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Delegations will find attached the partially declassified version of the above-mentioned document.



Brussels, 22 January 2019
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RESTREINT UE/EU RESTRICTED

FISC 52

NOTE

From:	Presidency
To:	Code of Conduct Group (Business Taxation)
Subject:	(3rd draft) Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes

Delegations will find attached a third Presidency compromise text in view of the meeting of the Code of Conduct subgroup on third countries on 25 January 2019.

New text compared to doc. 5299/19 EU RESTRICTED is marked **bold and underlined**, deletions are marked with ~~striketrough~~.

(3rd DRAFT) COUNCIL CONCLUSIONS

on the revised EU list of non-cooperative jurisdictions for tax purposes

The Council:

1. RECALLS the Council Conclusions of 25 May 2016 on an external taxation strategy and measures against tax treaty abuse, the Council Conclusions of 8 November 2016 on the criteria for and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes, and the Council Conclusions of 5 December 2017 on the EU list of non-cooperative jurisdictions for tax purposes;
2. WELCOMES the work that the Code of Conduct Group on Business Taxation (“Code of Conduct Group”), supported by the General Secretariat of the Council and with the assistance of the Commission services, has carried out in monitoring the implementation of commitments taken by jurisdictions to implement tax good governance principles and in taking stock of the work achieved by the relevant OECD fora;
3. WELCOMES the fact that most of these jurisdictions had a constructive dialogue with the Code of Conduct Group and resolved the deficiencies that had been identified in the areas of tax transparency, fair taxation and implementation of anti-BEPS standards by enacting the necessary laws within the agreed deadline;
4. REGRETS at the same time that a number of jurisdictions have not enacted by the end of 2018 all the measures to which they had committed, whilst some jurisdictions have still not committed to implement any or some of the tax good governance principles for which it was determined that they are not compliant;
5. **ENDORSES, accordingly, the revised EU list of non-cooperative jurisdictions for tax purposes set out in Annex I and CONFIRMS that the jurisdictions included therein will remain listed until:**
 1. **For jurisdictions listed since 5 December 2017: until they have provided a high level political commitment that is deemed sufficient by the Council;**

2. **For newly listed jurisdictions: until they have implemented all their commitments taken.**

Presidency comment:

- *Restructuring of the draft conclusions following discussion at the last meeting.*
- *This new paragraph merges former paragraphs 7-10-11 (or parts thereof)*

6. {CONSIDERS that ~~the following~~ reasons put forward by some jurisdictions for not fully enacting all of the measures to which they had committed, despite tangible efforts by their governments, should **in some cases** be viewed as justified:

- a) ~~constitutional issues ([name of the jurisdictions]);~~
- b) ~~[placeholder: wording for manufacturing regimes];~~
- c) ~~delay in obtaining a supplementary review and revised rating by the Global Forum;~~
- d) ~~[...];~~

and **ASKS the Code of Conduct Group to continue the dialogue with these jurisdictions and to recommend a new deadline, as appropriate;** ~~URGES those jurisdictions to enact the reforms no later than [date];~~

Presidency comments:

- *Shortening of the paragraph to the main principle and adjustment of the last paragraph, following discussion at the last meeting.*
- *See also parallel changes in Annex II.*

7. **TAKES THE VIEW, in particular, that developing countries without a financial centre should be given more time to reform their preferential tax regimes coving manufacturing activities and similar non-highly mobile activities considering the significant economic impact of these reforms;**

Presidency comment:

- *This paragraph appears necessary to explain to the external reader why a special treatment is granted in these specific cases, as these explanations cannot be put in Annex II.*

8. [EXPRESSES its satisfaction that many jurisdictions under criterion 2.2 have enacted the required reforms in 2018 but **ASKS the Code of Conduct Group to monitor their effective implementation** ~~CONSIDERS acceptable that some jurisdictions need more time to implement the following elements of the scoping paper on criterion 2.2:~~

a) ~~remedial of any shortcomings in the enforcement process;~~

b) ~~[...];~~

~~and RESOLVES that they should be enacted by [date], and ASKS the Code of Conduct Group to monitor the implementation of these reforms;]~~

Presidency comment:

- *Redrafting of the paragraph considering that the situations described previously would now fall under the new (more general) paragraph 6, in order to avoid duplication.*
- *The paragraph may be adjusted after discussions at the 25/01 subgroup meeting depending on the final assessment of 2.2 jurisdictions.*

~~CONSIDERS that jurisdictions which have not met their commitment and are not concerned by the above situations should be considered as non-cooperative for tax purposes;~~

Presidency comment:

- See new paragraph 5.

