Joint follow-up to the European Parliament resolution with recommendations to the Commission on bringing transparency, coordination and convergence to corporate tax policies in the Union, and the European Parliament resolution on tax rulings and other measures similar in nature or effect, adopted by the Commission on 16 March 2016

1. Rapporteurs: Anneliese DODDS (S&D/UK) and Luděk NIEDERMAYER (EPP/CZ) for resolution A8-0349/2015 / P8_TA-PROV(2015)0457; and Elisa FERREIRA (S&D/PT) and Michael THEURER (ALDE/DE) for resolution A8-0317/2015 / P8_TA-PROV(2015)0408

2. EP reference numbers: A8-0349/2015 / P8_TA-PROV(2015)0457 (prepared as 2015/2010 (INL)); and A8-0317/2015 / P8_TA-PROV(2015)0408 (prepared as 2015/2066 (INI))

3. Date of adoption of the resolution: 16 December 2015 and 25 November 2015

4. Subject: Bringing transparency, coordination and convergence to corporate tax policies; Tax rulings and other measures similar in nature or effect

5. Competent Parliamentary Committees: For resolution A8-0349/2015 / P8_TA-PROV(2015)0457 – Committee on Economic and Monetary Affairs (ECON); for resolution A8-0317/2015 / P8_TA-PROV(2015)0408 – Special Committee on Tax Rulings (TAXE)

6. Brief analysis/assessment of the resolutions and requests made:

Parliament's resolution of 16 December 2015 on "Bringing transparency, coordination and convergence to Corporate Tax policies in the Union" (hereafter referred to as "ECON" resolution) is a **legislative own initiative report (INL)** with Article 225 TFEU as legal base, the drafting of which was authorised by Parliament in December 2014. This resolution follows up on the recommendations included in **the non-legislative (INI) resolution of 25 November 2015 of** Parliament's temporary Special Committee on Tax Rulings (hereafter referred to as "TAXE" resolution); see in particular point 175 of that resolution where TAXE called for such a follow-up.

Both the "ECON" and "TAXE" resolutions include a large number of calls for legislative proposals to be presented by the European Commission aiming at combatting tax avoidance, evasion, aggressive tax planning and harmful tax competition and for a more coordinated, joint and decisive action by Member States and globally to this effect, for example with respect to implementing OECD/ G20 base erosion and profit shifting (BEPS) recommendations. The resolutions also call for the design of fair, efficient and growth-friendly corporate taxation adapted to the new conditions for cross-border business and based on the principle that companies should pay taxes in the country where profits are generated, for example by the introduction of a mandatory common consolidated corporate tax base.

The Commission has closely followed the work of Parliament preceding the adoption of its two resolutions and has taken due consideration of Parliament's discussions and calls. In this respect, the various elements of the Anti-tax Avoidance package which was

adopted by the Commission on 28 January 2016 will already address a number of requests for legislative action.

7. Response to requests and overview of action taken, or intended to be taken, by the Commission:

With regard to calls for Commission action included both in the "ECON" and "TAXE" resolutions

Regarding the request to introduce a legislative proposal on mandatory, public country-by-country reporting for all sectors by MNCs (ECON A1/ TAXE 136 – 139)

The Commission proposal for a Directive of 28 January 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (COM(2016) 25) will address Parliament's request for a country-by-country reporting (CbCR) to tax authorities. This Directive would implement **Action 13 of the OECD/ G-20 BEPS** project in the EU. The CbCR requirements would apply **to all multinationals** with annual consolidated revenues of EUR 750 million or more that operate in the EU. The proposal covers **any multinational with a taxable presence in the EU**, even if the parent company is outside the EU. This would guarantee fair competition and a level-playing field between EU and non-EU Groups operating in the EU.

Concerning the request to introduce **public CbCR**, the Commission is assessing options to increase transparency towards the public on taxation as part of ongoing Impact Assessment work and, following its completion, intends to present a legislative initiative in April 2016.

The revision of the **Shareholder Rights Directive** is currently the subject of trilogue negotiations. The above mentioned Impact Assessment on public CbCR will enable the Commission to adopt its positions regarding the need to introduce further tax transparency requirements for companies. Therefore the Commission will only be able to provide its opinion on the Shareholder Rights Directive (as voted for by the European Parliament on 8 July 2015) when the impact assessment process will be completed.

Regarding the request for a proposal on a new voluntary "Fair Tax Payer" label for companies who engage in good tax practices (ECON A2/ TAXE 146)

The above-mentioned Impact Assessment on public CbCR will also explore the possibility of introducing an **EU labelling system**.

The Commission is interested in further promoting the use of fair tax payer labels as private market initiatives; however, further exploration is required of whether coordination at EU level is needed, also in view of defining criteria and benchmarks on on-going monitoring of compliance by enterprises.

The Commission agrees on the importance of Responsible Corporate Tax behaviours as part of the **Corporate Social Responsibility** (CSR) practices of any responsible EU company. Progress by enterprises will be reviewed in the follow-up process of the 2011 EU CSR Strategy, so that possible measures to improve the uptake of responsible practices by a much larger number of EU enterprises can be identified with the EU CSR public and private stakeholders.

