Council of the European Union

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NOTE

From:	Presidency
To:	Council
Subject:	Future of the Code of Conduct (business taxation) - Draft Council conclusions = Adoption

1. The existing framework of the Code of Conduct is contained in two sets of Council conclusions. The first adopted on 1 December 1997 (OJ C 2, 6.1.1998, p. 1–6) describes the "mandate" of the Code, i.e. its purpose, the measures to which it will apply and Member States' obligations under it. The second conclusions of 9 March 1998 on the establishment of the Code of Conduct Group (business taxation) (OJ C 99, 1.4.1998, p. 1–2), concern the operation of the Code Group itself ("governance"). The Group has subsequently developed additional guidance, notably in 2008 concerning the meaning of "broad consensus".

2. A discussion was held during the Latvian Presidency on the scope and the governance of the Group, on the basis of various proposals from Member States. The HLWP welcomed in June 2015 that the Code of Conduct Group will continue work on this issue in July 2015, focusing on: a) making better use of the existing mandate of the Code; b) examining the possibilities to extend the mandate and to update the criteria; and c) the possible need to adjust the governance of the Code of Conduct accordingly. The ECOFIN Council endorsed this approach on 19 June 2015. The action plan of the Commission presented on 17 June 2015 also specifically supports a reform of the Code of Conduct.

3. The EU-BEPS Roadmap of the Luxembourg Presidency notes that the Presidency will discuss the future of the Code of Conduct in the HLWP, on the basis of the contribution from the Code of Conduct Group, with the aim of bringing the decision on the future work under the Code to the ECOFIN Council by the end of the Luxembourg Presidency.

4. In this context, the Luxembourg Presidency brought the issue of the future of the Code to the HLWP on 2 September 2015, where two questions were more specifically discussed :
   – what are the issues that should be discussed under the Code of Conduct and
   – whether these issues are covered by the current mandate.

5. On the basis of this discussion, the Presidency tabled draft Council conclusions on the future of the code which were discussed at the HLWP on 19 November 2015. During that meeting, some changes to the draft conclusions were agreed, though with several scrutiny reservations - either on certain paragraphs (UK and LT on paragraph 9) or on the whole text (MT). PL and PT also entered a political/scrutiny reservation linked to their ongoing change of government. Since then, PL lifted its reservation.

6. Following that meeting, a silence procedure was launched. This silence procedure was broken by four Member States (MT, CY, IE and LT) which raised concerns on two paragraphs. Concerning paragraph 9 (effective level of taxation), two Member States requested its deletion (CY, IE) and two Member States maintained a scrutiny reservation (MT and LT). Since then LT lifted its reservation on paragraph 9. Regarding paragraph 6 (extension of the mandate), the deletion of the words "and modalities" has been requested by one Member State (IE). These issues were discussed at COREPER on 2 December 2015 where MT, IE and CY confirmed their concerns. Other delegations reiterated their wish not to weaken the message to be conveyed by these Council conclusions.

7. Against this background, the Permanent Representatives Committee invites the Council (ECOFIN) to:
   - discuss the remaining open issues in paragraphs 6 and 9 of the draft conclusions set out in the annex
   - have an exchange of views on the future of the Code of Conduct
   - adopt the draft conclusions as set out in the annex.

ANNEX

(Draft) Council Conclusions on the future of the Code of Conduct

"The Council:

1. RECALLS its determination to combat tax fraud, tax evasion and aggressive tax planning at EU and global level;

2. RECALLS the adoption by the Council and the representatives of the Governments of the Member States, meeting within the Council, in December 1997 of a resolution on a Code of conduct for business taxation (hereafter "the Code");

3. RECALLS the subsequent establishment in March 1998 of a Code of Conduct Group (hereafter "the Group") to assess the tax measures falling within the scope of the Code and oversee the provision of information on these measures;

4. UNDERLINES that the May 2013 European Council conclusions noted that "*it is important to continue work within the EU on the elimination of harmful tax measures. To that end, work should be carried out on the strengthening of the Code of Conduct on business taxation on the basis of its existing mandate*";

5. RECALLS the usefulness and the efficiency of the work done under the Code of Conduct so far to assess Member States individual tax measures;

6. CONFIRMS that work on the future of the Code of Conduct and its reinforcement should focus on making better use of the existing mandate of the Code; on examining the possibilities and modalities to extend the mandate and to update the criteria and on the possible need to adjust the governance of the Code accordingly;

7. ENDORSES the Group's new Work Package, and ENCOURAGES the Group to continue its work on that basis;

8. CONFIRMS its invitation to the Group to develop general guidance to prevent tax avoidance, base erosion and profit shifting (BEPS);

9. INVITES the High Level Working Party on Taxation (HLWP) to discuss a revision to the mandate with the objective that profits are subject, as appropriate, to an effective level of tax within the EU;

10. AGREES that the rollback and standstill procedures foreseen in paragraphs C and D of the Code should cover existing and future general guidance notes developed by the Group;

11. INVITES in this respect the Group to ensure through such general guidance an effective implementation at the EU level of the relevant OECD BEPS Project conclusions when not covered by the EU legislation, and in accordance with the Group's new Work Program;

12. AGREES that the Code Group should clarify the third criterion by developing guidance on the basis of the OECD BEPS conclusion on Action 5 ;

13. AGREES that the Code Group should clarify the fourth criterion by developing guidance in the light of OECD Transfer Pricing Guidelines, as amended by OECD BEPS conclusions on Actions 8-9-10;

14. INVITES the Group to further develop, where appropriate, guidance notes on the interpretation of the criteria of the Code, including the gateway criterion, and their application;

15. CONFIRMS the importance that the principles of the Code of Conduct are applied on as broad geographical basis as possible, WELCOMES in this respect the recent Joint Statement with Switzerland and ongoing dialogue with Liechtenstein and INVITES the Group to open dialogues with relevant third countries, as well as to monitor the implementation of past agreements;

16. EXPRESSES the wish to improve the visibility of the work of the Code of Conduct Group and AGREES therefore that its results, in particular its 6-monthly reports, are systematically made available to the public;

17. INSISTS however on the confidentiality of the Group's deliberations with a view to protect the public interest as regards the economic policy of Member States, maintain the efficiency of the assessment process and counter related risks of aggressive tax planning;

18. INVITES the High Level Working Party on Taxation (HLWP) to conclude on the need to enhance the overall governance, transparency and working methods and to finalise the reform of the Group during the Dutch Presidency."