



Brussels, 6 February 2017
(OR. en)

5988/17

FISC 33

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 3 February 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.

**DRAFT EU-BEPS ROADMAP
BY THE MALTESE 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, 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).

3. In December 2015, the Council 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 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, 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) and, in November 2016, 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 Maltese 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. Hybrid mismatches (ATAD 2)

6. Political agreement on the proposal for an anti-tax avoidance directive (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.*"
7. The Commission produced a Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries on 25 October 2016, as part of the Anti-Tax Avoidance Package. The Slovak Presidency carried out extensive work on this proposal. During the ECOFIN meeting on 6 December 2016 the text was generally agreed to except on two items i.e. Articles 9(4)(b) and (c), and the date of entry into force.
8. The Maltese Presidency intends to work on the pending aspects of ATAD 2 with a view to finding agreement as swiftly as possible.

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

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

10. The Commission has submitted a proposal for Improvement of Dispute Resolution Mechanism within the EU, to the Council on 25 October 2016 and the Slovak Presidency carried out a preliminary examination of this proposal.
11. On 6 December 2016 the Council concurred “*that current international tax rules can, in some cases, lead to double taxation and double non-taxation that should be eliminated through coordinated EU measures*” (see doc. 15315/16). It also acknowledged that “*there is a need to review existing dispute resolution mechanisms to enhance tax certainty for business in the EU*”.
12. The Maltese Presidency considers that the introduction of an effective and efficient framework for resolution of tax disputes that would ensure legal certainty and a business friendly environment for investments is very important in the quest to achieve a fair and efficient tax system in the EU, and therefore regards this proposal as a priority aiming at reaching agreement by the end of June 2017.

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 for Effective Taxation and Commission Recommendation on the implementation of measures against tax treaty abuse. 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 without prejudice to Member State competence. 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. On 8 November 2016 the Council adopted conclusions on the criteria for and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes, which set out:
 - a) the criteria for screening jurisdictions with a view to establishing an EU list of non-cooperative jurisdictions, and
 - b) guidelines for the process of screening of jurisdictions with a view to establishing an EU list of non-cooperative jurisdictions for tax purposes.
15. The Council mandated the Code of Conduct Group (Business Taxation), supported by the General Secretariat of the Council of the European Union, to conduct and oversee the analysis (the screening process). The European Commission services will assist the Code of Conduct Group (Business Taxation) by carrying out the necessary preparatory work for the screening process. 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) 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.
16. While the Code of Conduct Group (Business Taxation) during the term of the Slovak Presidency has concluded work on points a) and b) above and made significant progress on other issues, the Maltese Presidency is to continue work in the relevant sub-group of the Code of Conduct Group, and, as appropriate, in the Council and its preparatory bodies with the aim of completing the task under point c) and to continue work under points d) and e) above.
17. The Maltese Presidency's intention is that during its term the work outlined above in the context of Council conclusions of May 2016 and November 2016 is carried out in accordance with the timeline agreed by the Council.

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

18. On 25 October 2016, the Commission re-launched its proposal for a Common Consolidated Corporate Tax Base (CCCTB) through new proposals for, as a first step, a Common Corporate Tax Base (CCTB) that includes a cross-border loss relief mechanism with a view to balance out the absence of the benefits of consolidation during that phase.
19. On 6 December 2016, the Council noted the two step approach proposed by the Commission concerning the proposals on a Common Corporate Tax Base (CCTB) and on a Common Consolidated Corporate Tax Base (CCCTB) and supported the view that work should focus as a priority on the elements of a common tax base (doc. 15315/16). It also invited Member States to, as a start, “*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)*”.
20. The Maltese Presidency intends to start the examination of the CCTB proposals with a view to stabilise the text on the novel aspects of the CCTB by the end of June 2017.

E. Interest and Royalties Directive (IRD)

21. 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 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.
22. During the last three Presidencies, substantial work was devoted to make progress in examining different alternatives to include a minimum effective taxation (MET) clause in the IRD.

23. The Slovak Presidency explored in particular 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. 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.
24. Taking into account the input received from bilateral discussions with Member States, the Maltese Presidency will follow up on the above and explore other options with the aim to reach agreement on the IRD taking account of discussions so far.

F. Good Governance in Tax Matters clause in EU agreements with third countries

25. 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.
26. The aim of the Maltese 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.

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

27. An exchange of views through the HLWP is foreseen in order to assess 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.

H. OECD BEPS issues in Double Taxation Agreements

28. As mentioned by the Council conclusions on BEPS in the EU context (doc. 15150/15), certain OECD BEPS conclusions concern bilateral double taxation agreements entered into by Member States.
29. An exchange of views through the HLWP is foreseen with a view to the signature of the OECD multilateral instrument to modify tax treaties, expected in June 2017.

II. MEDIUM-TERM WORK

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

A. Patent Boxes

31. The Maltese 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)

32. 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 on the notification of measures to the Group by reference to clear and objective criteria.
33. The Maltese 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 as required.

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

C. Outbound payments

35. 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.

D. Transparency: Mandatory disclosure rules

36. 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), and access to anti-money laundering information (under the SK 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).

37. 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"*.

38. On 10 November 2016, The European Commission launched a public consultation to gather feedback on the way forward for EU action on advisers and intermediaries who facilitate tax evasion and tax avoidance.
 39. Against this backdrop the EU Council could reflect during the Maltese Presidency on the possible approaches with regard to mandatory disclosure rules that the Commission is considering in preparation for possible future EU legislative initiatives by the Commission.
-