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NOTE

From:	Presidency
To:	High Level Working Party on tax issues
Subject:	BEPS: Presidency roadmap on future work

Following discussions at the High Level Working Party on 4 July 2017, delegations will find in Annex the final version of the Presidency roadmap, setting out future work in the Council during the coming months, in the field of Base Erosion and Profit Shifting (BEPS).

The Presidency will take into account relevant new developments when programming work in practice.

ANNEX

EU-BEPS ROADMAP

BY THE ESTONIAN PRESIDENCY OF THE COUNCIL

1. On 25 November 2014, at the High Level Working Party on Taxation (HLWP), a discussion was held on further work related to unfair tax competition and base erosion and profit shifting in the EU context (hereinafter – EU BEPS). It was noted that this work should be brought forward on the basis of a concrete roadmap, which would include actions and clear timelines, taking account of the OECD work in this area.

2. Following the discussions on this issue held during previous Presidencies, the Latvian Presidency promoted and carried forward a concrete EU-BEPS Roadmap setting out a number of priorities for its term and highlighting other issues on which work could be foreseen in the mid or longer term (doc. 5968/15 FISC 15). This Roadmap was updated on 8 July 2015 (doc. 10649/15 FISC 93) by the Luxembourg Presidency, on 19 February 2016 by the Netherlands Presidency (doc. 6039/16 FISC 20), on 14 July 2016 by the Slovak Presidency (doc. 11071/16 FISC 121) and on 6 February 2017 by the Maltese Presidency (doc. 5988/17 FISC 33).

3. In December 2015, the Council adopted Council conclusions on the EU BEPS (doc. 15150/15) and on the future of the Code of Conduct (CoC) on business taxation (doc. 15148/15). These conclusions provided the basis for further work by the Council in the area of BEPS in 2016 and endorsed a new Work Package for the Code of Conduct Group. Furthermore, the Council conclusions on the Future of the Code of Conduct (Business Taxation) was adopted by the Council on 8 March 2016 (doc. 6900/16). In May 2016, the Council has furthermore adopted Council conclusions on the Commission Communication on an External Strategy for Effective Taxation (doc. 9452/16) and, in November 2016, Council conclusions on the criteria for and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes (doc. 14166/16).

4. This roadmap intends to set out how the Estonian Presidency will conduct the work related to challenges in the area of BEPS, taking into account the views expressed by Member States in informal bilateral contacts and against the background of the recent Commission initiatives, as well as the results of the OECD work on BEPS. Its evolution since 2015 reflects that the EU has already adopted an important number of BEPS-related EU legislative initiatives that are now being implemented in Member States.

5. The Estonian Presidency will also continue to take into account horizontal aspects such as tax certainty and international developments in the area of taxation.

I. SHORT-TERM WORK

6. The Presidency will aim at reaching agreement during the coming months on the following EU-BEPS work items:

A. EU list of third country non-cooperative jurisdictions

7. 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*." [1]

[1] 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".

8. It is expected that following a balanced review of all information collected in the screening process, the Code of Conduct Group (COCG) will report to the Council. This report should 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) (see doc. 10047/17 points 79 and 80).

9. The Estonian Presidency, where it is chairing the Council preparatory bodies, e.g. the HLWP and the COCG Subgroup on third countries, intends to facilitate this process, as appropriate.

10. Further work is required in exploring the defensive measures, as well as a number of procedural issues related to the ongoing process (such as updates and review of the list and of the screening criteria, monitoring, de-listing process, etc.).

B. Patent Boxes

11. The Code of Conduct Group is monitoring the legislative process necessary to change the existing patent box regimes following the agreement reached on the interpretation of the third criterion of the Code of Conduct (modified nexus approach, see doc. 16553/14 Annex 1) and the Member States' subsequent commitment to report on the progress made through the annual standstill and rollback reports.

12. The objective under the Estonian Presidency will be to ensure the rollback of all remaining non-compliant patent boxes and close the standstill review of all new patent boxes.

C. 'Good Governance in Tax Matters' clause in the EU agreements with third countries

13. The Council conclusions on the External Strategy from 25 May 2016 called for the updating of the existing EU standard provision on good governance in tax matters which dates back to May 2008, and asked the COCG to examine the key elements which should be contained in a clause to be inserted in the agreements between the EU and those countries.

14. The aim of the Estonian Presidency is to seek agreement on these key elements, on the basis of the proposal presented by the Commission in Annex 2 of its External Strategy Communication of 28 January 2016.

D. Implementation of the Council conclusions on the 'Future of the Code of Conduct (Business Taxation)'

15. In line with the Council conclusions of 8 March 2016, the Estonian Presidency will seek agreement on a guidance note on the interpretation of the fourth criterion of the Code.

16. It also intends to continue to work on the application of the principles of the modified nexus approach to non-intellectual-property (non-IP) regimes, taking into account relevant international developments on this matter.

17. The Estonian Presidency intends to continue exploring possible ways forward as regards the revision of the mandate of the Code of Conduct (gateway criterion).

