86 ECOFIN 509 and 14257/16 FISC 190 ECOFIN 1023.

<sup>11</sup> EUCO 237/14, 18 December 2014.

4. More specifically in the area of direct taxation, the Council has adopted a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, and reached a general approach on a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union. It has also started the technical examination of the proposal for a Council Directive on a Common Corporate Tax Base (CCTB), continued the discussions on the recast of the Interest and Royalty Directive (IRD) and resumed discussions on EU anti-fraud agreements with Liechtenstein and other European third countries.
5. In the area of VAT, the Council has [made as much progress as possible] // [reached a general approach] on a proposal for a General Reversed Charge Mechanism (GRCM). It has [made as much progress as possible] // [reached a general approach] on a proposal for a Council Directive amending Directive 2006/112/EC, as regards rates of VAT applied to books, newspapers and periodicals. It has also substantially advanced the technical examination of the VAT e-commerce package.
6. The Code of Conduct Group (Business Taxation) continued further its work on the various matters falling within its mandate, including work in the context of the process leading to establishment of the EU list of non-cooperative jurisdictions in tax area, as foreseen in the Council conclusions prepared by the HLWP and adopted by ECOFIN on 8 November 2016.<sup>12</sup>
7. More detailed information on individual dossiers can be found below.

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<sup>12</sup> Doc. 14166/16 FISC 187 ECOFIN 1014.

## **A. Initiatives in the area of EU tax law**

### **Building a fair, competitive and stable corporate tax system for the EU**

#### *a) Hybrid mismatches involving third countries (ATAD 2)*

8. When agreeing on the Anti-Tax Avoidance Directive (ATAD) on 20 June 2016, the Council issued a statement, inviting the Commission to put forward a proposal on hybrid mismatches involving third countries in order to provide for rules consistent with and no less effective than the rules recommended by the OECD BEPS report on Action 2.
9. The Commission, responding to the Council statement, put forward a proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (doc. 13733/16 FISC 173) on 26 October 2016. The proposal set out rules to deal with hybrid mismatches with third countries involving hybrid entities, hybrid financial instruments, permanent establishments, hybrid transfers, imported mismatches and dual resident mismatches.
10. Under the Slovak Presidency, significant technical work took place, and a compromise text was presented to the ECOFIN Council on 6 December 2016. During that meeting, while most of the text was stabilised, some parliamentary reservations were noted and two open issues, linked to exemptions from the scope and the implementation date, were identified for further work.
11. The Maltese Presidency organised 4 meetings in order to examine those outstanding issues. On 21 February 2017, the ECOFIN Council reached a general approach on the compromise text proposed by the Presidency. This text provides for
  - a) An optional carve out on hybrid regulatory capital that is accompanied with safeguards and a “sunset clause” in order to control its application;

- b) a definition of hybrid mismatch specifying the conditions under which payments made by financial traders do not give rise to hybrid mismatches; and
  - c) differentiated dates of implementation, in order to allow sufficient implementation time for Member States, while ensuring a uniform implementation in a timely manner.
12. On 29 May 2017, the Council adopted the Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries, as revised by the lawyer-linguists.
- b) Common Corporate Tax Base (CCTB)
13. As part of relaunching the 2011 Common Consolidated Corporate Tax Base ("CCCTB") proposal, the Commission put forward a proposal for a Council Directive on a Common Corporate Tax Base, hereafter "CCTB" (doc. 13730/16 FISC 170 IA 99). The proposal lays down common rules for computing the tax base of multinational companies within the EU.
14. The main changes compared to the 2011 proposal are its mandatory character for large companies, a super-deduction for research and development expenses to support innovation (Article 9), a new Allowance for Growth and Investment to address the debt financing bias (Article 11), and a temporary loss relief (Article 42).
15. The proposal was presented to the Working Party on Tax Questions (WPTQ) on 3 November 2016 and followed by a general exchange of views. The accompanying impact assessment (doc. 13730/16 FISC 170 IA 99 ADD 2 + 3) was examined at the same meeting and raised a number of questions, notably on the expected impact on national tax revenues.
16. On 6 December 2016, the ECOFIN Council took the view (doc. 15315/16) that work should focus as a priority on the "*elements of a common tax base*" and invited Member States, as a start, to "*concentrate their efforts on the rules for calculating the tax base and, in particular, on the new elements of the relaunched initiative (chapters I to V)*". Furthermore, "*Member States should then concentrate on the remaining elements of the common base (chapters VI to XI)*".

