



**Brussels, 26 January 2017  
(OR. en)**

**5674/17**

**LIMITE**

**FISC 26  
ECOFIN 43**

**NOTE**

---

From:	General Secretariat of the Council
To:	Code of Conduct Group (Business Taxation)
Subject:	Code of Conduct Group of 25 January 2017

- Council conclusions of November 2016: follow-up work
- Outcome of proceedings: letter template and common communication line

---

In relation to the follow-up on the November 2016 Council conclusions on criteria and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes<sup>1</sup>, delegations will find attached the letter template (Annex I) and the common communication line, as endorsed by the Code of Conduct Group (Business Taxation) meeting of 25 January 2017.

---

<sup>1</sup> OJ C 461, 10.12.2016, p. 2.

To:

[credentials of the addressee

(representative of a jurisdiction concerned, accredited for relations with the EU)]

Brussels, XX January 2017

Our ref: [...]

Your Excellency,

The Council of the European Union, taking account of developments at international level, has committed as a priority to coordinated policy efforts in the fight against tax fraud, evasion and avoidance and against money laundering at EU and global level. This initiative is in line with the EU's external strategy to promote good governance standards in the tax area<sup>2</sup>.

On 8 November 2016, the Council adopted the "Conclusions on criteria and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes"<sup>3</sup>. These Conclusions contain a set of objective criteria that should be promoted internationally in relation to taxation systems of jurisdictions that are not EU Member States. These criteria, which are annexed to this letter, are based on the agreed international standards and concern the areas of tax transparency, fair taxation and implementation of anti-Base Erosion and Profit Shifting (anti-BEPS) measures.

---

<sup>2</sup> Council conclusions of 25 May 2016 on an external taxation strategy and measures against tax treaty abuse: [http://www.consilium.europa.eu/press-releases-pdf/2016/5/47244641250\\_en.pdf](http://www.consilium.europa.eu/press-releases-pdf/2016/5/47244641250_en.pdf)

<sup>3</sup> The official publication of this document can be found in the *Official Journal of the European Union*: OJ C 461, 10.12.2016, page 2.

The Code of Conduct Group (Business Taxation), set up by the Council and the Governments of the EU Member States in 1998, has so far mainly used its mandate to assess the tax measures of EU Member States in the context of the Code of Conduct for Business Taxation. On 8 November 2016 The Code of Conduct Group (Business Taxation) has been instructed by the Council to select jurisdictions to be invited to engage in a process, which will be arranged in a objective and co-operative manner, based on a common analysis against the criteria referred to above.

The Code of Conduct Group (Business Taxation), supported by the General Secretariat of the Council of the European Union, will conduct and oversee the analysis (the screening process). The European Commission services will assist the Code of Conduct Group (Business Taxation) by carrying out the necessary preparatory work for the screening process.

In this context, please note that the Code of Conduct Group (Business Taxation), in line with its mandate, takes the view that a constructive dialogue with the relevant authorities of [name of a jurisdiction[s]] in 2017, in accordance with the criteria referred to above, as further specified by the Code of Conduct Group (Business Taxation), will be important to the smooth functioning of the screening process.

It should be emphasised that the selection of jurisdictions for the 2017 screening process was based on a set of objective indicators (such as strength of economic ties with the EU, financial activity and stability factors) and that this selection does not prejudge the outcome of this process.

In order to ensure a smooth functioning of the screening process, and engage in the dialogue on clarification of specific aspects and relevant commitments, it would be helpful if these relevant authorities could forward the contact details of their representatives for this dialogue with the EU expert teams set up by the Code of Conduct Group (Business Taxation) to the e-mail address provided in this letter.

These representatives or contact persons from the relevant authorities will be approached in due course, to clarify any aspects in respect of which the above-mentioned expert teams have further queries, further to the preliminary analysis of the information that is already available (such as information in the public domain, reports in the context of the Global Forum on Transparency and Exchange of Information for Tax Purposes and the OECD Inclusive Framework for Tackling Base Erosion and Profit Shifting). This work should lead to a clearer understanding of the legislation and practices in the jurisdictions concerned in relation to the screening criteria referred to above.

During this process, full account will be taken of the specific situation of jurisdictions concerned with regard to the screening criteria, on the basis of the information that is or becomes available to the expert groups set up to conduct this analysis. Stock will also 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.

While the analysis is still under way, further written contacts and, where necessary, bilateral discussions will be established in the months ahead, with a view to engaging further in the dialogue, and suggesting and exploring solutions to facilitate, where relevant, that taxation systems or tax-related arrangements in these jurisdictions are compliant with the abovementioned good governance criteria.

