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NOTE

From: General Secretariat of the Council
To: Delegations
Subject: ECOFIN Report to the European Council on tax issues

1. The Council (ECOFIN) was invited to report back to the European Council on various tax issues 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 22 November 2016, for submission to the Council via Coreper.
3. ECOFIN on 6 December 2016 endorsed the report as set out in the Annex, and agreed to forward it to the European Council on 15-16 December 2016.

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 Slovak Presidency.
2. The report covers various issues mentioned in the European Council Conclusions of 1/2 March 2012¹ devoted to growth, as well as in the European Council Conclusions of 28/29 June 2012², 22 May 2013³, 24/25 October 2013⁴, 19/20 December 2013⁵, 20/21 March 2014⁶, 26/27 June 2014⁷ and 18 December 2014⁸ and the relevant Council Conclusions in the VAT area of 2012⁹ and of 2016¹⁰. 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 2014¹¹, during the Slovak 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 14 July 2016 (doc. 11071/16 FISC 121). In carrying out this work, the Presidency has paid particular attention to consistency between EU work and OECD actions in the area of BEPS.

¹ EUCO 4/3/12 REV 3 (items 9 and 21).

² EUCO 76/12, 28/29 June 2012.

³ EUCO 75/1/13 REV 1, 22 May 2013.

⁴ EUCO 169/13, 24/25 October 2013.

⁵ EUCO 217/13, 19/20 December 2013.

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

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

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

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

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

¹¹ EUCO 237/14, 18 December 2014.

4. More specifically in the area of direct taxation, the Council has swiftly reached a general approach in November 2016 and adoption in December 2016 on the fourth revision of the Directive on Administrative Cooperation (DAC 5). Furthermore, Council conclusions on the communication from the Commission of 5 July 2016 on further measures to enhance transparency and the fight against tax evasion and avoidance¹², criteria and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes¹³ and on the communication on building a fair, competitive and stable corporate tax system for the EU¹⁴ were adopted. Agreement on the recast of the Interest and Royalty Directive (IRD) could not yet be reached.
5. In the field of indirect taxation, the Slovak Presidency made progress on the following files in the Council:
- a) in the area of VAT:
 - i) adoption of Council conclusions "On Improvements to the current EU VAT rules for cross-border transactions";
 - ii) paving the way forward to concluding negotiations on EU - Norway agreement on administrative co-operation in the VAT area, and
 - iii) exchange of views on VAT fraud detection through IT systems.
 - b) adoption of Council conclusions "On the Commission Report to the Council on the evaluation of Council Directive 92/83/EEC on the structures of excise duties on alcohol and alcoholic beverages";
 - c) transparent discussions on the Financial Transaction Tax (FTT) in the framework of enhanced cooperation.

¹² Doc. 13139/16 FISC 150 ECOFIN 885.

¹³ Doc. 14166/16 FISC 187 ECOFIN 1014.

¹⁴ Doc. 15315/16 FISC 231 ECOFIN 1170 issued after ECOFIN on the basis of doc. 14752/16 FISC 204 ECOFIN 1094.

6. More detailed information on individual files can be found below.

A. Legislative dossiers

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

7. The package, which was put forward by the Commission on 26 October 2016, was presented and discussed at the HLWP meeting of 27 October and ECOFIN Council meeting of 8 November 2016.

8. The examination of its various components was given priority by the Presidency with a view to enabling progress on these files:

a) Hybrid mismatches involving third countries (ATAD 2)

9. 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. In that statement, the Council endeavours to reach an agreement on such proposal by the end of 2016.

10. 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). The proposal sets out rules to deal with hybrid mismatches with third countries involving permanent establishments, hybrid transfers, imported mismatches and dual resident mismatches.

11. The Presidency has placed this proposal high on its agenda, and has prioritised work in order to meet the expectations expressed in the Council statement.

12. Since its submission to the Council on 26 October 2016, the proposal has been discussed during several meetings, namely on 3, 10, 15, 16, 22, 23 and 28 November 2016. After a technical examination, Delegations discussed the scope of the Commission proposal, and compared that scope to the OECD BEPS Action 2. Several Delegations expressed a wish to further extend the Commission proposal.
13. The proposal was presented to the ECOFIN Council on 6 December for discussion. While most of the text was stabilised, the Presidency noted some parliamentary reservations and a number of open issues will require further work.

b) Common Corporate Tax Base (CCTB)

