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Subject:	Proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries – General approach

I. INTRODUCTION

1. The Commission presented its proposal for a Council Directive amending Directive (EU) 2016/1164[1] as regards hybrid mismatches with third countries (ATAD II) on 25 October 2016.

2. This proposal responded to a Council statement entered into the minutes of the ECOFIN Council meeting of 12 July 2016, when Directive (EU) 2016/1164 (ATAD I) was adopted, which requested 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*".

[1] Anti-Tax-Avoidance Directive ('ATAD I').

3. The European Economic and Social Committee issued its opinion on 14 December 2016. The opinion of the European Parliament is expected to be delivered soon.

4. At its meeting of 6 December 2016, the ECOFIN Council discussed the compromise text[2] proposed by the Slovak Presidency. During that meeting, the Chair concluded that, if broad consensus was reached on most of the text, some outstanding issues, linked to exemptions from the scope and the implementation date, still needed to be resolved. Some Member States also maintained Parliamentary reservations.

II. STATE OF PLAY

5. The Maltese Presidency, building on the outcome reached under the Slovak Presidency, continued working in order to find solutions to those outstanding issues.

6. The Working Party on Tax Questions met on 18 January 2017 and Fiscal Attachés met on 30 January 2017. The High Level Working Party met on 3 February 2017, and a meeting of Fiscal Attachés was convened on 9 February 2017.

7. On 15 February 2017, Coreper discussed the compromise text[3] proposed by the Presidency, and in particular those two outstanding issues:

   1. Limitation of the scope (Articles 2(9)(i) and 9(4)(b) of Directive (EU) 2016/1164):

      a) Hybrid Regulatory Capital

      aa) Some delegations have proposed an exemption for loss absorbing capacity requirements, in order to prevent potentially unfair situations between domestically owned and not domestically owned groups. It was equally identified that, should such exemption exist, it should be carefully tailored and narrowed down in order to cover defined, and limited, situations only.

[2] Doc. ST 15066/16 FISC 215 ECOFIN 1141.
[3] Doc. ST 6076/17 FISC 35 ECOFIN 76.

In order to find the right balance between the need to cater for an exemption and the need to control its strict application, the Presidency proposes as a compromise the wording that is set out in Article 9(4)(b).

bb) Compared to the draft put forward to Ministers in December, the latest compromise contains the following main changes:

(1) The provision is targeted to the banking sector, and in connection with consolidated groups issuing such financial instruments for the purposes of meeting loss-absorbing capacity requirements;

(2) The payment should not be made as part of a structured arrangement;

(3) A deletion of the reference to "ultimate" parent with a view to catering for issuances taking place at intermediate parent levels;

(4) Any mismatch in tax outcomes should only result in a single deduction under the structure. This means that the net tax result of applying the exclusion should be the same as it would have been, had the banking subsidiary been able to issue subordinated debt directly to the market.

cc) The wording of Article 9(4)(b) is to be seen in the light of the limitation of the exemption in time (sunset clause). The Commission will be tasked through the Directive to evaluate its application. In terms of timing, such evaluation should take place at a moment where proper assessment can be ensured; and sufficient time should be allowed to the legislator to assess the Commission's report before the exemption expires.

b) Financial traders

It appeared from discussions among experts that it was necessary to clarify that in specific situations, payments made by financial traders do not give rise to hybrid mismatches, provided that some conditions are met. The Presidency proposes a wording that encompasses the necessary safeguards in order to make sure that only the relevant situation is taken into account. This compromise can be found in Article 2 (9) (i).

The compromise text no longer keeps Article 9(4)(c) (as contained in the December compromise text) altogether. It tries however to preserve its intended outcome through a more delimited approach. The Presidency is of the view that this approach is more in line with the OECD BEPS Report on Action 2 (which treats financial traders as outside the scope of the hybrid financial instrument rule, rather than eligible for a specific exemption).

2. Date of implementation (Article 1(7) and Article 2):

Some delegations have indicated that the implementation date proposed by the Commission, originally aligned on the ATAD I Directive, would be difficult to hold, given the significant changes that need to be made to national legislation. While considering the postponement of the implementation, many delegations have recalled the importance of the fight against tax avoidance and the need to ensure a uniform, speedy and comprehensive implementation of all provisions on hybrid mismatches (coherence for the implementation of ATAD I and II).

During the Coreper meeting on 15 February 2017, the same views have been expressed.

The compromise proposed by the Presidency, reconciling both ends, is contained in Article 1(7) and Article 2.

8. As it was concluded during the meeting of Coreper that the approach proposed by the Presidency met with a good degree of support, the compromise set out in 6333/17 is submitted to the Council. The Commission announced its intention to ask for the inclusion of a statement to the Council minutes. One delegation had a Parliamentary reservation, which has been lifted in the meantime.

III. THE WAY FORWARD

9. The Council is invited to reach a general approach on the Directive, including on the implementation dates in square brackets (Article 9(4)(b) of Directive 2016/1164, Article 1(6) and Article 2(3)), on the basis of a compromise text set out in 6333/17 FISC 46 ECOFIN 95, with a view to adopting the Directive, subject to receiving the opinion of the European Parliament and legal-linguistic revision.