II. MEDIUM-TERM WORK

18. The Presidency also notes the willingness of the Member States to undertake work on the following items:

A. Interest and Royalties Directive (IRD)

19. In June 2015, the Latvian Presidency proposed a split of the proposal concentrating work first on the insertion of an anti-abuse provision similar to the one in the Parent-Subsidiary Directive (Articles 1(2) to 1(4) of Directive 2011/96/EU) and to discussing later the remaining provisions from the 2011 Commission proposal. The ECOFIN Council on 19 June 2015 could not, however, reach political agreement as some Member States insisted on the inclusion of a provision setting up a minimum effective level of taxation, which was not foreseen in the original proposal of the Commission.

20. During the last Presidencies, substantial work was devoted to making progress in examining different alternatives to include a minimum effective taxation (MET) clause in the IRD. The Slovak Presidency explored in particular a possible "ownership/base erosion test" inspired from the OECD BEPS 'Limitation of Benefits' (LOB) clause, whilst the Maltese Presidency suggested not to apply the IRD when interest and royalty payments would go into harmful preferential regimes, including indirect remittance to a third country on the EU list of non-cooperative jurisdictions for tax purposes. No agreement could, however, be found on any of these compromise suggestions.

21. Taking into account the input received from bilateral discussions with Member States, the Estonian Presidency will follow up on the above and will explore how to take the proposal forward.

B. Proposal for a renewed Common (Consolidated) Corporate Tax Base

22. On 25 October 2016, the Commission re-launched its proposal for the Common Consolidated Corporate Tax Base (CCCTB) through the new proposals for the Common Corporate Tax Base (CCTB) that includes a cross-border loss relief mechanism with a view to balancing out the absence of the benefits of consolidation during that phase.

23. On 6 December 2016, the Council supported the view that, as a priority, the work should focus on the elements of the common tax base (doc. 15315/16) and invited Member States 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)*".

24. The Maltese Presidency started the examination of the CCTB proposal concentrating on the new elements of the proposal.

25. The objective of the Estonian Presidency is to finish the first round of technical examination of the entire CCTB proposal.

26. In addition, the Estonian Presidency intends to launch a discussion on co-ordinated response to the challenges of digital economy, using CCTB as a framework for these discussions. These discussions provide the EU with an opportunity to provide input to the follow-up work to the OECD on the BEPS Action 1 Report.

C. Transparency: Mandatory disclosure rules

27. There have been significant advances at EU level in the area of tax transparency, notably through amendments to the Directive on Administrative Cooperation (DAC) implementing the common reporting standard (CRS) (under the Italian Presidency), the exchange of rulings (under the Luxembourg Presidency) and country-by-country reporting (CbCR) (under the Netherlands Presidency), and access to anti-money laundering information (under the Slovak Presidency).

28. The last remaining element of disclosure and transparency that has not been addressed by the EU is in the area of mandatory disclosure rules (MDR). In its conclusions adopted on 8 December 2015, the Council invited the COCG "*to assess the opportunity of developing EU guidance for implementing OECD BEPS conclusions on Action 12 (disclosure of aggressive tax planning), notably with a view to facilitate exchange of such information between tax authorities*" (doc. 15150/15, paragraph 25).

29. The issue was also discussed at the informal ECOFIN on 22-23 April 2016 and in its conclusions adopted on 25 May 2016, the Council invited the Commission "*to consider legislative initiatives on Mandatory Disclosure Rules inspired by Action 12 of the OECD BEPS project with a view to introducing more effective disincentives for intermediaries who assist in tax evasion or avoidance schemes*".

30. On 21 June 2017, the European Commission submitted a proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements ("DAC 6").

31. Against this backdrop, the Estonian Presidency will start and move forward with the technical examination of the proposal as much as possible.

D. Agreements with five third countries to counter fraud and all other illegal activities to the detriment of public financial interests ("EU anti-fraud agreements")

32. Under the Maltese Presidency, the HLWP confirmed the need for updating the mandate of negotiations for EU anti-fraud agreements with the Principality of Andorra, the Principality of Monaco, the Republic of San Marino and the Swiss Confederation (doc. 11640/09) and for a possible relaunch of the negotiations on the EU anti-fraud agreement with the Principality of Liechtenstein (doc. 16990/2/09 REV 2), following the repeal of the Savings Taxation Directive, the adoption of DAC2, and the completion of all agreements on automatic exchange of information with the five European third countries.

33. It was agreed 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. This process is still ongoing.

E. Outbound payments

34. In July 2009, the COCG agreed to establish guidelines on outbound payments and included the issue in its Work Package 2015. In April 2017 the COCG mandated its subgroup on anti-abuse issues to resume work on this topic.

35. A preliminary draft of possible guidance was discussed by the subgroup in May 2017, but Member States expressed different perspectives on the way forward and agreed that the issue should be dealt with again when the new data on the effectiveness of anti-abuse measures in EU Directives has become available.