



Council of the
European Union

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NOTE

From: General Secretariat of the Council
To: Council

Subject: Follow-up to the Council conclusions of 8 November 2016 on "Criteria and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes"
– State of play

DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (24.04.2017)

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Criterion 1.3 (the duration of the reasonable timeframe)

1. In line with point 13 of the Guidelines for the process of screening of jurisdictions annexed to the Council Conclusions, the Code of Conduct Group should define, based on objective criteria the duration of the reasonable timeframe, referred to in criterion 1.3.
2. For the purposes of application of criterion 1.3, the duration of the reasonable timeframe, referred to in criterion 1.3, will be construed as follows:
3. With respect to criterion 1.3(i) (sub-point relating to sovereign states), “within a reasonable timeframe” refers to the entry into force of the OECD Multilateral Convention on Mutual Administrative Assistance (MCMAA), as amended, for a given jurisdiction and not to the commitment.
4. With respect to criteria 1.3(i) and 1.3(ii) (sub-points relating to non-sovereign jurisdictions), “within a reasonable timeframe” refers, respectively, to the entry into force of the MCMAA, as amended, for the jurisdiction, and to the entry into force for the jurisdiction of a network of exchange agreements sufficiently broad to cover all Member States.
5. The duration of the reasonable timeframe, for these three points will be identical to the deadline applied in criterion 1.3(ii) in relation to sovereign states: 31 December 2018 (i.e. the same deadline which applies to the entry into force for a sovereign third jurisdiction of a network of exchange arrangements, which is sufficiently broad to cover all Member States).

6. Without prejudice to the deadline of 31 December 2018, the reasonable timeframe should not extend beyond the time required for:
 - a) the completion of the procedural steps according to national law,
 - b) adoption and entry into force of any required amendments to national law; and
 - c) any other objective deadlines that formal commitment could entail (for example: for a jurisdiction which expresses its consent to be bound by the MCMAA, it enters into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval).
7. The duration of the reasonable timeframe can only be extended by a consensus of a Code of Conduct Group for a specific non-sovereign jurisdiction, only in duly justified cases.

Scope of criterion 2.2

1. For the purposes of application of criterion 2.2, the absence of a corporate tax or applying a nominal corporate tax rate equal to zero or almost zero by a jurisdiction should be regarded as within the scope of Paragraph A of the Code of Conduct for Business Taxation of 1 December 1997 (Code of Conduct).¹
2. In this respect, where criterion 2.1 is inapplicable solely due to the fact that the jurisdiction concerned does not meet the gateway criterion under Paragraph B of the Code of Conduct ², because of the "absence of a corporate tax system or applying a nominal corporate tax rate equal to zero or almost zero"³, then the five factors identified in paragraph B of the Code of Conduct should be applied by analogy to assess whether the criterion 2.2⁴ has been met.

¹ "Without prejudice to the respective spheres of competence of the Member States and the Community, this code of conduct, which covers business taxation, concerns those measures which affect, or may affect, in a significant way the location of business activity in the Community." (OJ C 2, 06.01.1998, p. 3)

² "Within the scope specified in paragraph A, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code. Such a level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor." (OJ C 2, 06.01.1998, p. 3)

³ This may operate by virtue of the nominal tax rate, the tax base or any other relevant factor.

⁴ Criterion 2.2 reads as follows: "*The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.*"

3. In the context of criterion 2.2 the fact of absence of a corporate tax or applying a nominal corporate tax rate equal to zero or almost zero can not alone be a reason for concluding that a jurisdiction does not meet the requirements of criterion 2.2.
 4. A jurisdiction should be deemed as non-compliant with criterion 2.2 if it refuses to engage in a meaningful dialogue or does not provide the information or explanations that the Code of Conduct Group may reasonably require or otherwise does not cooperate with the Code of Conduct Group where it needs to ascertain compliance of that jurisdiction with criterion 2.2 in the conduct of the screening process.
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