17. The WPTQ subsequently proceeded with the examination of the CCTB proposal, with a particular focus on an article-by-article examination of the novel aspects of the proposal (Articles 9-11-42), and followed up the discussion on the impact assessment at its meeting of 16 February 2017.
18. This technical examination having revealed some different perspectives across Member States, the Presidency devoted the subsequent WPTQ meeting of 23 March 2017 to responding to concerns and questions raised by delegations, and discussing possible ways forward on Articles 9-11-42. On this basis, the Presidency was then able to propose preliminary amendments to these three Articles at the two subsequent WPTQ meetings.
19. The issue of the right mix between harmonisation and flexibility in the context of increased international competition being constantly resurfacing in technical discussions, the ECOFIN Council held a policy debate on the matter on 23 May 2017. Elements mentioned to be considered in further work included finding an appropriate balance between the need for flexibility required for national economic policy decisions on the one hand and the goal of harmonizing the corporate tax base on the other hand, in particular in view to a possible consolidation phase, as well as on the objective of an as broad as possible corporate tax base to preserve national tax revenues.

*c) Common Consolidated Corporate Tax Base (CCCTB)*

20. The Commission also put forward a proposal for a Council Directive on a Common Consolidated Corporate Tax Base, hereafter "CCCTB" (13731/16 FISC 171). The proposal complements the CCTB proposal with the consolidation element.
21. The proposal for a CCCTB lays down the conditions for having a group, including technical rules on consolidation, reorganisations, how to treat losses and unrealised capital gains, on transactions between the group and entities outside the group, for instance regarding withholding taxes and credit relief. The proposal also sets out rules for the apportionment of profit, by describing mechanisms of weights to allocate the consolidated base to the eligible Member State.

22. In terms of working method, the ECOFIN Council took the view on 6 December 2016 (doc. 15315/16) that "*tax consolidation should be examined without delay once the discussion on these elements has been successfully concluded*" - without prejudice to the competence of incoming presidencies to organise their work as appropriate.

d) Dispute resolution

23. With the aim of improving the current dispute resolution mechanisms, the Commission put forward a proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union (13732/16 FISC 172) on 26 October 2016. The proposal builds on the current Arbitration Convention<sup>13</sup>, by maintaining a system of mandatory binding arbitration that would be broadened whilst adding obligations of results and time constraints.
24. Enhancing dispute resolution mechanisms between Member States is considered as important by many stakeholders, in order to ensure a fair, efficient and competitive economy. Tax certainty plays an important role in promoting investment and growth, and should be part of the tax environment in which businesses operate. Potential cases of double taxation should therefore be solved quickly and conclusively.
25. In line with those objectives, the Presidency had flagged this proposal as a priority, and dedicated a significant amount of meetings to this file.
26. During the technical meetings, experts commented on several aspects of the Commission proposal, and extensive discussions took place. Areas of focus were mainly on the scope, procedural steps and deadlines, the role, type and composition of the Advisory Commission and of the Alternative Dispute Resolution Commission, the costs of the procedure, the interaction with national proceedings, whether a simplified procedures should be put in place for individuals and smaller undertakings and the publicity of the decisions.
27. The outcome of those discussions resulted in a compromise text that was presented to the ECOFIN Council at its meeting on 23 May 2017, which comprised the following elements:

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<sup>13</sup> Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, OJ L 225, 20.8.1990, p. 10.

- a) The Directive lays down mechanisms to resolve disputes between Member States when these arise from the interpretation or application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital.
- b) A taxpayer affected by such dispute may submit a complaint to the authorities of each of the Member States concerned, following which, when such complaint is accepted, the competent authorities of the Member States concerned will endeavour to resolve the dispute. The decision reached by the authorities on how to resolve the dispute will be binding on Member States provided that the taxpayer accepts such decision and renounces to other remedies.
- c) When the competent authorities do not reach a decision within the required time limit, or when the complaint is rejected by some but not all of the competent authorities, the taxpayer may require that the dispute be resolved by an Advisory Commission, composed of representatives of the competent authorities, of independent persons of standing and of a chair, which will give, where applicable, a decision on the acceptance of the complaint, and deliver an opinion on how to resolve the dispute.
- d) Instead of an Advisory Commission, the competent authorities of the Member States concerned may agree to set up an Alternative Dispute Resolution Commission, and that may apply other dispute resolution processes and techniques to resolve the dispute in a binding manner.
- e) When the Advisory Commission or the Alternative Dispute Resolution Commission issues its opinion on the question of dispute, the latter will be notified to the competent authorities, which must then reach an agreement on how to resolve the dispute. If they fail to reach an agreement on how to resolve the dispute, then they will be bound by the opinion of the Advisory Commission or the Alternative Dispute Resolution Commission.
- f) A simplified procedure has been put in place for individuals and smaller businesses.



28. At its meeting on 23 May 2017, the ECOFIN Council reached a general approach on the compromise text presented by the Presidency (9420/17). In addition, a Statement by all Member States was made in the minutes of the ECOFIN Council that *"Member States shall endeavour to explore the possibilities to further enhance the resolution of disputes among Member States relating to the interpretation and application of tax agreements and conventions by way of a permanent body, including the possibilities provided for under Article 273 TFEU. "* The Council will proceed with the adoption of this text after it receives the opinion of the European Parliament.