Regarding the request to submit a proposal on Mandatory notification by Member States of new tax measures (ECON A3/ TAXE 96)

The Commission does not envisage making a legislative proposal but has indicated that this, which is also included in the OECD/BEPS Action 12, is best followed within the framework of the **Code of Conduct Group** for business taxation; in this context it should be noted that the Commission agrees that the criteria and governance of the Code need to be reformed (see the section on the Code of Conduct).

Member States' new measures that fall within the scope of the Code of Conduct for business taxation already have to be notified to the Code of Conduct Group where they are analysed and discussed. If found that they constitute harmful tax practices they are subsequently eliminated. For example, during 2014/2015, the Group agreed that existing regimes on patent boxes need to be changed and some Member States have already taken the necessary steps to begin this process. Member States must also notify the Commission of any new tax measures which might contravene the Treaty State Aid rules.

In addition, the Commission's analysis of Member States' corporate tax provisions in the **European Semester** includes a review of any rules or practices that render tax systems vulnerable to aggressive tax planning. The analysis covers tax measures affecting corporate income tax bases, such as incentives (e.g. R&D tax incentives, allowances, and other similar measures).

Finally, under the **Directive on Administrative Cooperation (2011/16/EU)**, Member States have to inform each other either automatically (for certain categories of income and capital, financial account information or cross-border rulings and advance pricing arrangements) or spontaneously if they identify certain transactions that may have an impact on the tax base of another Member State.

On **reporting requirements for tax advisory firms** to disclose to national tax authorities and seek approval for any tax schemes they develop that might be harmful, the Commission is aware that only a few Member States specifically provide for this. However, all Member States will have to report tax schemes that have been the subject of tax rulings to the tax authorities of all other Member States as from 2017, under the revised Directive on Administrative Cooperation adopted by Council in December 2015. In addition, a notification to the Commission prior to entry into force of the measure is also required for State Aid purposes, when that measure is selective and constitutes state aid.

Regarding the request to complement the amended Directive 2011/16/EU so that automatic exchange of information on tax rulings be extended to all tax rulings and to a certain extent made public (ECON A4/ TAXE 107-111)

Directive 2015/2376/EU adopted on 8 December 2015 which amends Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation already provides that **not only information on rulings with clear cross-border elements but also national tax rulings given to local entities** which could have a cross-border impact will be subject to exchanges. Information about purely national rulings is regarded as less relevant in the context of cross-border profit shifting. The administrative burden for Member States is another important factor.

The information exchanges will be made in a **commonly agreed template** which will ensure efficient use by tax administrations. The Commission only has the information

needed to monitor the proper functioning of the Directive which will enable it to provide statistics but not **to summarise the main cases**.

By 2017, the Commission will, under the Directive, set up and administer **a secure central directory** to facilitate the exchange of information between the participating tax authorities on behalf of the Member States. The Commission will follow closely the implementation of the Directive by Member States and if needed take necessary measures in line with its Treaty obligations.

In 2015 the Commission initiated preliminary discussions with Member States on a potential common **framework at EU level for the issuing of tax rulings** including common criteria for the possible development of guidelines on the conditions and rules for the issuance of tax rulings by Member States. The discussion is ongoing and will also take further conclusions from the state aid angle into account.

As far as **more transparency** is concerned, in 2018 the Commission will review the implementation of the Directive and will evaluate its functioning in practice. In the same year, the Commission will provide a report to Member States and, if appropriate, consider further transparency requirements, e.g. the **setting up of a clearing house**.

Regarding the request to submit a legislative proposal on transparency of customs-free ports (ECON A5)

As far as VAT and customs are concerned, setting a maximum time limit during which goods can be sold VAT or customs-duty exempt in customs free ports would be disproportionate. Goods covered by customs free zone arrangement are non-Community goods (apart from Community goods placed in a free zone with the view of benefiting from customs measures that apply upon exportation) which are under customs supervision, in any case. However, targeted information exchange between customs and tax administration could be envisaged in case of suspicion of tax fraud. Therefore, the Commission does not envisage taking any action in this respect.

For direct taxation the main question would seem to be transparency. A transaction undertaken in a free port would in principle fall within the direct taxation system of the Member State where the free port is located. Where such a Member State provides preferential direct tax treatment for such transactions, this Member State would have to notify the measure to the EU Code of Conduct on Business Taxation which would have to assess its compatibility with the criteria of the Code. In addition, a notification to the Commission prior to entry into force of the measure is also required for State Aid purposes, when the measure constitutes state aid.

The Commission will explore with Member States how customs and tax legislation interact in the particular case of customs-free ports.

Regarding the request for the Commission to create a harmonised methodology to estimate the corporate tax gap (ECON A6/ TAXE 122)

As announced in the March 2015 Communication on tax transparency to fight tax evasion, the Commission will work with Member States to explore how more comparable and reliable data on the scale and economic impact of tax evasion and avoidance could be compiled. To this end, a Fiscalis project group has been launched, with a view to encouraging greater transparency between Member States on their national tax gap data and the methodologies for calculating it, in case they do so.