14. 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).
15. The CCTB proposal lays down common corporate tax rules for computing the tax base of companies within the EU. The main changes compared to the 2011 proposal are its mandatory character for large companies, a new Allowance for Growth and Investment (AGI) to address the debt financing bias, super-deduction for research and development expenses to support innovation, and a temporary cross-border loss relief.
16. The proposal was presented to the WPTQ on 3 November 2016 and followed by a general exchange of views.
17. The impact assessment (doc. 13730/16 FISC 170 IA 99 ADD 2 + 3) that accompanied the CCTB proposal was examined at the same meeting and raised a number of questions, notably on the expected impact on national tax revenues. Technical work will continue.

c) Common Consolidated Corporate Tax Base (CCCTB)

18. 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.
19. 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.
20. The proposal was presented to the WPTQ on 3 November 2016 and followed by a general exchange of views. The impact assessment (doc. 13731/16 FISC 171 ADD 2 + 3) that accompanied the CCCTB proposal was examined at the same meeting.
21. In terms of working method, Member States will first concentrate on the CCTB proposal, thereby examining consolidation without delay once the discussion on CCTB has been successfully concluded - without prejudice to the competence of incoming presidencies to organise their work as they deem it fit. However, both the CCTB and the CCCTB proposals were proposed as a package.

d) Dispute resolution

22. With the aim of improving the current 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). The proposal builds on the current multilateral Arbitration Convention¹⁵, by maintaining a system of mandatory binding arbitration that would be broadened to all cross-border situations of double income tax imposed on business profits, whilst adding obligations of results and time constraints.

¹⁵ 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.

23. 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 decisively. Current situations of double taxation are solved by mutual agreement procedures foreseen in double taxation conventions between Member States (with some of them already providing for binding arbitration), or by the Arbitration Convention when the dispute relates to transfer pricing.
24. The proposal was presented to the WPTQ on 3 November 2016 and followed by a general exchange of views. Technical work will continue.

e) "Chapeau" communication

25. The Commission communication on Building a fair, competitive and stable corporate tax system for the EU¹⁶ introduces in general terms the four legislative proposals contained in the package. The communication was discussed at the High Level Working Party on Taxation (HLWP) on 27 October 2016, and was presented at the ECOFIN Council meeting on 8 November 2016, giving an occasion for delegations to provide their preliminary views on the different proposals. The Presidency concluded that it would propose Council conclusions on the "Chapeau" communication, which were discussed by the WPTQ on 15 November, fiscal attachés on 16 November, and adopted by ECOFIN on 6 December 2016.

Interest and Royalties Directive (IRD) recast

26. The Netherlands Presidency had proposed technical elements which could be used to calculate the minimum effective taxation (MET) and explored several options regarding the scope of the minimum effective taxation. Leaving aside the political question on the appropriateness of inserting a MET clause in the IRD directive, three main questions however remained open:

¹⁶ Doc. 13729/16 FISC 169.

- a) The method to calculate effective taxation: a large number of delegations supported from a purely technical perspective a proposal by the NL Presidency on a method to calculate effective taxation, while some delegation could not support this proposal.
- b) The exemptions from the MET: There were diverging views on possible exemptions from the MET clause for royalty payments as well as for modified nexus compliant regimes and/or for interest payments.
- c) The scope of the directive: some delegations wished to extend the current scope of the directive in order to cover interest and royalty payments to third countries, while other did not support such an extension.

27. During the HLWP of 13 April 2016 it was concluded that delegations are split on the principle of introducing a MET clause in the IRD, that there are diverging views on the scope of such a clause, and that further work was therefore required.

28. The Slovak Presidency devoted one WPTQ on 22 September 2016 to the IRD, which was prepared by an in-depth questionnaire on identifying situations of inappropriate use of the benefits applicable under the IRD. Technical work at that meeting focussed on the following issues:

- a) Common minimum anti-abuse rule: At technical level, after considering the alternative application of the ATAD general anti-abuse rule, Member States confirmed their support to the June 2015 Presidency compromise text with regard to the insertion of a common minimum anti-abuse rule in the IRD. However, some Member States maintained their position that their support to such a clause is conditioned to the adoption of a MET clause to ensure that IRD covers a wide scope of abusive and non-abusive situations.

- b) MET Clause: the controlled foreign company (CFC) rule adopted in the ATAD avoids the concept of 'effective taxation' and refers instead to the level of 'actual corporate tax paid', but the two concepts are linked since measuring effective taxation entails to compare a certain income with the level of the actual tax paid on that same income. The relevance of the ATAD CFC rule for the purposes of ensuring actual/effective taxation in the IRD was explored. However no sufficient support for implementing this solution was found amongst Member States.
- c) Outbound payments: The WPTQ explored additional measures that could be considered, in particular the so-called "*ownership/base erosion test*", which is a test incorporated into the OECD BEPS 'Limitation of Benefits' (LOB) clause. This test is designed and directed at legal entities, assuring that the legal entity claiming the benefits of the tax treaty is not merely an interposed entity for tax treaty purposes. It aims to disqualify such interposed entities from being able to claim the tax treaty benefits. As an alternative, the WPTQ discussed whether measures adopted on a unilateral basis by Member States could be a suitable way to identify and limit the instances of abuse of IRD. It was concluded that further work would be needed on these issues.