### **Interest and Royalties Directive (IRD) recast**

29. In November 2011, the Commission presented a proposal to recast Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (hereafter "IRD"), aiming at solving some shortcomings resulting from the limited scope of the Directive. The proposal mainly provided for:
- a) the extension of the list of companies to which the Directive applies and to reduce the shareholding requirements to be met for companies to qualify as associated;
  - b) the addition of a new requirement for the tax exemption to ensure that the tax relief is not granted when the corresponding income is not subject to tax and thus close a loophole that could be used by tax evaders; and
  - c) a technical amendment to avoid situations where payments made by a permanent establishment and deriving from its activities are denied the exemption on the grounds that they do not constitute a tax-deductible expense.
30. A split of the file focusing on a new common anti-abuse rule was presented by the Latvian Presidency at the ECOFIN Council on 19 June 2015 for political agreement. However, such an agreement could not be reached as some Member States insisted on the inclusion of a provision setting up a minimum effective level of taxation, in particular of royalty payments, which would require substantial technical work.

31. During past Presidencies, substantial work was devoted to examining different alternatives to include a Minimum Effective Taxation (MET) clause in the IRD. Leaving aside the question on the need to introduce a MET clause, Member States discussed at length at technical level whether the MET should be a sole criterion or if it should be combined with a substance test, whether to exempt or not payments to modified nexus compliant patent boxes, and whether to include in the scope outbound royalty payments.
32. The Maltese presidency consulted bilaterally all Member States with a view to developing a clearer picture of Member States' positions and the possible margin of manoeuvre for progressing the file, and two working party meetings were held on this file, on 26 April and 30 May 2017.
33. On 26 April, the presidency proposed a compromise text along the following lines
- the insertion of a 'subject to tax' clause in Article 1 (1);
  - the insertion in Article 5 of a Targeted Anti-Abuse Rule (TAAR) modelled on the one introduced in the PSD and on the GAAR of ATAD 1;
  - an amendment in Article 4 (1) allowing the state of source not to apply the IRD to payments of interest and royalties going into preferential measures in the state of residence;
  - the incorporation of the other pending amendments of the 2011 Commission proposal, namely (a) the extension of the list of companies to which the IRD applies; (b) the reduction in the shareholding requirements in line with the PSD; (c) the right to allow payments flowing out of Permanent Establishments to benefit from the IRD if they are treated as expenses for accounting but not necessarily for tax purposes.
34. Not all Member States were in a position to support the proposed compromise and the Presidency concluded that it would come back to this file at a future meeting. Several delegations in particular insisted that non-harmful preferential regimes should not be excluded from the scope of the Directive.

35. On 30 May 2017, the Presidency proposed an updated compromise, in particular on how the carve-out/amendment to Art 4(1) referred to in point 33 could be reformulated with a view of targeting intra-EU payments where they are indirectly remitted to a third country on the eventual EU list of non-cooperative jurisdictions. At this stage, no agreement could be found on the basis on the compromise suggestions put forward for the WPTQ of 30 May 2017.

**EU anti-fraud and tax information exchange agreement with Liechtenstein and other non-EU countries (Andorra, Monaco, San Marino and Switzerland)**

36. On 7 November 2006, the Council authorised the Commission to negotiate with the Principality of Liechtenstein an Agreement to counter fraud and all other illegal activities to the detriment of public financial interests, including the resources and expenditures, in particular grants and taxes (doc. 12977/06). The aim was to get an Agreement which could serve as a model for negotiating Anti-fraud and tax information exchange agreements with other non-EU Countries (Andorra, Monaco, San Marino and Switzerland).
37. On 11 December 2008, the Commission adopted a proposal for a Council Decision on the signing and conclusion, on behalf of the European Community, of the Cooperation Agreement between the European Community and its Member States, of the one part, and the Principality of Liechtenstein, of the other part, to combat fraud and any other illegal activity to the detriment of their financial interests (doc. 17247/08 FISC 188).
38. Following the conclusions adopted by the ECOFIN Council on 10 February 2009 (doc. 6116/09 FISC 18; doc. 6069/09 Press 32), Liechtenstein was expected to encompass in the agreement with the EU at least a similar scope of obligations as it had agreed with third countries. The Council also mandated the Commission to obtain changes to ensure effective administrative assistance and access to information with regard to all forms of investments, in particular foundations and trusts.

39. On 9 June 2009, recalling the Council Conclusions of 10 February 2009, the Council urged the Commission to swiftly present the negotiating result on the anti-fraud agreement with Liechtenstein and noted the intention of the Commission to present negotiating directives for anti-fraud agreements with the Principality of Andorra, the Principality of Monaco, the Republic of San Marino and with the Swiss Confederation (doc. 10252/4/09 REV 4 FISC 72).
40. On 1 July 2009, the Commission submitted to the Council a Recommendation for a mandate authorising the Commission to open negotiations for anti-fraud and tax information exchange agreement with Andorra, Monaco, San Marino and Switzerland (doc. 11640/09 FISC 93). On the basis of this recommendation, a draft negotiating mandate was prepared (doc. 14523/09). However, the discussions were put on hold as priority was given to the finalisation of the negotiations with Liechtenstein.
41. On 23 November 2009, the Commission presented amended proposals regarding the signing (doc. 16989/09) and on the conclusion (doc. 16990/09) of the agreement with Liechtenstein. They were discussed at the ECOFIN Council on 2 December 2009 and 19 January 2010. On 8 March 2010, a revised version of the proposal regarding the Conclusion of the agreement was then presented by the Commission (doc. 16990/2/09 REV 2) which took into account the new provisions of the Treaty on the Functioning of the European Union.
42. The file was discussed at COREPER on 12 May 2010. The discussions revealed that further work was necessary, in particular due to the requests by two delegations to add an external conditionality clause and to clarify the link with the transitional period in the Savings taxation directive. The last discussion on this file took place at the HLWP on 6 June 2013.