Regarding the request to submit a proposal for the protection of whistleblowers (ECON A7/ TAXE 144-145)

The Commission acknowledges the importance of protecting whistleblowing for promoting, amongst others, good governance, privacy, freedom of expression and the fight against corruption. The Commission is closely following the evolving jurisprudence of the European Court of Human rights on whistleblowing, as well as the Council of Europe discussions on a possible framework convention on this issue, and has taken note of the Council of Europe Recommendation on the Protection of whistleblowers (CM/Rec(2014)7). The Commission is monitoring developments in different areas where the EU has competences, such as competition law, trade and the internal market, including with a view to assess the possible need for action at EU level where such action – within the scope of the EU competences – could have added value in terms of improving protection of whistleblowers.

More specifically, the Commission agrees that whistleblowers can play an essential role in preventing and detecting misconduct such as corruption. The 2014 EU Anti-Corruption Report covers whistleblowing for all EU countries, and this remains an important topic in bilateral discussions with Member States on the follow-up to the report. The Commission has also funded research in this area and projects to support whistleblowers, and organised an experience-sharing workshop for Member State experts on whistleblowing in July 2015. One of the conclusions of this workshop was that whistleblowing requires multiple channels (internal and external), as well as professional advice and support. Other points discussed included the "public interest" or "good faith" requirements which are potentially problematic, and the question whether the whistleblower's motives should be relevant. The Commission is currently supporting efforts to improve protection at national level.

Moreover, in the context of the ongoing negotiations to adopt the Regulation setting up the European Public Prosecutor's Office (EPPO), the Commission will seek to ensure that whistleblowers who report suspected EU-fraud and corruption cases to the EPPO receive the necessary protection in accordance with national law.

The co-legislators reached a provisional political deal on 15 December 2015, after trilogue discussions, as regards the Commission proposal for a Directive on the protection of know-how and business information (trade secrets) against their unlawful acquisition, use or disclosure: i.e. in cases where there is a dishonest conduct or the breach of a legal or contractual obligation to keep a trade secret confidential or not to use it (COM(2013) 813 – 2013/0402 (COD)). The agreed compromise text amends the exception clause proposed by the Commission in the event of whistleblowing activity. Following the amendment, any claim on an alleged unlawful acquisition, use or disclosure of trade secrets should be dismissed when such (otherwise allegedly unlawful) conduct was carried out: "for revealing a misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest." This Directive does not establish a comprehensive legal regime on whistleblowing activity, modalities and procedures for reporting information to public authorities or other designated bodies, or conditions for disclosing information to the public, protection of whistle-blowers, etc.; Member States remain free to establish rules on those issues. Nor does this Directive constitute an obstacle to the application of other rules that may be relevant in that context and, for instance, establish specific duties of care regarding the processing of information, e.g., privacy law, rules on professional secrecy, rules on protection of State secrets. The Legal Affairs Committee of the European Parliament approved the compromise text on 28 January 2016; the vote of the compromise text by the European Parliament in plenary has been provisionally scheduled

for 12/13 April 2016. A positive vote would normally allow for a first reading adoption by Council.

Article 99d of the UCITS V Directive provides an obligation for Member States to establish reliable mechanisms to encourage the reporting of potential or actual infringements of national provisions transposing the UCITS Directive to competent authorities. ESMA has to provide for one or more secure communication channels for whistleblowing which have to meet confidentiality and data protection requirements. UCITS does not provide for harmonisation of fiscal provisions. However, the experience that ESMA is acquiring to establish the communication channels could be useful also in that context.

Article 32 of the Market Abuse Regulation (EU) No 596/2014 requires that Member States establish effective mechanisms to enable reporting of infringements under this Regulation to competent authorities. It contains certain provisions on the protection of persons reporting such infringements. The Commission Implementing Directive (EU) 2015/2392 of 17 December 2015 further specifies procedures and arrangements for the protection of whistleblowers and of the reported persons, including the arrangements for reporting and for following up reports, and measures for the protection of persons working under a contract of employment, as well as measures for the protection of personal data.

Article 30e of the Audit Directive requires Member States to ensure that effective mechanisms are established to encourage the reporting of breaches of the Audit Directive and of the Audit Regulation to competent authorities. It contains certain provisions on the protection of both the person reporting such breaches and of the reported person. The Directive also requires Member States to ensure that audit firms establish appropriate procedures for their employees to report actual or potential breaches of the Directive and of the Regulation internally through a specific channel.

Regarding the request to submit a proposal on a Common Consolidated Corporate Tax Base (ECON B1/ TAXE 100, 116 – 120)

The Commission aims at re-launching the Common Consolidated Corporate Tax Base (CCCTB) initiative (at least for multinational enterprises) before the end of 2016. A proposal for an optional CCCTB has been pending in Council since 2011. The re-launch will consist of putting forward a proposal for a mandatory scheme and taking a staged approach: as a first step Member States should secure the common rules for computing the tax base (Common corporate tax base – CCTB) and as a second step, provide for consolidation (CCCTB). The exact scope of the revised proposal is yet to be agreed. The Commission takes note of Parliament's proposal for a temporary exemption for small and medium sized enterprises.