Transparency: Beneficial ownership of non-transparent entities

29. On 6 July 2016, the Commission transmitted a proposal for a Council Directive amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities (DAC 5)¹⁷. The proposal was issued together with the Commission Communication on further measures to ensure transparency and the fight against tax evasion and avoidance, in which the Commission presented several proposals for a stronger and more coordinated EU stance against tax abuse.

¹⁷ Doc. 10978/16 FISC 120.

30. Under the Directive on Administrative Cooperation (DAC), Member States automatically exchange information on income and capital held by individuals and entities abroad. The Directive has been then amended several times, and Member States will automatically exchange, as from 2017, information on their cross-border tax rulings; and will soon exchange country-by-country reports of multinationals' activities for tax purposes.
31. Together with a proposal to amend the 4th Anti-money-laundering Directive in order to reinforce the EU defence mechanisms against money laundering and terrorist financing, the Commission proposed to revise the DAC in order to improve the information exchange on beneficial ownership. As the Directive stipulates that financial institutions are to look through structures to identify and report beneficial owners, tax authorities must, in order to enable tax authorities to monitor, confirm and audit that the financial institutions apply DAC properly, be able to access the anti-money-laundering information.
32. The Slovak Presidency had identified the proposal as a priority fully in line with its priorities in the fight against tax fraud and tax evasion, and started work as of 19 July 2016. The WPTQ examined the proposal, and, after a first exchange of views, the Presidency tabled a compromise proposal that was examined on 6 September 2016. A general approach was agreed during the ECOFIN meeting on 8 November 2016¹⁸. The opinion of the European Parliament having been issued on 22 November 2016, the Council adopted the Directive on 6 December 2016.
33. The Council also recognised the importance of strengthening the link between the Administrative Cooperation in taxation matters and enhancing the fight against money-laundering. To that end, the Council and the Commission have issued a joint statement, reaffirming their commitment to take stock of the future revision of the 4th Anti-money-laundering Directive, and to incorporate, in a future revision of the DAC, the outcome of the revision of the 4th anti-money-laundering Directive.

¹⁸ Doc. 12041/1/16 REV 1 FISC 133 ECOFIN 782.

34. In reaction to the Communication from the Commission of 5 July 2016 on further measures to enhance transparency and the fight against tax evasion and avoidance accompanying the DAC 5 proposal, the Slovak Presidency prepared Council conclusions which were endorsed by ECOFIN on 11 October 2016¹⁹. These conclusions also identified a need for more effective and efficient cooperation between tax authorities and other agencies involved in the fight against tax evasion, money laundering and terrorist financing.

Savings Negotiations with European third countries

35. On 17 June 2011, the Commission adopted a recommendation for a mandate to initiate negotiations with Switzerland, Liechtenstein, Andorra, Monaco and San Marino, in order to upgrade the EU's Savings Taxation agreements with those third countries and to ensure that they continue to apply measures equivalent to those in the EU.
36. At the Council on 14 May 2013 agreement was reached on the Negotiating Mandate, in line with the recent developments at global level, where it was agreed to promote automatic exchange of information as an international standard.
37. Following the adoption of the Decision on the signing of the agreement with Switzerland and the signing of the agreement on behalf of the European Union on 27 May 2015, the signing of the agreement with Liechtenstein took place on 26 October 2015, that of the agreement with San Marino on 8 December 2015 and that of the agreement with Andorra on 12 February 2016. On 8 December 2015 the Council adopted the Decision on the conclusion of the agreements with Switzerland and Liechtenstein and on 21 April 2016 that on the conclusion of the agreement with San Marino.
38. The Slovak Presidency was in position to positively close the full process through the adoption on 12 July 2016 of the Decision on the signing of the agreement with Monaco, the signing on the same day of that agreement and finally the adoption on 20 September 2016 of the Decision on the conclusion of the agreement with Andorra and on 11 October 2016 of that on the conclusion of the agreement with Monaco.

¹⁹ Doc. 13139/16 FISC 150 ECOFIN 885.

