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OUTCOME OF PROCEEDINGS

From: General Secretariat of the Council

On: 8 November 2016

To: Delegations

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Subject: Criteria and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes
– Council conclusions (8 November 2016)

Delegations will find in the annex the Council conclusions on criteria and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes, adopted by the Council at its 3495th meeting held on 8 November 2016.

COUNCIL CONCLUSIONS

on the criteria for and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes (*)

(*) The Council agreed to publish these conclusions for information purposes in the Official Journal.

The Council:

1. CONFIRMS its priority commitment to continue the fight against tax fraud, evasion and avoidance, and against money laundering which erode Member States' tax bases;
2. IS OF THE VIEW that co-ordinated policy efforts in this area at EU and global level, such as determining the objective criteria to identify non-cooperative jurisdictions for tax purposes are part of effective measures that will contribute to economic growth and tax certainty;
3. RECALLS the Council Conclusions on an external taxation strategy and measures against tax treaty abuse of 25 May 2016 and in particular points 6 to 10 of those Conclusions;
4. RESOLVES that the EU list of non-cooperative jurisdictions will be determined by the Council in 2017;
5. WELCOMES, in this context, the preparatory work by the Code of Conduct Group (Business Taxation) and the European Commission conducted so far;
6. APPROVES the Annex to these Conclusions and NOTES that future work in this area should be coordinated with and build on the developments in the Global Forum on Transparency and Exchange of Information for Tax Purposes and the OECD Inclusive Framework for Tackling Base Erosion and Profit Shifting;

7. CALLS for high international tax good governance standards relating to tax transparency, fair taxation and anti-BEPS measures, and as regards tax transparency in particular;
8. TAKES NOTE, as regards tax transparency, of the commitment by over 100 jurisdictions to implement the Common Reporting Standard (CRS) and takes stock of the ongoing monitoring by the Global Forum on Transparency and Exchange of Information for Tax Purposes and the assessment of the international standards on Automatic Exchange of Information and Exchange of Information on Request;
9. TAKES NOTE, as regards fair taxation and anti-BEPS measures, of the ongoing work at the OECD Inclusive Framework for Tackling Base Erosion and Profit Shifting, including work of the Forum on Harmful Tax Practices as part of it;
10. ASKS the Code of Conduct Group (Business Taxation) and its relevant subgroup to finalise by January 2017 its work on selection of the jurisdictions for screening on the basis of the European Commission's Scoreboard and to continue exploring defensive measures at EU level to be endorsed by the Council, in line with the Council Conclusions of May 2016.

I. Criteria for screening jurisdictions with a view to establishing an EU list of non-cooperative jurisdictions

The following tax good governance criteria should be used to screen jurisdictions, with a view to establishing the EU list of non-cooperative jurisdictions for tax purposes, in line with the guidelines for the screening. The compliance of jurisdictions on tax transparency, fair taxation and the implementation of BEPS measures will be assessed cumulatively in the screening process.

As regards future screenings, these criteria will be adjusted by the Council, as necessary, having regard to evolution in international standards, future ratings of those standards and the importance of continued and rapid progress by all relevant jurisdictions in these areas.

1. Tax transparency criteria

Criteria that a jurisdiction should fulfil in order to be considered compliant on tax transparency:

1.1. Initial criterion with respect to the OECD Automatic Exchange of Information (AEOI) standard (the Common Reporting Standard – CRS): the jurisdiction, should have committed to and started the legislative process to implement effectively the CRS, with first exchanges in 2018 (with respect to the year 2017) at the latest and have arrangements in place to be able to exchange information with all Member States, by the end of 2017, either by signing the Multilateral Competent Authority Agreement (MCAA) or through bilateral agreements;

Future criterion with respect to the CRS as from 2018: the jurisdiction, should possess at least a “Largely Compliant” rating by the Global Forum with respect to the AEOI CRS, and

- 1.2. the jurisdiction should possess at least a “Largely Compliant” rating by the Global Forum with respect to the OECD Exchange of Information on Request (EOIR) standard, with due regard to the fast track procedure, and
- 1.3. (for sovereign states) the jurisdiction should have either:
- i) ratified, agreed to ratify, be in the process of ratifying, or committed to the entry into force, within a reasonable time frame, of the OECD Multilateral Convention on Mutual Administrative Assistance (MCMAA) in Tax Matters, as amended, or
 - ii) a network of exchange arrangements in force by 31 December 2018 which is sufficiently broad to cover all Member States, effectively allowing both EOIR and AEOI;

(for non-sovereign jurisdictions) the jurisdiction should either:

- i) participate in the MCMAA, as amended, which is either already in force or expected to enter into force for them within a reasonable timeframe, or
- ii) have a network of exchange arrangements in force, or have taken the necessary steps to bring such exchange agreements into force within a reasonable timeframe, which is sufficiently broad to cover all Member States, allowing both EOIR and AEOI.

1.4. Future criterion: in view of the initiative for future global exchange of beneficial ownership information, the aspect of beneficial ownership will be incorporated at a later stage as a fourth transparency criterion for screening.