The Commission aims at ensuring that profits are taxed where they are earned. To this end, the **formula apportionment method** should comprise many different factors (including labour, assets and sales) that give appropriate weight to the interests of all the Members States involved and reflect in a general way the value creation of the companies active in the EU.

A **cross-border loss relief regime** is envisaged as an integral part of the first step (i.e. CCTB) in order to balance out the drawbacks resulting from the absence of consolidation. The Commission's proposal for such a regime will ensure that it is structured in a way which makes it sufficiently robust to prevent circumvention. This

cross-border loss relief regime would be automatically cancelled when the full CCCTB enters into force.

Concerning the **single set of generally accepted accounting principles suggested by Parliament**, it should be noted that a new Accounting Directive was adopted in 2013 with a view to simplify and clarify the financial statements of EU companies and to make them more comparable. The CCCTB rules would not affect the preparation of individual or consolidated financial statements. The harmonisation proposed under the CCCTB (see IP/11/319) would only involve the computation of the tax base. Therefore, Member States would be able to maintain their national rules on financial reporting as derived from the Directive, and the CCCTB system would introduce autonomous rules for computing the tax base of companies. From the perspective of the re-launch of the CCCTB this does not – in any way – affect the relation between the common tax rules and financial statements. Given this topic has extensively been discussed in the past, and notably during the preparatory period which led to the CCCTB proposal of 16 March 2011, it is not opportune to include it in the assessment of impact of the re-launched CCCTB.

The Commission is currently examining the possibility of introducing **specific tax incentives for specifically defined R&D** in its revised CCCTB proposal. It will also examine the inclusion of a new definition of a **permanent establishment** that is capable of dealing with the business models of the digital economy and that would not be easily circumvented.

The re-launched CCCTB proposal will be accompanied by an impact assessment. It will build on and refine the previous economic analysis by also expanding on the anticipated effects of new elements, such as addressing debt bias in corporate taxation and further promoting R&D. Finally, it will also include the stakeholders' input to the Commission's public consultation.

Regarding the request to submit a proposal to incorporate the Code of Conduct Group into the Community method and to strengthen its mandate and improve its transparency (ECON B2/ TAXE 124 – 126, 128, 133)

The Commission will not present a legislative proposal to incorporate the Code of Conduct Group into the Community method, because Member States should first be given the opportunity to review the Code. However, the Commission agrees that the criteria and governance of the Code need to be reformed and has publicly recommended this.

Member States are discussing the governance of the Code of Conduct Group under the Dutch Presidency, which will cover issues such as transparency and effectiveness. Member States intend to discuss the mandate of the Group (i.e. its tasks) during the second half of 2016.

Regarding the suggestion for a high-level ***tax policy committee*** like the Economic and Financial Committee (EFC) (which has also been proposed by President Juncker), this is primarily a matter for the Council to decide, but the Commission would in principle support this idea.

Regarding the request for guidance/ future legislative proposal on patent boxes and other preferential regimes (ECON B3/ TAXE 117, 121)

Member States have accepted the new "modified nexus approach" as the future basis for patent boxes. The Commission will, in the framework of the Code of Conduct Group, **continue providing guidance** to Member States on how to implement patent box regimes in line with this new approach so as to ensure that they are not harmful, and (together with the Code of Conduct Group) will carefully monitor implementation. If Member States are not applying the new approach appropriately, then the Commission will consider introducing legislation to ensure its proper implementation. Any such possible proposal would need to be compliant with existing EU law requirements (i.e. Treaty freedoms) and with the general principles of EU law (e.g. subsidiarity). Should there be geographic restrictions to the access to tax advantages provided for by means of patent box regimes, for instance, these would need to be duly justified by overriding reasons of general interest.

The Commission has not brought forward **harmonising measures regarding the promotion of R&D and patent boxes** due to Member States' agreement on the nexus approach. No measure advancing the **abolition of the existing patent box regimes** has been brought forward for the same reason.

Regarding the request to submit a proposal on Controlled Foreign Corporation rules (ECON B4/ TAXE 121)

The recent Commission Proposal for a Directive of 28 January 2016 against tax avoidance practices that directly affect the functioning of the Internal Market (COM(2016) 26 final – Anti-Tax Avoidance Directive) includes controlled foreign corporation (CFC) rules that are conceived in order to provide a European common approach of the OECD best practice recommendations and at the same time ensure that the rules are EU law compliant.

Regarding the request to submit a proposal to amend the Directive 2011/16/EU in order to improve Member States' coordination on tax audits (ECON B5)

The Commission will not immediately bring forward a proposal to amend the Directive on Administrative Cooperation (2011/16/EU), because experience and feedback from Member States demonstrate that existing tools are fit for purpose. The primary focus at this stage should be stepping up cooperation between Member States on the basis of the existing acts and instruments in order to reap all the benefits of the existing tools. The Commission started discussions with Member States in 2015 under the Fiscalis programme in this regard, and organised a first joint Direct Tax-VAT workshop with Member States to raise awareness, share experience and best practices, and promote greater concrete cooperation.