The common system of Financial Transaction Tax (FTT)

39. 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. The proposal had as objectives a fair contribution of the financial sector to the costs of the crisis, avoiding fragmentation of the single market, and creating appropriate disincentives for transactions that do not enhance the efficiency of financial markets.
40. Given that unanimous agreement by all Member States could not be attained, on the basis of the request of eleven Member States (Austria, Belgium, Estonia²⁰, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain - hereafter referred to as "participating Member States"), and in accordance with the authorization of the Council of 22 January 2013²¹, which was adopted following the European Parliament's consent given on 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.
41. 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, where the Ministers of ten participating Member States (without Slovenia) released a Joint Statement²²;
 - 7 November 2014²³, 9 December 2014²⁴, and 8 December 2015²⁵, on the basis of the Presidency reports;

²⁰ On 16 March 2016, the Republic of Estonia has completed the formalities required to leave the enhanced co-operation on FTT. See doc. 7808/16 FISC 47 LIMITE.

²¹ OJ L 22, 25.1.2013, p. 11.

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

²³ Doc. 14949/14 FISC 181 ECOFIN 1001.

²⁴ Doc. 16498/14 FISC 222 ECOFIN 1159 and doc. 16753/14 FISC 230 ECOFIN 1188 CO EUR-PREP 50, points 36 to 46.

²⁵ Doc. 14942/15 FISC 181 ECOFIN 947.

- 17 June 2016²⁶, where, as a follow-up to the statement of ten participating Member States (without Estonia) that was inserted into the minutes of the 8 December 2015 ECOFIN²⁷, the Council took note of the state of play on this dossier regarding a number of selected issues, namely:
- a) application of "issuance" and "residence" principles and the territorial scope for the FTT²⁸;
 - b) exemption from FTT of market making activities²⁹;
 - c) scope of transactions in derivatives contracts to be subject to the FTT³⁰.
42. The process that has started in 2015, where "the WPTQ discussed the constitutive parts (the "building blocks") of the FTT and the assembly of those "building blocks" into possible FTT models"³¹, has also continued under the Slovak Presidency. At the initiative of the participating Member States, further progress could be made at the WPTQ level on a number of elements of the FTT, which are deemed to be of high importance (the "core engine") for further work with a view to refining the remaining aspects of the future FTT and drafting a legislative text of the Directive.
43. Moreover, the participating Member States have presented to the WPTQ their findings relating to cost efficiency of FTT collection, as the discussion at June 2016 ECOFIN has shown a need for further reassurance that the tax can be collected in a cost-efficient way.

²⁶ Doc. 9602/16 FISC 90 ECOFIN 522.

²⁷ Doc. 15112/15 PV/CONS 72 ECOFIN 961 ADD 1.

²⁸ Doc. 9602/16 FISC 90 ECOFIN 522, point 6 to 8, and doc. 14942/15 FISC 181 ECOFIN 947, point 7 to 11.

²⁹ Doc. 9602/16 FISC 90 ECOFIN 522, point 9 to 12, and doc. 14942/15 FISC 181 ECOFIN 947, point 15 to 17.

³⁰ Doc. 9602/16 FISC 90 ECOFIN 522, point 13 to 15, and doc. 14942/15 FISC 181 ECOFIN 947, point 18 to 19.

³¹ Doc. 14942/15 FISC 181 ECOFIN 947, point 3.

44. Against this background, and on the basis of a report set out in doc. 13608/16 FISC 164 ECOFIN 948, the state of play on this dossier was discussed at the ECOFIN Council meeting on 6 December 2016.
45. In the light of the foregoing, and as already indicated in the June 2016 ECOFIN report to the European Council on Tax matters³², 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.

Value added tax (VAT)

a) Improving the current EU VAT rules for cross-border transactions

46. The Commission Communication on an Action Plan on VAT "Towards a single EU VAT Area – Time to decide" (the VAT Action Plan) was published on 7 April 2016³³. The VAT Action Plan sets out the Commission's views on the pathway for the modernisation and rebooting of VAT, which, with a set of urgent and mid-term measures, would lead towards a Single EU VAT Area.
47. In response to the VAT Action Plan, the ECOFIN Council at its meeting of 25 May 2016 adopted a set of conclusions, which contained chapters "On Urgent Measures to Fight VAT Fraud and Tackle the VAT Gap", "On Short and Medium-term Actions in VAT Area and SMEs", "On the Definitive VAT System (Single EU VAT Area)" and "On VAT Rates"³⁴.

³² Doc. 10502/16 FISC 108 ECOFIN 640 CO EUR-PREP 28, point 42.

³³ COM (2016) 148 final. See also:
http://ec.europa.eu/taxation_customs/taxation/vat/action_plan/index_en.htm

³⁴ Doc. 9494/16 FISC 86 ECOFIN 509.