9. *[Placeholder: wording to be decided in respect of jurisdictions that have replaced harmful preferential tax regimes by a **new** territorial taxation system with exemption of foreign income **providing equally harmful effects**];*

Presidency comment:

- The placeholder will be replaced by a draft wording after the 25/01 COCG subgroup discussion on the horizontal paper.

10. *[Placeholder, if applicable: wording to be decided in respect of preferential tax regimes for which the Code of Conduct Group could not fully take stock of the conclusions reached by the OECD Forum on Harmful Tax Practices (FHTP) due to a difference in their respective mandates in respect of de facto ring-fencing];*

Presidency comment:

- This placeholder will be deleted after the COCG subgroup of 25/01 if not applicable to any jurisdiction.

11. INVITES the Code of Conduct Group to continue seeking commitments from the remaining [5] jurisdictions that have not yet committed to address the deficiencies identified since the Council conclusions of 5 December 2017 and ~~CONSIDERS that these jurisdictions should in the meantime continue to be considered as non-cooperative;~~

~~ENDORSES, accordingly, the revised EU list of non-cooperative jurisdictions for tax purposes, as set out in Annex I, and CONFIRMS that jurisdictions will remain on this list until they have implemented all the commitments taken, or for the jurisdictions that have been listed since the Council conclusions of 5 December 2017, until they have provided a high level political commitment that is deemed sufficient by the Council;~~

Presidency comment:

- *See new paragraph 5.*

12. ~~CONSIDERS~~**BELIEVES**, in respect of these jurisdictions ~~that have been listed since the Council conclusions of 5 December 2017~~, that a reasonable deadline for implementing their possible new commitments would be 12 calendar months after their respective de-listing has been published in the Official Journal of the EU;

Presidency comments:

- *Drafting improvements.*
- *Some delegations questioned the discrepancy with paragraph 14, which provides for a longer timeline (end of the calendar year following the commitments):*
- *Changing the timeline in paragraph 14 would create procedural issues for jurisdictions which have already provided commitments based on this rule, whilst prolonging the timeline in paragraph 12 would not be fair towards Namibia - to which this rule has already been applied.*
- *Overall, the Presidency would prefer to keep the wording unchanged considering that this only affects 4 jurisdictions (Trinidad and Tobago already committed to reform its harmful preferential tax regimes by September 2019).*

13. INVITES the Code of Conduct Group to continue monitoring the effective implementation by end 2019 of the commitments made by developing countries without a financial centre in respect of tax transparency and implementation of anti-BEPS minimum standards, as well as the implementation of the relevant transparency and anti-BEPS minimum standards in jurisdictions that cannot **or do not wish to** join the Global Forum or OECD BEPS Inclusive Framework;

Presidency comment:

- *Amendment following discussion at the last meeting: this would e.g. be applicable in the case of jurisdictions which committed to implemented anti-BEPS minimum standards if and when such commitment will become relevant, or to implement these standards by themselves.*

14. WELCOMES the work of the Code of Conduct Group in reviewing newly identified preferential regimes in some jurisdictions and in monitoring the commitments taken by these jurisdictions to remove the harmful features of these regimes by the end of the calendar year following these commitments;
15. ENDORSES the state of play with respect to commitments taken by cooperative jurisdictions to implement tax good governance principles, as set out in Annex II;
16. **NOT DECLASSIFIED**

17. WELCOMES the fact that the ~~EU list set out in Annex I~~ **the Council conclusions of 5 December 2017, and more particularly Annex I, are** is being taken into account by the European Commission in the implementation of EU financing and investment operations; ~~[and NOTES that it also takes into account Annex II];~~

Presidency comment:

- *Amendments following discussion at the last meeting.*

18. INVITES the Code of Conduct Group to continue the dialogue with the relevant jurisdictions and CONFIRMS that it can recommend to the Council at any time to update, but at least once a year **in October**, the ~~revised~~ EU list set out in Annex I, as well as of the state of play set out in Annex II any new commitment taken or of the implementation thereof;
19. CONSIDERS that these modifications should take effect **on 1 January of the year following the annual update in October** in respect of existing national and possible future co-ordinated defensive measures in the tax area against **listed** jurisdictions ~~at a point in time that allows Member States to implement these changes into national legislation;~~

Presidency comment:

- *Paragraphs 19-20: new compromise text following discussion at the last meeting.*