Furthermore, **to facilitate the exchange of information and the performance of multilateral controls**, the Commission has already **developed a Multilateral Control (MLC)-platform** on which the Member States' tax administrations can exchange best practices, set up procedures to initiate MLCs and draft an MLC guide. With the assistance of the Joint Transfer Pricing Forum, the Commission is, at the current stage, **examining whether joint audits could be of specific value** for addressing **transfer pricing risks** and for preventing **transfer pricing disputes**. To conclude, in the area of **VAT and direct taxation,** the Commission is currently exploring whether the joint audit instrument could be an effective tool for cooperation to address situations where simultaneous controls are not adapted.

Regarding the request to submit a proposal for the introduction of a common European Tax Identification Number (ECON B6/ TAXE 141)

In 2017, after the completion of its ongoing feasibility study, the Commission will decide on the need to make a legislative proposal and its exact scope. This study explores a series of options (including EU Tax Identification Numbers – TINs – and Legal entities identifier – LEI) to enhance the identification of taxpayers involved in cross-border transactions. Already in 2016, the Commission will publish in the Official Journal the format and structure of the national TINs of the Member States. It will also update the TIN on the EUROPA portal in order to ensure that, when applicable, the on-line check module allows validation of the structure and syntax of TINs of individuals for all Member States.

Regarding the request to submit a proposal to allow the Union to speak with one voice in relation to international tax arrangements (ECON C1/ TAXE 151-152, 154)

The Commission does not currently envisage presenting such a legislative proposal in relation to international tax arrangements. However, on 28 January 2016, the Commission adopted a Communication on an External Strategy for Effective Taxation (COM(2016) 24) (External Strategy). This sets out measures to promote tax good governance internationally, list third countries that refuse to engage in good governance and further support developing countries in the area of corporate taxation through increased financial and technical support. It also proposes a new and more effective approach for the inclusion of tax good governance clauses in EU agreements with third countries.

The Commission agrees with the recommendation that it should more systematically receive **authorisation to negotiate tax agreements with third countries**, notably in the area of administrative cooperation, where the EU has exercised its competences since 2004 through the signature of the agreements on taxation of savings with Switzerland and four other EU neighbours. These agreements have already been, or will be, brought into line with the EU and international developments on automatic exchange of financial account information. An EU-wide approach makes it easier to achieve full reciprocity in negotiations with third countries. However, it is difficult to achieve unanimous consensus within the Council on this matter: despite the positive experience of the 2014 EU agreement with the French dependent territory of Saint-Barthélemy, in 2015 it was not possible to obtain unanimous support from Member States for a Commission offer to negotiate agreements on behalf of the EU with dependencies of the UK and the Netherlands. These agreements would have allowed for a uniform application of the Global Standard on automatic exchange of information.

In the **field of VAT**, in which the EU has exclusive competence, the Commission has opened negotiations for an EU agreement for administrative cooperation and recovery of claims with Norway. In the field of administrative cooperation, the Commission is also pursuing the objective of "one single European voice" in the OECD.

On monitoring of the agreed phasing out of some harmful tax measures in Switzerland, the Commission will do this in the framework of the Code of Conduct Group, as agreed in the October 2014 joint statement between the Member States and Switzerland.

Regarding the request to submit a proposal to establish cogent criteria to define "tax havens" (ECON C2/ TAXE 96, TAXE 122[1], 149-150)

The recent External Strategy sets out a **common EU approach towards assessing, screening and listing third countries for tax purposes.** This approach is founded on detailed good governance criteria and a robust screening process, to identify those third countries that pose real risks to Member States' tax bases (i.e. "tax havens"). It will ensure that tax competition vis-à-vis third countries takes place within a clear framework of rules. The current "pan-EU list" is a consolidated version of Member States' national lists and is only intended as an interim solution while work proceeds towards the goal of a common EU approach. This EU approach will be founded on clear, coherent and internationally recognised tax good governance criteria, which are consistently applied in relation to third countries. It will not only have a stronger deterrent effect for "tax havens" but would also ensure greater clarity and legal certainty for businesses and the EU's international partners.

The Commission supports Parliament's recommendation to use a comprehensive set of indicators to identify third countries which may pose risks to Member States' tax bases. As outlined in the Strategy, the Commission will prioritise third countries for screening on the basis of a scoreboard of indicators to determine the potential impact of jurisdictions on Member States' tax bases (such as economic ties with the EU, the level of financial activity and institutional and legal factors). The first findings of the scoreboard will be presented to Member States in the Code of Conduct Group by autumn 2016. As the next step, on the basis of the scoreboard, Member States should decide which jurisdictions should be assessed against the EU's updated good governance criteria which are set out in Annex I of the External Strategy. In the final step, third countries found to be problematic on tax matters will be included in a common EU list.

The External Strategy also sets out a transparent, coherent and fair EU framework to apply common defensive measures where necessary.

The Commission commits to **regularly reviewing any list** of third countries that is published at EU level – whether this is the current consolidated version of Member States' national lists or a future common EU list.