43. Given that the political issues which were preventing progress are now solved, the Maltese Presidency relaunched discussions on the above at the HLWP meeting of 6 April 2017. It was agreed at this occasion to continue to concentrate first on the anti-fraud and tax information exchange agreement with Liechtenstein, and identify points to be technically updated before the possible adoption of the Commission proposals regarding the signing (doc. 16989/09) and the conclusion (doc. 16990/2/09 REV 2) of the agreement. In this regard, it was agreed that the HLWP would be informed on the findings of OLAF at one of its next meetings as soon as their technical scrutiny has been finalised.

### **Value added tax (VAT)**

#### *a) VAT e-commerce package*

44. In line with the objectives developed in its Digital Single Market (DSM) Strategy, the Commission has put forward its VAT e-commerce package on 1st December 2016, composed of amendments to Council Directives 2006/112/EC ("VAT Directive") and 2009/132/EC as regards certain VAT obligations for supplies of services and distance sales of goods (doc. 14820/16), Council Implementing Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of VAT (doc. 14821/16), and Council Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of VAT (doc. 14822/16).
45. These proposed amendments introduce measures that would enter into force in two steps:
- a) The first step (short term) would involve simplifications to the current Mini One Stop Shop ("MOSS") scheme, such as a low, optional for businesses, EU-wide threshold related to the supply of telecommunication, broadcasting and electronic services;
  - b) The second step (2021) would introduce further simplifications and an extension of the MOSS scheme, e.g. with regard to distance sales of goods from third countries and low value consignments.

46. The legislative proposals and their related impact assessment (doc. 14820/16 IA 126 ADD 1+2) were introduced to the WPTQ on 14 December 2016.
47. The Maltese Presidency started with the article-by-article technical examination of two of the three proposals (changes to the VAT Directive and Council Implementing Regulation) at the WPTQ meetings of 11 January and 8 February 2017. The article-by-article technical examination of the third proposal (changes to Council Regulation 904/2010) will have to be conducted at a later stage: the Presidency's intention was to agree first on the changes to the VAT directive before examining related administrative cooperation modalities.
48. The Presidency subsequently tabled various iterations of a possible compromise on these two proposals. The 5th compromise was examined by experts (WPTQ) on 19 May 2017.
49. Although there are still a number of reservations on the substance of the proposals, substantial discussions at technical level (8 working party meetings in total) enabled to reach significant progress and to stabilise the legal drafting of a substantial part of the aforementioned two proposals. However discussions also revealed particular technical difficulties with regard to the extension of the one stop shop to imports and to the coordination thereby required with customs experts. The technical questions put forward by delegations that could not be addressed under this term will notably need to be followed up.
50. Discussions at technical level also revealed two more substantial issues on which further work will be needed: whether to make online platforms and fulfilment houses liable to collect VAT in the case of distance sale of goods, in particular from third countries or by third country suppliers.
51. Against this background, a progress report (doc. 10044/17) accompanied by a new version of the Presidency compromise (doc. 10043/17) was discussed at the HLWP meeting of 6 June 2017 [and submitted to the ECOFIN Council meeting of 16 June 2017 for information (no discussion)].

*b) VAT treatment of e-publications*

52. On 1 December 2016, the Commission submitted a proposal for a Council Directive amending Directive 2006/112/EC, as regards rates of value added tax applied to books, newspapers and periodicals (doc 14823/16).
53. In its current form, Directive 2006/112/EC on the Common System of value added tax provides that electronically supplied services, including electronically supplied publications, are taxed at the standard rate. Publications on means of physical support may be taxed at a reduced VAT rate, and some Member States were also granted the possibility to continue to apply super-reduced rates, including exemptions with the deductibility of the VAT paid at the preceding stage (zero rate).
54. In line with the objectives developed in its DSM Strategy, the Commission has undertaken to modernise VAT for the digital economy, and has accordingly proposed to open up the possibility of applying reduced, super-reduced, and zero rates to electronic publications.
55. The Presidency examined this proposal during the Council WPTQ meetings of 26 January, 8 February, 8 March and 4 April 2017. The ECOFIN Council, on 21 March 2017, held an orientation debate. During that orientation debate, most Member States confirmed their willingness to open the reduced rates to electronically supplied publications. Super-reduced rates and zero rates however, given their extraordinary nature, should only be granted to electronic publications under the same conditions as the ones under which they are granted to paper publications. It was also recalled that Member States should maintain discretion to set VAT rates for publications and restrict the scope of reduced VAT rates, including, subject to objective justification, where digital publications offer the same reading content.