20. WELCOMES the extensions of the geographical scope of the EU screening exercise to other jurisdictions agreed in 2018 and INVITES the Code of Conduct Group to review the economic data used for selecting jurisdictions ~~[in 2020, for application as from 2021];~~

21. Equally WELCOMES the agreements reached in respect of coordinated defensive measures in the non-tax area vis-à-vis the non-cooperative jurisdictions since the Council conclusions of 5 December 2017¹, as well as on the future criterion 3.2 (implementation of the country by country reporting - CBCR minimum standard);
22. REITERATES its invitation to the Code of Conduct Group to finalise discussions in respect of future criterion 1.4 (~~exchange of~~ **transparency of** beneficial ownership ~~information~~) and further coordinated defensive measures, **without prejudice to Member States' obligations under EU and international law**;

Presidency comments:

- *Criterion 1.4 would go beyond exchange of information*
- *Following discussion at the last meeting, the wording of the Council conclusions of 04/12/2018 (doc. 15802/18) has been replicated.*

23. ~~ACKNOWLEDGES that the EU listing process may have an impact on the diplomatic, economic and political relationships between the EU and certain jurisdictions, and~~ INVITES the EU institutions and Member States, as appropriate, to take the revised EU list of non-cooperative jurisdictions for tax purposes into account in foreign policy, economic relations and development cooperation with the relevant third countries, ~~as well as~~ to strive for a comprehensive approach as regards to the issue of compliance with the Criteria, without prejudice to the respective spheres of competence of the Member States and of the Union as resulting from the Treaties;

¹ Regulation (EU) 2017/2402 on a general framework for securitisation, Regulation (EU) 2017/2396 on the European Fund for Strategic Investments, Regulation (EU) 2017/2396 on the European Fund for Strategic Investments and on the European Investment Advisory Hub, Decision (EU) 2018/412 on granting an EU guarantee to the European Investment Bank against losses under financing operations supporting investment projects outside the EU, and Regulation (EU, Euratom) 2018/1046 on the financial rules applicable to the EU general budget.

Presidency comment:

- *Deletion following discussion at the last meeting.*

24. REITERATES that the Code of Conduct Group, supported by the General Secretariat of the Council, should continue to conduct and oversee the EU screening, listing and monitoring processes, in co-ordination with the High Level Working Party on tax issues (HLWP). The Commission services will continue to assist the Code of Conduct Group by carrying out the necessary preparatory technical work in accordance with the roles as currently defined under the Code of Conduct for Business Taxation.

The EU list of non-cooperative jurisdictions for tax purposes*Presidency comments:*

- *The title of Annex I remains unchanged*
- *The final list submitted to Coreper/ECOFIN will be in alphabetical order (no subsections).*

1. [Name of jurisdiction]

Situation 1 (jurisdictions that are already listed): [Name of jurisdiction] [does not apply any automatic exchange of financial information], [does not cover all EU Member States for the purpose of automatic exchange of information], [is not a Member of the Global Forum on Transparency and Exchange of Information for Tax Purposes], [does not have a rating of at least “Largely Compliant” by the Global Forum on Transparency and Exchange of Information for Tax Purposes for Exchange of Information on Request], [has not signed and ratified (, including through the jurisdiction they are dependent on,) the OECD Multilateral Convention on Mutual Administrative Assistance as amended], [has harmful preferential tax regimes], [facilitates offshore structures and arrangements aimed at attracting profits without real economic substance], [is not a member of the Inclusive Framework and/or did not commit to apply the BEPS minimum standards] and did not commit to addressing these issues.

[Furthermore, (name of jurisdiction) committed to comply with criterion/criteria (X.X) by the end of 2018 but has not resolved this/these issue(s).]

Situation 2 (newly listed jurisdictions): [Name of jurisdiction] [does not apply any automatic exchange of financial information], [does not cover all EU Member States for the purpose of automatic exchange of information], [is not a Member of the Global Forum on Transparency and Exchange of Information for Tax Purposes], [does not have a rating of at least “Largely Compliant” by the Global Forum on Transparency and Exchange of Information for Tax Purposes for Exchange of Information on Request], [has not signed and ratified (, including through the jurisdiction they are dependent on,) the OECD Multilateral Convention on Mutual Administrative Assistance as

amended], [has not amended or abolished its harmful preferential tax regimes], [has replaced a harmful preferential tax regime by another harmful preferential tax regime], [facilitates offshore structures and arrangements aimed at attracting profits without real economic substance], [is not a member of the Inclusive Framework or does not apply the BEPS minimum standards] and has not resolved this/these issue(s) by the end of 2018.