48. The Council conclusions of 25 May 2016 left room for further work and debate in a number of areas³⁵. Therefore the Slovak Presidency initiated an exchange of views between Member States on identifying the needs for quick improvement of the current EU VAT rules governing cross-border supplies of goods, which should be addressed within the work on definitive VAT system and, in the first legislative step phased-in as appropriate.
49. At its meeting of 8 November, ECOFIN adopted Council conclusions "On Improvements to the current EU VAT rules for cross-border transactions"³⁶. These Council conclusions cover certain aspects related to improvement of the current EU VAT rules, applicable within intra-EU supplies of goods: VAT identification number; VIES data, chain transactions, call-off stock simplification and proof of intra-EU supply, which should be addressed within the work on definitive VAT system and, in the first legislative step phased-in as appropriate.

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

50. 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 tax³⁷; and Directives for the negotiations on this future agreement³⁸.
51. The aim of the negotiations is to establish 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.

³⁵ Doc. 9046/16 FISC 77 ECOFIN 404, point 10.

³⁶ Doc.. 14257/16 FISC 190 ECOFIN 1023.

³⁷ Doc. 15942/14 FISC 207 N 32 ECOFIN 1080 LIMITE and doc. 16153/14 FISC 219 N 33 ECOFIN 1110 LIMITE + COR 1.

³⁸ Doc. 15942/14 ADD 1 FISC 207 N 32 ECOFIN 1080 RESTREINT UE/EU RESTRICTED + COR 1.

52. Following the discussions at the WPTQ, the Presidency tabled an updated draft text of the Agreement³⁹, which contained a number of amendments to the text presented by the Commission⁴⁰. All delegations could unanimously approve that Presidency text as a possible outcome of these negotiations on the basis of which the Commission was invited to continue and complete these negotiations.
53. At the meeting of 8 November 2016, ECOFIN took note of the state of play on the 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, and of the text of the draft Agreement set out in doc. 13527/16 FISC 159 N 60 ECOFIN 940 RESTREINT UE/EU RESTRICTED⁴¹.

c) Fight against VAT fraud and further work

54. Building on the previous discussions on fighting the EU fraud in VAT area, the results of which were summarised in the June 2016 ECOFIN report to the European Council on Tax matters⁴², the Presidency initiated an exchange of views at the HLWP meeting of 27 October 2016 on the issue of VAT fraud detection through IT systems, with the following objectives:
- a) promoting the benefits of the domestic listing;
 - b) promoting participation of Member States in the Transaction Network Analysis (TNA) on a broader base;
 - c) examining possible interconnection of the TNA with the national risk analysis system (e.g. domestic listings).

³⁹ Doc. 13527/16 FISC 159 N 60 ECOFIN 940 RESTREINT UE/EU RESTRICTED.

⁴⁰ Doc. 12045/16 FISC 134 N 52 ECOFIN 783 RESTREINT UE/EU RESTRICTED.

⁴¹ Doc. 13607/2/16 FISC 163 N 61 ECOFIN 947 LIMITE.

⁴² Doc. 10502/16 FISC 108 ECOFIN 640 CO EUR-PREP 28, point 48-54.

55. At this discussion, the Commission presented the delegations the state of play on the TNA and the delegation of Czech Republic presented its national measures covering a VAT control statement (a reporting obligation imposed on taxable persons registered for VAT purposes), which was introduced to provide the tax authorities with a detailed overview of taxable transactions reported by taxable persons on their VAT returns (to permit cross-checking of the data provided by suppliers and purchasers and early detection of mismatches).
56. A number of delegations took the view that the data gathered from domestic listings could help, where appropriate, to speed up national risk analysis systems and effectively contribute to fight against VAT fraud and that it could be worth exploring possible interconnection of domestic listing tools with TNA in the future.
57. Moreover, following the decision taken by the HLDG Customs meeting of 20 April 2016 and in line with the May 2016 Council Conclusions in response to the VAT Action Plan adopted in May 2016, an Expert Study Group on customs procedure 4200 was established in June 2016.
58. The main objectives of that group is to identify the existing problems with customs procedure 4200 which facilitate VAT and customs fraud and to formulate possible options to improve existing controls, while respecting the competences of both Tax and Customs Authorities.
59. During the term of the Slovak Presidency, three meetings of the Expert Study Group took place and at the HLWP meeting of 22 November 2016 Member States were informed on the state of play of this work.