While the key objective of this process is to promote a high level of international standards of tax transparency, fair taxation and implementation of anti-BEPS measures, the Council will, by the end of 2017, and following the necessary preparatory steps, endorse an EU list of those jurisdictions that it considers not to be cooperative at that stage. To be noted that there is no such EU list today. These jurisdictions will be given a clear explanation of the reasons for such listing and of the steps which would secure de-listing.

Please also note that this letter, or any subsequent invitation of a jurisdiction concerned to a further dialogue, shall be without prejudice to the outcome of our discussions.

Should you have any further practical questions relating to this process, please use one of the following contacts:

[regular mail address of GSC]

[specific e-mail of GSC]

[specific phone number of GSC]

We look forward to constructive work with your authorities on this important global challenge.

[courtesy clause]

[...]

The Chair of the Code of Conduct Group (Business Taxation)

## **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 taxation<sup>4</sup>, 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.

## 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 assessment<sup>5</sup> for the effective implementation of the agreed OECD anti-BEPS minimum standards.

---

<sup>4</sup> OJ C 2, 6 January 1998, p. 2.

<sup>5</sup> Once the methodology is agreed, the wording of the criterion will be revised by the Council accordingly.



**Common communication line**

Notwithstanding public pronouncements already made by Council on the work that is ongoing in this area, the issuance of letters to commence dialogue with third countries is likely to trigger a material surge in the amount of queries to Member States. In accordance with point 4 of the November 2016 Guidelines, “appropriate transparency of this process” is to be ensured.

In this respect, and without prejudice to the respective sphere of competence of the Member States and the EU, it would be appropriate for Member States to take a common stand and to adopt a common communication line in contacts with third countries; particularly till further public pronouncements are made by the Council. A unified voice will not only facilitate contacts but also ensure that the analysis and fact-finding work to be undertaken by the Expert Panels in the months ahead can take its course in an objective manner.

The following common communication line was endorsed at the Code of Conduct Group (Business Taxation) meeting of 25 January 2017:

**The Process leading to the establishment of an EU list of non-cooperative jurisdictions**

- Today, there is no EU-list of non-cooperative jurisdictions. In November 2016, the Council adopted the "Conclusions on criteria and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes"<sup>6</sup>, which contain a set of criteria, which should be promoted internationally in relation to taxation systems of jurisdictions that are not EU Member States. These concern three areas: tax transparency, fair taxation and implementation of anti-Base Erosion and Profit Shifting (BEPS) measures;
- The outcome of this process will be the result of a constructive dialogue undertaken in partnership and transparency with the third countries concerned;

---

<sup>6</sup> The official publication of this document can be found in the Official Journal of the European Union: OJ C 461, 10.12.2016, page 2.

- The Code of Conduct Group (Business Taxation), set up by the Council and the Governments of the EU Member States in 1998, has been mandated by the Council to conduct and oversee the screening process, supported by the Council's secretariat. The Commission's services will assist the group in carrying out the necessary preparatory work for the screening process.
- In conducting and overseeing the screening process, the Code of Conduct Group (Business Taxation) will also continue to refine, based on objective criteria, further practical considerations in giving effect to the November 2016 ECOFIN Council Conclusions, inter alia the application of the criterion which requires that jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.
- In order to ensure a smooth functioning of the screening process, Experts Panels set up for this analysis and working under the aegis of the Code of Conduct Group (Business Taxation) will engage in the technical dialogue with the respective jurisdictions in order to seek clarification of specific aspects and relevant commitments. This work will lead to determining the situation in the jurisdictions concerned with regard to the screening criteria referred to above. Pertinent information concerning a jurisdiction's status with respect to the above mentioned screening criteria should thus be made available to these Expert Panels.
- In this process, full account will be taken of the situation of jurisdictions concerned and groups thereof with regard to the screening criteria, on the basis of the information that is or will become available to the Expert Panels . This aspect is particularly pertinent with respect to 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.
- Given that developing countries may lack the capacity to implement tax transparency and anti-BEPS minimum standards according to the same timeline as developed countries, due consideration will also be given to their situation during the screening process.

- It is important to stress that the screening of a jurisdiction or its invitation to a dialogue is without prejudice to the outcome of the screening process. Furthermore, the decision by Council to commence dialogue and screening with a given jurisdiction does not presuppose any element of non-compliance by the third country concerned. Building on the European Commission`s Scoreboard published on 12 September 2016, the Council believes that the appropriate way forward is to commence dialogue with all those jurisdictions which, in view of economic and financial ties, are mostly relevant for the EU and its Member States without any prejudgment on the outcome of this exercise.
  
  - Finally, it is important to recall that the key objective of the exercise that would lead to a common EU list (to be drawn-up by end-2017) is to promote tax good governance principles common to EU Member States.
-