Council of the
European Union

Brussels, 14 July 2016
(OR. en)

11071/16

FISC 121

NOTE

From:	Presidency
To:	Members of the High Level Working Party on Tax issues
Subject:	BEPS: Presidency roadmap on future work

Following discussions at the High Level Working Party on 7 July 2016, delegations will find in Annex the Presidency roadmap, setting out future work in the Council during the coming months on Base Erosion and Profit Shifting (BEPS), fairness and tax certainty in the field of EU corporate taxation.

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

ANNEX

EU-BEPS ROADMAP
BY THE SLOVAK 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, 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 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 middle 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 and on 19 February 2016 by the Netherlands Presidency (doc. 6039/16 FISC 20).

3. In December 2015, the Council has adopted two sets of Council conclusions on base erosion and profit shifting (BEPS) in the EU context (doc. 15150/15), and on the future of the Code of Conduct (CoC) on business taxation (doc. 15148/15). These conclusions are providing 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, a second set of 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).

4. This roadmap intends to set out how the Slovak Presidency will conduct work related to the challenges in the area of BEPS, taking into account views expressed by Member States in informal bilateral contacts and against the background of recent Commission initiatives, as well as the results of the OECD work on BEPS.

I. SHORT-TERM WORK

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

A. Interest and Royalties Directive (IRD)

6. In June 2015, the Latvian Presidency proposed a split of the proposal concentrating work first on the insertion of a anti-abuse provision similar to the one in the PSD (Articles 1(2) to 1(4) of Directive 2011/96/EU) and to discuss later the remaining provisions. It was clear that the examination of the provisions of the future directive was finalised and technically ready in case the split would be decided. 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.

7. During the last two Presidencies, substantial work was devoted to make progress in examining different alternatives to include a minimum effective taxation (MET) clause in the IRD. Leaving aside the political question on the appropriateness of inserting a MET clause in the IRD, a large number of delegations supported from a purely technical perspective a method proposed by the Netherlands Presidency to calculate effective taxation, while some delegations could not support this proposal. Furthermore, the relation between the special regimes applicable to royalties, i.e. patent boxes (with possible inclusion or reference to the OECD modified nexus approach), and the design of an effective MET clause was also examined. The Netherlands Presidency concluded that delegations have diverging views on the scope of such a clause and that at this stage further technical work on this MET clause proposal seems not helpful.

8. The Slovak Presidency intends to explore a different path in order to reach a possible political agreement on the IRD dossier towards the end of its term, following considerable work during past presidencies. It will use the result of the previous discussions as a basis and take into account the possible impact of the political agreement reached on the Anti-Tax Avoidance Directive (ATAD) on the IRD.

B. Transparency: Beneficial ownership of non-transparent entities

9. The fourth Anti-Money Laundering Directive (Directive EU 2015/849) was published in June 2015.

10. In line with the EU priority to improve the fight against tax evasion and avoidance, the Commission adopted on 5 July 2016 a proposal to amend the fourth Anti-Money Laundering Directive, along with a Communication on further measures to enhance transparency and the fight against tax evasion and avoidance (doc. 10977/16) and a proposal to revise the Directive on Administrative Cooperation ("DAC5", see doc. 10978/16), in response to the recent "Panama Papers" revelations.

11. The proposal aims at revising the Directive on Administrative Cooperation. It will allow tax authorities to access to the mechanisms, procedures, documents and information of the Anti-money laundering directive. The Slovak Presidency intends to start immediately technical work on the DAC 5 proposal with the aim to adopting it as soon as possible under its Presidency.

12. In the Communication, the Commission exposes its views on the priority areas for action in the coming months, at EU and international level, to strengthen the fight against tax evasion, avoidance and illicit financial activity. The Slovak Presidency will aim at the adoption of Council conclusions setting out the views of the Council on this Communication.

C. EU list of third country non-cooperative jurisdictions

13. On 25 May 2016, the Council adopted conclusions on the Commission Communication on an External Strategy. The Council agreed on the establishment by the Council of an EU list of third country non-cooperative jurisdictions and to explore coordinated defensive measures at EU level. In doing so, it stressed the need to work closely and in parallel with the OECD to draw the international criteria in this area and to take into account the work of the Global Forum when developing the EU list of non-cooperative jurisdictions.

14. As regards the criteria to be used for establishing the list of non-cooperative jurisdictions, the Council decided that "*the criteria on transparency have to be compliant with internationally agreed standards on transparency and exchange of information for tax purposes, in particular standards developed by the OECD*" (both on exchange of information on request and on automatic exchange of information) and invited the Code of Conduct Group "*to consider an additional criterion based on the non-existence of harmful tax regimes as defined by the criteria of the Code of Conduct on Business Taxation*" and "*possible additional criteria which could be inspired in particular by the OECD BEPS actions*".