Excise duties (Council Directive 92/83/EEC)

60. The Commission on 28 October 2016 presented a Report to the Council on the evaluation of Council Directive 92/83/EEC on the structures of excise duties on alcohol and alcoholic beverages. The Commission was required to present a report to the Council in accordance with Article 22(7) of Directive 92/83/EEC⁴³. Furthermore, the Directive has been identified for evaluation under the Commission's Regulatory Fitness and Performance Programme (REFIT)⁴⁴.
61. Following the examination of the report, the Council adopted on 6 December 2016 the conclusions that are set out in doc. 15009/16 FISC 212 ECOFIN 1134⁴⁵. The Council, *inter alia*, requested that the Commission, taking into account these Council Conclusions, as well as the objectives set out in the Directive 92/83/EEC, undertakes all relevant studies and, after carrying out relevant technical analysis, public consultations and impact assessment, submits to the Council an appropriate legislative proposal in 2017 or, in the case it chooses not to submit a proposal, informs the Council of the reasons. Moreover, the Council confirmed that it is necessary to prevent ambiguities leading to distortions of competition between economic operators and apply harmonised conditions and rules of taxation of alcoholic beverages. Moreover, it is essential to provide equal conditions for economic operators to functional internal market and eliminate disruptions to fair competition and prevent tax evasion and avoidance.

⁴³ Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages (OJ L 316, 31.10.1992).

⁴⁴ REFIT is a programme to review the entire stock of EU legislation – to identify burdens, inconsistencies, gaps or ineffective measures and to make the necessary proposals to follow up on the findings of the review.

⁴⁵ Document issued after ECOFIN on the basis of doc. 14722/16 FISC 200 ECOFIN 1088.

B. Tax Policy Coordination

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

a) EU list of third country non-cooperative jurisdictions

63. 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 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*”⁴⁶.

64. The Slovak Presidency has prioritised work on this dossier and arranged exchange of views in the Code of Conduct Group subgroup on third countries⁴⁷, the Code of Conduct Group and HLWP.

65. In its meeting of 8 November 2016, the ECOFIN Council has agreed Conclusions on the “criteria for and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes”⁴⁸.

⁴⁶ Doc. 9452/16 FISC 85 ECOFIN 502, point 10.

⁴⁷ Doc. 6674/16 FISC 33 ECOFIN 189.

⁴⁸ Doc. 14166/16 FISC 187 ECOFIN 1014.

66. Once particular non-EU jurisdictions are selected, in accordance with the guidelines set out in the Annex to these Council conclusions, those jurisdictions will be screened, in accordance with the guidelines and criteria that were also agreed by the Council. The Code of Conduct Group (Business Taxation), supported by the General Secretariat of the Council, will conduct and oversee the screening process. The Commission services will assist the Code of Conduct Group by carrying out the necessary preparatory work for the screening process in accordance with its current role as currently defined under the Code of Conduct for Business Taxation process, with particular reference to previous and ongoing dialogues with third countries.
67. By the end of 2017, following the necessary preparatory steps at the Code of Conduct Group (Business Taxation), in co-ordination with the HLWP, the Council should endorse the EU list of non-cooperative jurisdictions.
68. The Code of Conduct Group (Business Taxation) was also given the task to finalize by January 2017 the selection of jurisdictions for screening as well as to continue exploring defensive measures at EU level.
69. Work in these areas will continue in accordance with the timeline set out in the Council Conclusions of 8 November 2016.

b) Code of Conduct Group (Business taxation)

70. The Code of Conduct Group met four times under the Slovak Presidency, on 21 July, 21 September, 19 October and 24 November 2016. The Group continued the work on the basis of the new Work Package adopted in November 2015 (doc. 14302/15 FISC 159).
71. The Code of Conduct Group⁴⁹ continued work on standstill and rollback of harmful preferential tax regimes, focusing on Patent boxes. In November 2014 the Group agreed that the EU patent box regimes that had been subject to examination by the Group, including the French one, are not compatible with the modified nexus approach and had to be amended.

⁴⁹ Report to ECOFIN on 8 December 2016, doc. 14750/16 FISC 202 ECOFIN 1092.