Regarding the request to submit a proposal for a catalogue of Counter-measures towards companies which make use of tax havens (ECON C3/ TAXE 153)

The anti-avoidance measures in the Anti-Tax Avoidance Directive will already remove advantages for companies working through tax havens. These measures should ensure that, even when companies try to shift profits offshore, they will still be effectively taxed. In addition, the EU listing process in the External Strategy will help Member States to take a stronger stance against tax havens and, where necessary, apply defensive measures against them. Such measures would also impact the companies which make use of these tax havens.

Art. 140 (4) of the EU Financial Regulation No 966/2012 already prohibits EU funds from being invested in or channelled through entities in third countries which do not comply with international tax transparency standards. The Financial Regulation also

[1] The Strategy will address all relevant low or no tax jurisdictions and countries with harmful tax regimes, whether they are dependent territories or not.

provides that EU international financial institutions (IFIs)[2] must transpose these good governance requirements in their contracts with all selected financial intermediaries.

In the External Strategy, the Commission notes that these provisions could be extended further than the current transparency requirements, to also encompass the EU's principles for fair tax competition. In the past, the Commission has blocked certain projects submitted by the IFIs involving unjustifiably complex tax arrangements due to harmful or zero tax regimes in third countries. The Commission intends to integrate the EU's updated tax good governance standards – including fair tax competition – into the Financial Regulation, as part of its ongoing revision.

Regarding the request to submit a proposal on a permanent establishment (ECON C4/ TAXE 121)

As indicated above, the new legislative proposal on a CCCTB will include a new **definition of a permanent establishment** that is capable of dealing with the business models of digital economy and is resilient against attempts to artificially circumvent its application.

Furthermore, the recent Commission Recommendation of 28 January 2016 on the implementation of measures against tax treaty abuse (C(2016) 271) already explicitly encourages Member States, in their tax treaties, to implement the new Article 5 of the OECD Model Tax Convention as proposed in the report on **BEPS Action 7** in October 2015 (so as to address artificial avoidance of taxable presence in the form of a permanent establishment). The Commission addresses them in a Recommendation rather than a Directive because, as opposed to purely national rules, tax treaties are negotiated agreements between two (or more) countries via which the contracting states allocate taxing rights amongst themselves.

Abuse[3] through letter box companies is covered by the anti-abuse rules in the recent proposal for a Directive COM(2016) 26. The rules are designed to deal with artificial arrangements.

Regarding the request to submit a proposal for EU guidelines on transfer pricing (ECON C5/ TAXE 95, 112, 120)

The 2015-2019[4] work Programme of the EU Joint Transfer Pricing Forum (JTPF) focuses on the development of good practices that ensure how the OECD's fairly broad guidelines can actually be applied to the specific situation in the EU. These good practices will aim at ensuring the appropriate allocation of resources and will take into account the compliance burden the OECD principles create for tax administrations and companies. The JTPF also foresees monitoring and updating the "Guidelines for Advance

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[2] European Investment Bank, European Investment Fund and Global Energy Efficiency and Renewable Energy Fund.

[3] As regards abuse, the fight against letterbox companies which are used exclusively for tax evasion purposes should not lead to the stigmatisation of company forms. There are many reasons why companies are established abroad. Legitimate reasons for establishment should be protected. The Court of Justice has ruled in case Inspire Art (Case C-167/01) that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only or principally in the other Member State is not sufficient to prove the existence of abuse or fraudulent conduct.

[4] http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm

Pricing Agreements in the EU" from 2007 as regards how advance pricing agreements can be a tool for providing certainty *ex-ante*.

The new G20/ OECD guidelines on Transfer Pricing should help link profits to the economic activities which generate them. The Commission, with the assistance of its Expert Group, the JTPF, will monitor Member States' implementation of the new rules developed under the G20/ OECD BEPS project and the implications of these rules, and it will, if appropriate, consider a legislative proposal.

Regarding the request to submit a legislative proposal on hybrid mismatches and conduct further analyses and studies (ECON C6/ TAXE 122)

The recent Commission proposal for a Directive of 28 January 2016 against tax avoidance practices (COM(2016) 26) already addresses the problem of hybrid mismatches within the EU, including rules to prevent double non taxation of the income of hybrid entities and hybrid financial instruments.

The study on structures of aggressive tax planning carried out for the Commission sets out seven major structures that companies use to avoid taxation, including hybrid mismatches. It also identifies the provisions in national tax systems that facilitate such tax avoidance.

Regarding the call to present a proposal to change the EU State Aid regime as it relates to tax (ECON C7/ TAXE 130, 131, 132, 133, 134)

The Commission will provide **guidance on the application of the State Aid rules** to tax planning practices of companies.

The Commission will publicly identify in individual decisions tax measures that are not compatible with the State Aid rules.

In October 2015, the Commission took its final decisions on tax rulings for Fiat in Luxembourg and Starbucks in the Netherlands. In January 2016, it took a negative decision on the excess profits rulings scheme in Belgium. Its investigations into tax rulings for Apple in Ireland and Amazon and McDonalds in Luxembourg are on-going and remain a top priority for the Commission.

The Commission will continue analysing and assessing all the information that it has at its disposal on tax rulings in the Member States. It will open State Aid investigations whenever there is evidence that tax rulings give selective advantages to companies and distort competition in the Internal Market.