56. In order to reflect that orientation, the Presidency submitted a compromise text which was discussed during the WPTQ meeting of 4 April. The technical discussion was concluded and the file (doc. 8076/17) was discussed in COREPER on 26 April. Upon request, the Council Legal Service presented its opinion on the compatibility of the proposal with the principle of equal treatment. That oral opinion was confirmed in writing on 28 April 2017. The ECOFIN Council [was invited to reach] [reached] a general approach on the text at its meeting on 16 June 2017.

c) General reverse charge mechanism (GRCM)

57. At the ECOFIN meeting of 17 June 2016, the Commission made the following statement to be inserted in the minutes: "*The Commission commits to present, before the end of the year, a legislative proposal allowing individual Member States to derogate from the common system of value added tax so as to apply a generalised reverse charge mechanism to domestic supplies above a defined threshold and preserving the Internal Market*".

58. On 21 December 2016, the Commission therefore presented a Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards the temporary application of a generalised reverse charge mechanism (GRCM) in relation to supplies of goods and services above a certain threshold (doc. 15817/16 FISC 241).

59. This Proposal was discussed under the Maltese Presidency at the WPTQ meeting of 26 January 2017. A first compromise text was prepared by the Presidency and discussed at the WPTQ of 22 February 2017. A second compromise text was presented and discussed at the WPTQ of 8 March 2017. It was then updated and presented for an orientation debate at the Council (ECOFIN) meeting on 21 March 2017 (doc. 7118/17 FISC 61).

60. The Presidency noted the orientations given by Ministers as well as open issues which would serve as a basis for further work on this issue in the Council.



61. Further work was undertaken at the meetings of the WPTQ on 4 April and 19 May 2017. At the meeting on 4 April, a new compromise presented by the Presidency was discussed by Member States. Upon request, the Council Legal Service issued, on 12 May 2017, a legal opinion on the compatibility of the proposal with the Treaties.
62. On that basis, a new compromise was prepared, and a non-technical discussion followed at the HLWP of 6 June 2017. The ECOFIN Council [was invited to reach] [reached] a general approach on the text at its meeting on 16 June 2017.

*d) EU – Norway agreement on administrative co-operation in the area of VAT*

63. On 9 December 2014 the Council (ECOFIN) adopted a Decision authorising the Commission to open negotiations for an agreement between the European Union and Norway on administrative cooperation, combating fraud and recovery of claims in the field of value-added tax<sup>14</sup>; and Directives for the negotiations on this future agreement<sup>15</sup>.
64. The negotiations are expected to result in establishing a common European framework for administrative cooperation between EU Member States and Norway in the field of VAT in order to exchange information and best practices and cooperate for the recovery of claims in a manner similar to the way it takes place between Member States.
65. At the meeting of 8 November 2016, ECOFIN took note of the state of play on these negotiations, and of the text of the draft Agreement<sup>16</sup>, which could be supported by all MS delegations as a possible outcome of these negotiations, on the basis of which the Commission was invited to continue and complete these negotiations

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<sup>14</sup> Doc. 15942/14 FISC 207 N 32 ECOFIN 1080 LIMITE and doc. 16153/14 FISC 219 N 33 ECOFIN 1110 LIMITE + COR 1.

<sup>15</sup> Doc. 15942/14 ADD 1 FISC 207 N 32 ECOFIN 1080 RESTREINT UE/EU RESTRICTED + COR 1.

<sup>16</sup> Doc. 13607/2/16 FISC 163 N 61 ECOFIN 947 LIMITE and, for the draft text of the Agreement - doc. 13527/16 FISC 159 N 60 ECOFIN 940 RESTREINT UE/EU RESTRICTED.

66. The agreement was initialled by the EU and Norway in May 2017 and further progress on this dossier is expected in due time.

#### **Excise duties (Commission Report on Council Directive 2008/118/EC)**

67. On 21 April 2017 the Commission submitted a Report to the Council and the European Parliament on the implementation and evaluation of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty<sup>17</sup>.
68. The Presidency has initiated the exchange of views on this Commission Report at the meeting of Fiscal Attachés' on 31 May 2017. Delegations indicated their willingness to work towards drafting conclusions that Council could possibly adopt in response to this Report.
69. The work on this dossier is expected to continue during the term of Estonian Presidency.

#### **The common system of Financial Transaction Tax (FTT)**

70. The proposal for a Directive on a common system of financial transaction tax (FTT) was submitted by the Commission to the Council on 28 September 2011. Given that unanimous agreement by all Member States could not be attained, on the basis of the request of eleven Member States, and in accordance with the authorization of the Council of 22 January 2013<sup>18</sup>, and consent of the European Parliament's of 12 December 2012, the Commission on 14 February 2013 submitted a proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax.
71. At this stage, 10 Member States continue to participate in the enhanced co-operation in the area of FTT: Austria, Belgium, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain (hereafter referred to as "participating Member States").<sup>19</sup>

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<sup>17</sup> Doc. 8523/17 FISC 84 ECOFIN 309 + ADD1.