72. At the meeting of 21 September 2016, France presented a document on its Patent Box, reiterating that the French IP regime does not affect in a significant way the location of business activities and therefore should not be changed. The Code of Conduct Group decided to forward to the Council a report on "Patent boxes: state of play and the way forward" (doc. 13924/16 FISC 183) of which the Council (ECOFIN) took note on 8 November 2016.
73. The Code of Conduct Group adopted a new Work Package under its report to the Council of 23 November 2015. In the new Work Package it is stated that:
- "The Group will consider the question of outbound payments. Its initial work will involve the identification of potential problems which arise when payments are made from the EU to a third country."*
74. At the meetings of the Code of Conduct Group on 20 July, 21 September, and 19 October the issue has been discussed.
75. A German paper for the Group's meeting on 20 July and a paper of the Commission Services identified the following problem: royalties as well as dividends can be transferred without taxation between EU Member States and that companies that wish to transfer their royalty or dividend income to third countries can use this to transfer such income to "conduit entities" in Member States with low or no withholding tax on payments bound to such third countries. The royalties or dividends can then be transferred from those Member States to third country recipients with no or very little withholding tax being paid. This means that taxpayers can potentially avoid taxation partly or completely on such payments. If those payments are transferred to third countries that do not levy tax on such payments, the end result is that no tax is paid on this type of income. In addition such structures may allow the "conduit companies" to avoid paying corporate tax in their Member State of establishment as they use costs generated by the arrangement to reduce their taxable profit.

76. Outbound payments may create problematic effects. Member States expressed different opinions on whether the issue of taxation of outbound payments should be discussed further in the Code of Conduct Group and if so which potential solutions would be suitable.
77. Some delegations referred to the already existing possibilities within the EU framework and double tax treaties to counteract "conduit companies". Other delegations referred to the fact that some initiatives have been agreed in the EU and in the OECD very recently. This would make the statistics presented by the Commission services less relevant as it only covers the situation under current rules. When the new initiatives have been implemented there may be no need for further action relating to outbound payments. As a result it is argued that the Code of Conduct Group should wait for the results of the implementation.
78. According to an analysis provided by the Commission's services for the Group's meeting on 19 October 2016 the recently introduced changes would only establish a minimum level of protection which could be improved through the introduction of more targeted measures. Some delegations consider that there is a need for new initiatives to counter the potentially harmful effects related to outbound payments. The following options for a solution were discussed:
- a) Coordination of withholding taxes;
 - b) Coordination of national defensive measures;
 - c) Toolbox approach: the tool box approach would allow Member States to choose to apply one or more of a number of options to remedy a situation where it would be considered sufficient to apply one of the options. A tool-box for outbound payments could include specific defensive measures and a definition of minimum withholding tax rates.
79. At this stage, no agreement could be reached. It was concluded that further work is required on this issue.

80. Regarding the interpretation of the gateway criterion, in its conclusions of 8 December 2015 (doc. 15148/15, FISC 184) the ECOFIN Council invited the Code of Conduct Group "to further develop, where appropriate, guidance notes on the interpretation of the criteria of the Code, including the gateway criterion, and their application". In its conclusions of 8 March 2016 the ECOFIN recalled that the Code of Conduct Group was "to develop guidance on the interpretation of the gateway criterion and its application" (doc. 6900/16 FISC 35). The Group discussed the interpretation of the gateway criterion on 19 October 2016 and decided that the current wording did not need any further clarification.
81. The group agreed on two sets of guidelines:
- a) one relating to the conditions and rules for the issuance of tax rulings – standard requirements for good practice by Member States and;
 - b) one concerning procedural issues relating to the notification of tax measures under paragraph E of the Code of Conduct.
82. The Code of Conduct 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. The Commission informed the Group on the state of play of the dialogue with Liechtenstein. The chairman of the Code of Conduct Group sent a letter to Liechtenstein inviting it to the Group for a dialogue related to its tax regimes.
- c) **Code of Conduct Group: Subgroup on the clarification of the third and fourth criteria**
83. 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 interpretation of Code's criteria 3 and 4:
"The Council (...) DECIDES that a subgroup will deal with the clarification of the third and the fourth criteria of the Code".
84. The Code of Conduct Group meeting of 20 July 2016 confirmed this mandate and requested the new subgroup formation to prepare Council conclusions on this issue.

85. The Subgroup met on 30 September and 13 October 2016. It agreed draft Council conclusions that were integrated in the broader conclusions on the six-month report of the Code of Conduct Group and further work by this subgroup to be conducted during upcoming presidencies.

d) Code of Conduct Group: Subgroup on third countries

86. In the context of preparatory work on the Council conclusions "On the criteria for and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes"⁵⁰ (see points [60 to 66] of this report), the Code of Conduct Group subgroup on third countries⁵¹, chaired by the Presidency, met four times since July 2016 and focused its work on the following areas:

- i) establishing the criteria and guidelines to be used in the screening process;
- ii) identifying the third country jurisdictions to be prioritised for screening; and
- iii) potential defensive measures.

87. The Code of Conduct Group in its meeting of 19 October 2016 endorsed a report⁵², reflecting the state of play of work on the process leading to establishment of the EU list of non-cooperative jurisdictions for tax purposes. Discussions on open issues took place at the High Level Working Party on 27 October 2016, with a view to submission of this file to ECOFIN.