With regard **to sharing best practices on tax rulings with Member States**, the Commission will give clarity to Member State as to the compliance of tax policies with the State Aid rules with further guidance, and with its further decisions on State Aid cases. The Commission stands ready to assist the Member States and the tax agencies in sharing lessons how they can avoid that tax rulings that they grant amount to incompatible State Aid.

The rules for **recovery of State Aid** are based on long-standing jurisprudence of the EU Courts under the Treaty provisions on State Aid. The Commission's objective is to close some of the most common legal loopholes that can give rise to incompatible State Aid. The Commission will continue to work with the other institutions on the Anti-Tax Avoidance Package and on other initiatives with the core aim of ensuring that companies pay taxes where they make their profits.

Regarding the call to present a proposal to amend Council Directive 90/435/EC, Directive 2003/49/EC, Directive 2005/19/EC and other relevant Union legislation and introduction of a general anti-abuse rule (ECON C8/ TAXE 120)

The Commission proposal for a Directive of 28 January 2016 against tax avoidance practices (COM(2016) 26) includes a general anti-abuse rule for arrangements that are "wholly artificial" (non-genuine) and therefore should not affect the applicability of specific anti-abuse rules.

The Commission has proposed a stronger anti-abuse provision in the **Interest and Royalty Directive (2003/49/EC)** in the Commission's amending proposal concerning that Directive (COM(2011) 714), in line with its proposal for the Parent-Subsidiary Directive (2011/61/EU) as amended (2015/121/EU). In addition, the Commission shares the view that in order to prevent companies from using this legislation to enjoy double non-taxation, effective taxation of the payment should be required for the exemption from withholding tax, as is currently being discussed in Council.

The Commission will consider the amendment of the **Mergers Directive** (Council Directive 2009/133/EC of 19 October 2009, which codifies the Directive 90/434/EEC and its subsequent amendments, including Directive 2005/19/EC) in the same light as for the Interest and Royalty Directive. In relation to additional transparency obligations for new measures, these are addressed by the Directive on Administrative Cooperation and the Code of Conduct.

Regarding the call to present a proposal on improving cross-border taxation dispute resolution mechanisms (ECON C9/ TAXE 131, 138)

The Commission will, by summer 2016, bring forward a proposal on improving the current mechanisms to resolve cross-border taxation disputes in the Union. An Impact Assessment is being prepared to examine the possible solutions, and upon its completion the Commission will decide on the best approach.

Regarding the call to present a proposal to avoid profits leaving the Union untaxed (ECON C10/ TAXE 151)

The proposal adopted by the Commission on 28 January 2016 against tax avoidance practices (COM(2016) 26) introduces new measures to ensure that all profits generated within the Union are effectively taxed within the Union. These measures include exit taxation rules, a switch-over clause, a general anti abuse rule, interest limitation rules, controlled foreign companies rules, and a framework to tackle hybrid mismatches.

Regarding the additional measures to address the tax gap (ECON D1/ TAXE 113, 114, 123, 140, 167)

Regarding **VAT administration** ***(ECON D1/ TAXE 123)***, Article 12 of Council Regulation 1553/89 on the definitive uniform arrangements for the collection of own resources accruing from VAT requires the Commission to submit a report to the European Parliament and the Council every three years on the procedures applied in the Member States for registering taxable persons and determining and collecting VAT, as well as on the modalities and results of their VAT control systems. Within this framework, the Commission will therefore continue to evaluate the functioning of Member States' VAT administration in order to stimulate improvements, continue to facilitate the exchange of information on administrative practices and identify best practices, support Member States in their efforts to modernise VAT administration and

enhance compliance and facilitate the provision of technical assistance to requesting Member States. In order to make the VAT regime really tailored to the Single Market and make it simpler, more robust and fraud-proof, in March 2016 the Commission will adopt an Action Plan on VAT.

Tax compliance and the **efficiency of tax administrations** are also monitored in the context of the European Semester.

No initiatives on **tax amnesties** ***(ECON D1/ TAXE 167)*** are envisaged at this stage. Tax amnesties are a matter of national competence, and such schemes show significant specificities and differences from one Member State to another. The national economic context in which such schemes are adopted also varies greatly across the EU. Therefore, EU-wide coordination or harmonisation could be very difficult and have little added value.

Certain provisions arising from the revised Recommendations of the Financial Action Task Force (FATF) have been integrated in the recently adopted 4th Anti-Money Laundering Directive (2015/849). Concretely, this Directive requires information on **beneficial ownership for companies** *(ECON D1/ TAXE 113, 114, 140)* including details of the beneficial interests, to be held by the company and, in addition, in central registers, such as commercial registers or companies' registers or public registers; different levels of access are to be granted. A similar provision also deals with beneficial ownership information regarding trusts and other similar legal arrangements. Now it is up to the Member States to swiftly transpose the Directive and make it work. The Commission is also preparing a Communication which will consider extending anti-money laundering actions to explicitly tackle terrorist financing.