<sup>18</sup> OJ L 22, 25.1.2013, p. 11.

<sup>19</sup> On 16 March 2016, the Republic of Estonia has left the enhanced co-operation on FTT. See doc. 7808/16 FISC 47 LIMITE.

72. Following the preparatory work by the WPTQ, and, where relevant, by the HLWP, the state of play on this dossier has been discussed at the following meetings of ECOFIN Council:

- 6 May 2014<sup>20</sup>, 7 November 2014<sup>21</sup>, 9 December 2014<sup>22</sup>, and 8 December 2015<sup>23</sup>;
- 17 June 2016<sup>24</sup>, where, as a follow-up to the statement of ten participating Member States that was inserted into the minutes of the 8 December 2015 ECOFIN<sup>25</sup>, the Council took note of the state of play on this dossier regarding a number of selected issues (application of "issuance" and "residence" principles and the territorial scope for the FTT<sup>26</sup>; exemption from FTT of market making activities<sup>27</sup>; scope of transactions in derivatives contracts to be subject to the FTT<sup>28</sup>);
- 6 December 2016<sup>29</sup>, where the Council took note of the ongoing discussion on the constitutive parts (the “building blocks”) <sup>30</sup> of the FTT and the assembly of those “building blocks” into possible FTT models. The Council also took note of the discussions on issues relating to cost efficiency of possible FTT collection models.

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<sup>20</sup> Doc. 9399/14 FISC 79 ECOFIN 445 and doc. 9576/14 PV/CONS 22 ECOFIN 460.

<sup>21</sup> Doc. 14949/14 FISC 181 ECOFIN 1001.

<sup>22</sup> Doc. 16498/14 FISC 222 ECOFIN 1159 and doc. 16753/14 FISC 230 ECOFIN 1188 CO EUR-PREP 50, points 36 to 46.

<sup>23</sup> Doc. 14942/15 FISC 181 ECOFIN 947.

<sup>24</sup> Doc. 9602/16 FISC 90 ECOFIN 522.

<sup>25</sup> Doc. 15112/15 PV/CONS 72 ECOFIN 961 ADD 1.

<sup>26</sup> Doc. 9602/16 FISC 90 ECOFIN 522, point 6 to 8, and doc. 14942/15 FISC 181 ECOFIN 947, point 7 to 11.

<sup>27</sup> Doc. 9602/16 FISC 90 ECOFIN 522, point 9 to 12, and doc. 14942/15 FISC 181 ECOFIN 947, point 15 to 17.

<sup>28</sup> Doc. 9602/16 FISC 90 ECOFIN 522, point 13 to 15, and doc. 14942/15 FISC 181 ECOFIN 947, point 18 to 19.

<sup>29</sup> Doc. 13608/16 FISC 164 ECOFIN 948.

<sup>30</sup> Doc. 14942/15 FISC 181 ECOFIN 947, point 3.

73. In the light of the foregoing, as already indicated in the December 2016 ECOFIN report to the European Council on tax issues<sup>31</sup>, further work at the Council and its preparatory bodies will be required, before a final agreement on this dossier can be reached among the Member States participating in the enhanced co-operation, that respects the competences, rights and obligations of the Member States not participating in the enhanced co-operation on FTT.

## **B. Tax Policy Coordination**

74. Important work in the area of Tax Policy coordination (outside of the scope of EU legislation in tax area) has been taken forward, as set out below.

### **a) Code of Conduct Group (Business taxation): rollback and standstill**

75. The Code of Conduct Group met three times under the Maltese Presidency, on 25 January, 5 April and 8 June 2017. The Group continued the work on the basis of the new Work Package approved by the Council (ECOFIN) on 8 December 2015 (14302/15 FISC 159).
76. At the Code of Conduct (CoC) Group meeting on 25 January 2017, on the basis of the voting procedure set out by the General Secretariat of the Council, Ms Lapecorella, Director General of Finance of the Ministry of Economy and Finance (Italy) was appointed as Chair of the CoC Group for a period of two years, starting on 5 February 2017.
77. The CoC Group continued work on standstill and rollback of harmful preferential tax regimes, focusing on Patent boxes. During the Netherlands Presidency, it was agreed to split the review process into rollback of existing Patent Boxes and standstill aspects concerning new or amended patent boxes.

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<sup>31</sup> Doc. 15254/16 FISC 227 ECOFIN 1160 CO EUR-PREP 48, point 45.