Until 30 June 2019, the following exception should apply:

- A jurisdiction could be regarded as compliant on tax transparency, if it fulfils at least two of the criteria 1.1, 1.2 or 1.3.

This exception does not apply to the jurisdictions which are rated "Non Compliant" on criterion 1.2 or which have not obtained at least "Largely Compliant" rating on that criterion by 30 June 2018.

Countries and jurisdictions which will feature in the list of non-cooperative jurisdictions currently being prepared by the OECD and G20 members will be considered for inclusion in the EU list, regardless of whether they have been selected for the screening exercise.

2. Fair taxation

Criteria that a jurisdiction should fulfil in order to be considered compliant on fair taxation:

- 2.1. the jurisdiction should have no preferential tax measures that could be regarded as harmful according to the criteria set out in the Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997 on a code of conduct for business taxation¹, and
- 2.2. The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.

¹ OJ C 2, 6 January 1998, p. 2.

3. Implementation of anti-BEPS measures

3.1. Initial criterion that a jurisdiction should fulfil in order to be considered compliant as regards the implementation of anti-BEPS measures:

- the jurisdiction, should commit, by the end of 2017, to the agreed OECD anti-BEPS minimum standards and their consistent implementation.

3.2. Future criterion that a jurisdiction should fulfil in order to be considered compliant as regards the implementation of anti-BEPS measures (to be applied once the reviews by the Inclusive Framework of the agreed minimum standards are completed):

- the jurisdiction should receive a positive assessment² for the effective implementation of the agreed OECD anti-BEPS minimum standards.

² Once the methodology is agreed, the wording of the criterion will be revised by the Council accordingly.

II. Guidelines for the process of screening of jurisdictions with a view to establishing an EU list of non-cooperative jurisdictions for tax purposes

1. The screening of the relevant jurisdictions by the Code of Conduct Group (Business Taxation) on the basis of the criteria set out in Part I of this Annex should begin swiftly, with a view to the Council endorsing the EU list of non-cooperative tax jurisdictions before the end of 2017.
2. The Code of Conduct Group (Business Taxation), supported by the General Secretariat of the Council will conduct and oversee the screening process. The Commission services will assist the Code of Conduct Group (Business Taxation) by carrying out the necessary preparatory work for the screening process in accordance with the roles as currently defined under the Code of Conduct for Business Taxation process, with particular reference to previous and ongoing dialogues with third countries.
3. In the screening process, stock should be taken of the work achieved by the Global Forum on Transparency and Exchange of Information for Tax Purposes and the OECD Inclusive Framework for Tackling Base Erosion and Profit Shifting.
4. By January 2017, letters should be sent to jurisdictions selected for screening, inviting these jurisdictions to engage in the process, while ensuring appropriate transparency of this process.
5. By February 2017, the Code of Conduct Group (Business Taxation) should nominate, where relevant, Member States and/or their experts, or groups thereof, to work together with the Commission on the screening of relevant jurisdictions.

6. By Summer 2017 written contacts and, where necessary, bilateral discussions with jurisdictions concerned should take place, to further engage in the dialogue and explore solutions to concerns with the tax systems of these jurisdictions, as well as to obtain the necessary commitments. The Code of Conduct Group (Business Taxation) should be kept informed and actively involved in this process.
7. By September 2017 the outcome of the bilateral discussions and the state of play thereof should be presented to the Code of Conduct Group (Business Taxation).
8. By the end of 2017, following the necessary preparatory steps at the Code of Conduct Group (Business Taxation), in co-ordination with the High Level Working Party on Tax Questions, the Council should endorse the EU list of non-cooperative jurisdictions.
9. The work on exploring defensive measures at EU level in line with the Council Conclusions of May 2016 should be completed in due time. Any defensive measures should be without prejudice to the respective spheres of competence of the Member States, such as to apply additional measures or maintain lists of non-cooperative jurisdictions at national level of a broader scope.
10. As soon as the listing process is completed, letters should be sent to the listed non-cooperative jurisdictions without delay, with clear explanation for such listing and which steps from a jurisdiction concerned are expected, in order to de-list that jurisdiction.
11. Given that developing countries may lack the capacity to implement the tax transparency standards and anti-BEPS minimum standards according to the same timeline as developed countries, particular account should be taken of this situation during the screening process, provided that such jurisdictions do not rank high in terms of financial activity and do not have financial centers.

12. The Code of Conduct Group (Business Taxation) should further develop the appropriate arrangements on the practical methods and modalities on implementing these 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.
 13. *Inter alia*, the Code of Conduct Group (Business Taxation) should define, by January 2017, based on objective criteria, the duration of the reasonable timeframe, referred to in criterion 1.3 as well as the scope of application of criterion 2.2. In the context of criterion 2.2, the Code of Conduct Group (Business Taxation) should evaluate the absence of a corporate tax system or applying a nominal corporate tax rate equal to zero or almost zero as a possible indicator.
 14. The EU list of non-cooperative jurisdictions should be regularly updated, as necessary, by the Council, along these guidelines, on the basis of information that will be made available to the Commission and/or to the Code of Conduct Group (Business Taxation).
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