15. Since there is an invitation from the Council to the Code of Conduct Group to start work on an EU list by September 2016, the first meeting of the relevant subgroup is already scheduled on 15 July 2016. The aim of the Slovak Presidency is to make progress in (1) validating the indicators which should be used to identify relevant third countries to be prioritised for screening, (2) determining the criteria for assessing the compliance of screened third countries and (3) exploring possible common EU defensive measures, with a view that ECOFIN agrees on the list of third countries to be screened and the criteria to be used in the screening process, on the basis of proposal by the Code of Conduct Group.

16. The overall coherence of the implementation of the Council conclusions on the External Strategy will be monitored by the HLWP.

D. Good governance in Tax matters with third countries

17. The Council Conclusions on the External Strategy from 25 May 2016 called for the update of the existing EU standard provision on good governance in tax matters which dates back to May 2008 and asked the Code of Conduct Group to examine key elements which should be contained in a clause to be inserted in agreements between the EU and those countries. The aim of the Slovak 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.

E. Hybrid mismatches

18. On 2 June 2015 the Code of Conduct Group decided to extend the mandate of the Subgroup to continue work on further cases of hybrid mismatches: hybrid entities and hybrid permanent establishments in situations involving third countries; hybrid financial instruments other than dividends/interest; hybrid transfers; dual resident companies and imported mismatches.

19. A guidance and explanatory notes on Hybrid Entity Mismatches in situations involving third countries were finalised by the Code of Conduct Subgroup and agreed by the Code of Conduct Group in November 2015.

20. Under the Netherlands Presidency, the Subgroup discussed a guidance and explanatory notes on hybrid permanent establishment (PE) mismatches involving third countries. The latter were approved by the Code of Conduct Group at its meeting of 2 June 2016. The Code of Conduct Group however agreed to wait for the outcome of the legislative process on the proposal for an anti-tax avoidance directive (ATAD) before deciding on possible further works.

21. Political agreement on the ATAD was reached at the ECOFIN meeting on 17 June 2016 and accompanied by the following Council statement: "*The Council requests the Commission to put forward a proposal by October 2016 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, with a view to reaching agreement by the end of 2016*." The Slovak Presidency intends to work on that legislative proposal as soon as it will be presented.

22. As a result, given the priority to be given to hard law, the work on hybrid mismatches in the context of the subgroup will be put momentarily on hold.

II. MEDIUM-TERM WORK

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

A. Patent Boxes

24. The Slovak Presidency will support the Code of Conduct Group in its task to continue monitoring the legislative process necessary to change 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 Member States' subsequent commitment to report on the progress made through the annual standstill and rollback reports.

B. Implementation of the Council Conclusions on the future of the Code of Conduct (Business Taxation)

25. The Council conclusions of 8 March 2016 asked in particular for a more active use of subgroups (in particular in relation to anti-abuse, third countries and criteria 3 and 4) and for the development of guidance on the interpretation of the gateway criterion and on the notification of measures to the Group by reference to clear and objective criteria.

26. The Slovak Presidency will support work of the Code of Conduct Group and subgroups in this area with a view to develop guidance on the interpretation of these items.

C. Proposal for Improvement of Dispute Resolution Mechanism within the EU

27. The Commission has announced its intention to submit a proposal for Improvement of Dispute Resolution Mechanism within the EU, to the Council by November 2016. This should allow the OECD BEPS conclusion on Action 14 to be implemented in the EU in a coordinated manner at the EU level.

28. The Slovak Presidency intends to start the examination of this proposal as soon as it will be presented with a view to enabling progress on this file.

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

29. On 17 June 2015, the Commission announced its intention to re-launch in 2016 its proposal for a Common Consolidated Corporate Tax Base (CCCTB) through new proposals for a Common Corporate Tax Base (CCTB) as a first step and a cross-border loss relief mechanism aimed to balance out the absence of the benefits of consolidation during that phase. The new proposals are expected by November 2016.

30. The Slovak Presidency intends to start the examination of these proposals as soon as they will be presented.

E. Outbound payments

31. The Code of Conduct Group included outbound payments in its Work Package 2015. The initial work of the Code of Conduct Group with regard to this issue will involve the identification of potential problems which arise when payments are made from the EU to a third country.

F. Transparency: Mandatory disclosure rules

32. There have been significant advances at the EU level in the area of tax transparency, notably through amendments to the Directive on Administrative Cooperation implementing the common reporting standard (CRS) (under the IT Presidency), the exchange of rulings (under the LU Presidency) and country by country (CbC) reporting (under the NL Presidency). 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 Code of Conduct Group "*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).

33. 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*".

34. Against this backdrop the EU Council could reflect during the Slovak Presidency on the possibility to exchange best practices and adopt guidance in the Code of Conduct Group on mandatory disclosure rules targeting specific offshore tax evasion schemes, in preparation for possible future EU legislative initiatives.

G. Conditions and rules for the issuance of tax rulings

35. According to its Work Package 2015 the Code of Conduct Group will develop a set of guidelines on the conditions and rules for the issuance of tax rulings by Member States. Work is already ongoing.