88. [After the Council Conclusions were endorsed, further meetings of the subgroup and of the Code of Conduct group were organised to continue work paving the way towards Council agreement on the EU list of non-cooperative jurisdictions that should take place in 2017.]

⁵⁰ Doc. 14166/16 FISC 187 ECOFIN 1014.

⁵¹ Doc. 6674/16 FISC 33 ECOFIN 189.

⁵² Doc. 13496/16 FISC 158 ECOFIN 934 LIMITE + COR 1.

89. 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 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 Group discussed this issue on 14 September 2016, reiterated the need to update clause on tax good governance to be included in future agreements and acknowledged that further technical work is needed.

e) Other tax coordination issues

90. The Slovak Presidency has continued work on new areas already identified by previous Presidencies for possible tax policy coordination in the HLWP.

i) EU/OECD: Base Erosion and Profit Shifting (BEPS)

91. The Slovak Presidency continued to promote EU work on BEPS while taking into account international developments and relevant conclusions of the Council and European Council.

92. Paragraph 6 of the Council conclusions of 14 May 2013 relates to coordination and cooperation with the OECD and G20 on BEPS:

"6. SUPPORTS further efforts at OECD level on Base Erosion and Profit Shifting (BEPS) and RECALLS the European Council Conclusions of 13 and 14 March 2013 on the need for close cooperation with the OECD and the G20 to develop internationally agreed standards for the prevention of base erosion and profit shifting and in particular NOTES the European Council call for the European Union to coordinate its positions. NOTES that this coordination will take place through the appropriate Council bodies including the High Level Working Party and WELCOMES that progress at international level in this area is being monitored. To this end, the EU should closely monitor its legal framework and identify where common solutions would best ensure effectiveness and efficiency."

93. In Paragraph 27 of its conclusions of 19/20 December 2013, the European Council states the following:

"27. Recalling its conclusions of May 2013, the European Council calls for further progress at the global and EU levels in the fight against tax fraud and evasion, aggressive tax planning, base erosion and profit shifting (BEPS) and money laundering. The European Council welcomes work undertaken in the OECD and other international fora to respond to the challenge of taxation and ensure fairness and effectiveness of tax systems, in particular the development of a global standard for automatic exchange of information, so as to ensure a level playing-field."

94. Following discussions on BEPS 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 (i.e. beyond June 2015). 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) and on 14 July 2016 by the Slovak Presidency (doc. 11071/16 FISC 121).

95. The Slovak Presidency subsequently brought forward, respectively concluded, the work on all related files as set out above, notably:

- a) the Interest and Royalties Directive recast;
- b) Beneficial ownership of non-transparent entities (DAC5);
- c) EU external strategy for effective taxation;
- d) Hybrid mismatches involving third countries (ATAD 2);
- e) the Code of Conduct Group and Subgroups.

The HLWP was regularly updated on progress made.

96. The Slovak Presidency also 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.

ii) Tax in non-tax dossiers

97. 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.
98. A recent alert covered the proposal for a Regulation of the European Parliament and Council amending Regulations (EU) No 1316/2013 and (EU) 2015/1017 as regards the extension of the duration of the European Fund for Strategic Investments (EFSI).
99. An updated overview of tax provisions in non-tax dossiers was discussed at the HLWP meeting of 20 September 2016, as well as the state of play of negotiations on the Directive on the fight against fraud affecting the Union's financial interest by means of criminal law ("PIF" Directive) in the Justice and Home Affairs (JHA) Council.

100. Ministers were debriefed on the state of play of the PIF Directive at the ECOFIN Council meeting of 11 October 2016 and exchanged views on whether to include VAT fraud in the scope of the PIF directive, with a view to assist the JHA Council in defining a Council position for negotiations with the European Parliament on this matter. Most Finance ministers expressed an openness to compromise but with some conditions, among which notably a limitation to most serious cases of cross-border VAT fraud through the use of a threshold. Some Ministers expressed their opposition to such an inclusion, whilst some suggested including VAT fraud in the scope of the European Public Prosecutor Office (EPPO) Regulation rather than in the PIF Directive. The Presidency concluded that it would report on the outcome of this exchange of views to the JHA Council, primarily responsible for the dossier, which was held on 14 October 2016.
101. The HLWP also held an exchange of views on "Tax rulings and state aid control" at the HLWP meeting of 27 October 2016 following the Commission Notice on the notion of State aid as referred to in Article 107(1) of the TFEU, adopted on 19 May 2016.
102. The Legal Service of the Council delivered on 11 November 2016 an opinion on the legal basis of the proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (doc. 14384/16).
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