78. The CoC Group continued its efforts to promote the principles and criteria of the Code of Conduct towards third countries, concentrating at this stage on a dialogue with Liechtenstein, which was invited to the Code of Conduct Group on 8 June 2017. At the same meeting the authorities of Switzerland briefed Member States on recent developments in Swiss corporate tax policy, against the background of the Joint Statement signed on 14 October 2014, in relation to the removal of five Swiss regimes.
79. More detailed information on the work of the CoC Group can be found in its report to the Council (ECOFIN) (doc. 10047/17).

**b) Code of Conduct Group: process leading to the establishment of the EU list of non-cooperative jurisdictions**

80. The ECOFIN Council, in its Conclusions of 25 May 2016 on an “External Strategy for Effective Taxation and Commission Recommendation on the implementation of measures against tax treaty abuse” invited “*the Code of Conduct Group to start work [...], with a view to establishing an EU list of non-cooperative jurisdictions and exploring defensive measures at EU level to be endorsed by the Council in 2017. Those defensive measures could be considered to be implemented in the tax as well as in the non-tax area.*”<sup>32</sup>.
81. In its 8 November 2016 Conclusions the Council set out 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 resolved that “*the Code of Conduct Group (Business Taxation), supported by the General Secretariat of the Council, will conduct and oversee 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 in accordance with the roles as currently defined under the Code of Conduct for Business Taxation process, with particular reference to previous and ongoing dialogues with third countries.*”<sup>33</sup>

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<sup>32</sup> Doc. 9452/16 FISC 85 ECOFIN 502, point 10.

<sup>33</sup> See doc. 14166/16, point 2 of the “Guidelines for the process of screening of jurisdictions with a view to establishing an EU list of non-cooperative jurisdictions for tax purposes”.

82. 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;
  - 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.
83. The Code of Conduct Group (Business Taxation) and the Maltese Presidency, chairing the Code of Conduct Group subgroup on third countries<sup>34</sup> has prioritised work on this dossier.
84. Preparatory work referred to in points 82(a) to 82(d) above, which was required for launching the assessment exercise was carried out, in line with the request and the guidelines set by the Council.<sup>35</sup>
85. During the term of the Maltese Presidency, exploratory work on possible defensive measures in tax and non-tax area (point 82(e) above) continued to be carried out at the meetings of the Code of Conduct Group (Business Taxation) subgroup on third countries.

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<sup>34</sup> Doc. 6674/16 FISC 33 ECOFIN 189.

<sup>35</sup> Doc. 6325/17 FISC 45 ECOFIN 93 LIMITE.

86. Further details on this work, including on defensive measures in tax area, are set out in the report of the CoC Group to the Council.<sup>36</sup>
87. It is to be noted, however, that before the debate on any specific defensive measures and co-ordination thereof could be concluded, certain important constitutive parts of the "listing" process need to be clarified further, such as conditions for "de-listing", mechanism for continuous monitoring of the situation and regular updates to the list.
88. While exploring options for defensive measures to be considered in non-tax area, delegations took note of the ongoing negotiations on a number of EU legislative files<sup>37</sup>, where, in certain provisions, a link with the future common list of non-cooperative jurisdictions could be designed, if an agreement on a compromise text is reached by all parties to negotiations in the relevant fora.
89. A significant number of delegations, in the context of the mandate given by the Council to explore defensive measures in non-tax area, agreed that if these legislative files (without prejudice to the outcome of the ongoing negotiations) contain a link to the future list of non-cooperative jurisdictions, such provisions could constitute a set of effective and dissuasive defensive measures at EU level in non-tax area.
90. 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.
91. This report is expected to 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).

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<sup>36</sup> Report to ECOFIN: doc. 10047/17, Council conclusions: doc. 10048/17.

<sup>37</sup> 2016/0275 (COD); (2016/0276 (COD); (2016/0282 (COD), (2016/0107(COD).

92. In conducting and overseeing the screening process, the Code of Conduct Group (Business Taxation) will have to continue, where relevant, to refine, based on objective criteria, further practical considerations, to give effect to the November 2016 ECOFIN Council Conclusions.
93. Moreover, in line with the above Council conclusions, the Code of Conduct Group (Business Taxation) and its relevant subgroup, in co-ordination with the HLWP, is expected, to "continue exploring defensive measures at EU level to be endorsed by the Council, in line with the Council Conclusions of May 2016".

**c) Code of Conduct Group: tax good governance clause**

94. In its Conclusions on an external taxation strategy and measures against treaty abuse from 25 May 2016 (doc. 9452/16 FISC 85) the Council also supported "*the need to update the principles of tax good governance to be used as the new standard provision in future negotiations with third countries*" and invited the CoC Group "*to examine key elements which should be contained in a clause to be inserted in agreements between the EU and those countries*".
95. At its meeting of 20 July 2016, the Group agreed that CoC subgroup on third countries should deal with this issue.
96. The subgroup on third countries discussed the issue on 18 May 2017 on a basis of a proposed text. Delegations largely supported the latter, subject to some clarifications. It was underlined that the provision should set up some common criteria to be respected but, at the same time, be flexible enough to adapt to all countries, in particular developing countries. Whilst the initial draft put forward at the meeting was mostly welcomed by delegations, it was concluded that further work will be undertaken on this issue.