[For developing countries without a financial centre that would not have met their commitment on criterion 2.1: (Name of jurisdiction)'s commitment to comply with criterion/criteria (X.X) by the end of 2019 will continue to be monitored.]

**State of play of the cooperation with the EU with respect to commitments taken ~~international~~
~~cooperation~~ to implement tax good governance principles**

Presidency comments:

- *The existing title of Annex II (as agreed in December 2017) was restored following discussion at the last subgroup meeting.*

1. Transparency

1.1 Commitment to implement the automatic exchange of information, either by signing the Multilateral Competent Authority Agreement or through bilateral agreements

The following jurisdictions are committed to implement automatic exchange of information by end 2019:

[list]

1.2 Membership of the Global Forum on transparency and exchange of information for tax purposes ("Global Forum") and satisfactory rating

The following jurisdictions, **which were committed to have a sufficient rating by end 2018**, will receive **are waiting for a supplementary review by** ~~a revised rating from the Global Forum by end 2019:~~

[list]

Presidency comments:

- *This situation falls under the provision set out in paragraph 6 of the draft Council conclusions but in this case there would be no need for recommending a new deadline since the calendar of the supplementary review depends on the GF.*
- *The commitment of the concerned jurisdictions was to comply with this criterion by end 2018 but this type of situation could nevertheless remain in Annex II considering that it still relates to a commitment taken.*

The following jurisdictions are committed to become member of the Global Forum and/or have a sufficient rating by end 2019:

[list]

1.3 Signatory and ratification of the OECD Multilateral Convention on Mutual Administrative Assistance (MAC) or network of agreements covering all EU Member States

The following jurisdictions are committed to sign and ratify the MAC or to have in place a network of agreements covering all EU Member States by end 2019:

[list]

2. Fair Taxation

2.1 Existence of harmful tax regimes

~~[Placeholder for situations described in paragraph 5 of the draft Council conclusions, e.g. delay due to constitutional reasons, or manufacturing regimes:-]~~ **[The following jurisdictions, which were committed to amend or abolish their harmful manufacturing tax regimes (or the manufacturing part thereof) by end 2018 and demonstrated tangible progress in initiating these reforms in 2018, were granted further time to adapt their legislation:**

list]

[The following jurisdictions, which were committed to amend or abolish their harmful tax regimes by end 2018 and faced constitutional issues that prevented the completion of these reforms despite tangible progress in 2018, were granted further time to adapt their legislation:

list]

Presidency comment:

- *See paragraphs 6-7 of the draft Council conclusions.*

The following jurisdictions are committed to amend or abolish harmful tax regimes by end 2019²:

[list]

The following jurisdictions are committed to amend or abolish harmful tax regimes by end 2020:

[list]

[2.2. Existence of tax regimes that facilitate offshore structures which attract profits without real economic activity]

The following jurisdictions are committed to continue implementing the remaining elements of the scoping paper on criterion 2.2 by [date]:

[list]

Presidency comment:

- *The wording will be adjusted after the 25/01 COCG subgroup discussion on progress reports concerning criterion 2.2 jurisdictions.*

*[Placeholder for situations where a jurisdiction has introduced a **new** harmful ~~territorial~~ taxation system **providing equally harmful effects** ~~with exemption of foreign income~~]:*

[list]]

Presidency comment:

- *The placeholder will be replaced by a draft wording (and if appropriate moved/copied to section 2.1) after the 25/01 COCG subgroup discussion on the horizontal paper.*

² Or an earlier date defined by reference to the date of publication of the Council's de-listing decision in the Official Journal of the EU.

3. Anti-BEPS Measures

3.1 Membership of the Inclusive Framework on BEPS or commitment to implementation of OECD anti-BEPS minimum standards

The following jurisdictions are committed to become member of the Inclusive Framework on BEPS or implement OECD anti-BEPS minimum standards by end 2019:

[list]

The following jurisdictions are committed to become member of the Inclusive Framework on BEPS or implement OECD anti-BEPS minimum standards if and when such commitment will become relevant:

[list]

~~*3.2 Implementation of OECD anti-BEPS minimum standards*~~

~~The following jurisdictions are expected to have effectively implemented the Country by Country Reporting (CbCR) anti-BEPS minimum standard by end 2019:~~

~~[list]~~

~~The following jurisdictions are expected to have effectively implemented the Country by Country Reporting (CbCR) anti-BEPS minimum standard by end 2020:~~

~~[list]~~

Presidency comment:

- *Deletion following discussion at the last subgroup meeting, limiting the scope of Annex II to commitments taken.*