**d) Code of Conduct Group: clarification of the third and fourth criteria**

97. The Council conclusions of March 2016 (doc. 6900/16, point 10) supported the creation of the new subgroup to deal with the clarification of the third and fourth criteria of the Code.



98. The Council conclusions of 6 December 2016 (doc. 15276/16) agreed to consider the principles of the OECD BEPS modified nexus approach as a starting point for the work on preferential regimes other than patent boxes when interpreting the third criterion of the Code and to substantiate these principles on a case-by-case basis depending on the type of regime in a manner consistent with the OECD.
99. The Subgroup met on 24 February and 3 April 2017. At this occasion and in line with the work programme agreed by the CoC Group in November 2016, the subgroup discussed:
- a) a proposal for a revision of the guidance note on tax privileges related to special economic zones (SEZ), in the light of the new interpretation of the third criterion: agreement was reached on the third Presidency compromise following a silence procedure. This compromise was then endorsed by the Group on 8 June [and by ECOFIN on 16 June 2017];
  - b) a new guidance note on the interpretation of the fourth criterion: a preliminary compromise text was tabled at the meeting of 3 April 2017, but further work will be required on this matter in view of the different views expressed by delegations.
100. With regard to the application of the principles of the modified nexus approach to non-IP regimes, views of Member States were split between postponing the work on new guidance until completion of parallel work by the OECD Forum on Harmful Tax Practices (FHTP), in the context of BEPS inclusive framework, or starting the work at the EU level whilst capitalising on the latter.

**e) Tax certainty**

101. The Slovak Presidency initiated a debate on "tax certainty and effective tax administration" at the informal ECOFIN of 10 September 2016, which was followed up at the HLWP meetings of 20 September and 22 November 2016. In particular, the Presidency sent a letter to delegations proposing to launch national consultations on the topic and to discuss tax certainty and effective tax administration more systematically in the HLWP.

102. The Maltese Presidency followed up on this issue with a debate on "Tax Certainty in a Changing Environment" at the informal ECOFIN of 7-9 April 2017, prepared at the HLWP meeting of 6 April 2017. On this occasion the Presidency put forward a 10-point action plan to ensure a higher level of tax certainty in the EU.

**f) International developments**

103. The Maltese Presidency strived to ensure EU coordination in advance and follow-up of important international meetings, notably:

- a) the G20 Finance Ministers Meeting in Baden-Baden on 17-18 March 2017: at the HLWP meeting of 6 April 2017;
- b) the G7 Finance Ministers Meeting in Bari on 11-13 May 2017: at the HLWP meetings of 6 April and 6 June 2017;
- c) the signature of the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI): at the HLWP meeting of 11 May 2017.

104. The Maltese Presidency also invited the HLWP meetings of 3 February and 6 April 2017 to take stock of US FATCA's implementation and discuss problems that Member States and their financial institutions and/or US nationals residing in the EU may have faced. These efforts resulted in the send-out of a letter by the Maltese Presidency on behalf of EU Member States to the US Secretary of the Treasury, S. Mnuchin, on 8 May 2017.

**g) Tax in non-tax dossiers**

105. On 19 November 2013, the HLWP agreed that tax provisions in non-tax dossiers leading to any changes in Member States' tax laws or administrative practices or having other consequences on taxation should fall under an 'informal alert mechanism'. The systematic approach of bringing these cases to the attention of tax experts, with the support of the General Secretariat, will continue to ensure that Member States are alerted in a timely manner, including on negotiations of agreements between the EU and third countries.

106. Recent alerts covered:

- a) the Proposal for a Regulation on the establishment of the European Public Prosecutor's Office (EPPO);
- b) the Proposal for a Regulation of the EP and Council on the financial rules applicable to the general budget of the Union and amending Regulation (EC) No 2012/2002, Regulations (EU) No 1296/2013, (EU) 1301/2013, (EU) No 1303/2013, EU No 1304/2013, (EU) No 1305/2013, (EU) No 1306/2013, (EU) No 1307/2013, (EU) No 1308/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, (EU) No 652/2014 of the EP and of the Council and Decision No 541/2014/EU of the EP and of the Council (OMNIBUS REGULATION);
- c) the proposal for a Revision of the Audio-visual Media Services Directive (AVMSD);
- d) the draft terms of reference of the "project group on e-commerce" created by the Council's Working Party on Customs Union;
- e) the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU;

- f) the Regulation of the European Parliament and the Council laying down common rules on securitisation and creating a European framework for simple, transparent and standardised securitisation and amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012;
- g) the draft Council Conclusions on EU relations with Switzerland; and
- h) the Proposal for a Decision of the EP and of the Council amending Decision No 466/2014/EU granting an EU guarantee to the European Investment Bank against losses under financing operations supporting investment projects outside the Union (EIB-ELM).

107. An updated overview of tax provisions in non-tax dossiers was discussed at the HLWP meeting of 3 February 2017.

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