<u>With regard to calls for Commission action included only in the "TAXE" resolution</u>

Alleged breach by the Commission of Art. 17 (1) TEU regarding infringements of the Administrative Cooperation Directives (TAXE 86, 89, 93)

The "TAXE" resolution claims that the Commission did not fulfil its role of guardian of the Treaties (Art. 17(1) TEU) by not taking all necessary steps to ensure that Member States comply with the Administrative Cooperation Directives (77/799/EEC and 2011/16/EU), by exchanging information on tax rulings.

Under Directives 77/799/EEC[5] and 2011/16/EU, each Member State was required to communicate information on tax rulings to other Member States only spontaneously and under certain circumstances, namely:

- if the first Member State believed that there might be a loss of tax in the other Member State, and

- provided that sending the information would not breach commercial secrecy or public policy rules.

Member States interpreted the above as giving them the right to exercise discretion when assessing whether the conditions for exchanging information were met. As a result, very few spontaneous exchanges of tax rulings occurred. However, the Commission was not

[5] It should be noted that this Directive did not impose any legal obligation on Member States to provide the Commission with reliable statistics on their exchanges, which made it very difficult for the Commission to monitor its effective application.

able to establish a **systematic** infringement of the spontaneous exchange obligation. The Commission cannot rely on a few individual cases of a questionable administrative practice, even if the infractions are sufficiently established in these cases (see Case C-156/04 Commission v Greece, paragraph 51).

In 2014, the Commission promoted a **Model Instruction** for the spontaneous exchange of cross border rulings and unilateral advance transfer pricing agreements, and this was agreed by Member States in the Code of Conduct Group. This Model Instruction sets out what information they should spontaneously exchange with regard to certain types of cross-border rulings. The Commission is monitoring the progress of this, and a proper application will ensure that there is no "gap" before the start of automatic information exchanges under Directive 2015/2376 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation. This Directive, proposed by the Commission in March 2015 and adopted by Council on 8 December 2015, incorporates the details of the Model into legislation. The Commission will ensure that Member States fully transpose this Directive, and it will monitor and evaluate its effective application.

Alleged breach by the Commission of its obligations under Art. 108 of TFEU by not launching State Aid investigations in the past (TAXE 86, 66)

The Commission has applied the State Aid rules strictly and diligently in the taxation field. In 1998 already, the Commission issued a Notice on the application of the State aid rules to measures relating to direct business taxation.

In March 2015, the TAXE Committee requested the Commission to provide information on the State Aid cases that it concluded since 1991 on tax rulings and measures similar in nature or effect. The Commission identified 65 such cases. In many of those cases, the Commission required Member States to end tax measures that were unlawful aid, or to take steps to remove competition concerns. The Commission notes that the scope of the information that the TAXE Committee requested the Commission to provide is narrower than information on all the tax-related State Aid cases that the Commission did.

The Commission assures Parliament that it acts whenever information of possible State Aid issues becomes available, including in the field of taxation. The Commission has not failed its duties under the Treaty to apply the State Aid rules.

The Commission does agree that tax secrecy can pose an obstacle to investigations of possible State Aid in the taxation area. The Commission has proposed wide ranging measures to improve transparency in this field.

Regarding the call for the Commission to urgently consent to the pending proposal for a Regulation of the European Parliament on the detailed provisions governing the exercise of Parliament's right of inquiry (TAXE 88)

The Council and the Commission have communicated their serious legal and institutional concerns with the Parliament's proposal for a Regulation on the exercise of its right of inquiry. It is for the Parliament to take the necessary steps to allow the file to be taken forward.

Regarding the calls for action on automatic exchange of information (AEOI)/ the global standard on automatic exchange of financial account information (TAXE 105, 157)

The Commission will continue to promote AEOI and to support developing countries' capacity building. The Commission is aware of developing countries' problems in meeting reciprocal conditions but prefers to assist in capacity building rather than to promote transitional derogations. As regards Commission access to an EU-wide register, this remains a potential goal but one that Member States continuously reject.

Regarding the call for the Commission to fully implement the EU Ombudsman's recommendations regarding the composition of expert groups (TAXE 129)

The Commission is preparing new horizontal rules on expert groups, responding positively to Parliament's requests and to many suggestions submitted by the Ombudsman and the Parliament. These new rules, which fully reflect the line taken by First Vice-President Timmermans in his letter to the European Ombudsman of May 2015 in response to her inquiry on expert groups, will in particular include the following measures:

- New rules will reconfirm the Commission's commitment to strive for a balanced composition of expert groups. When defining the composition of these groups, the Commission and its departments shall aim at ensuring, as far as possible, a balanced representation of relevant areas of expertise and areas of interest, as well as a balanced representation of gender and geographical origin, while taking into account the specific tasks of every particular expert group, the type of expertise required and the response received to calls for applications.

- As requested by Parliament and the Ombudsman, in order to select expert group members, the Commission will introduce **mandatory public calls for applications** including the mandate of the groups concerned, except when members of expert groups are public authorities. Such calls shall be published on the Register of expert groups. This will be a visible move to make selection procedures more transparent and inclusive, and thereby also contribute to balanced composition of expert groups.

- As requested by Parliament, the Commission will improve **conflict of interest management** in relation to experts appointed in a personal capacity, who are due to act independently and in the public interest. In particular, new provisions will be approved introducing a definition of "conflict of interest" and providing for a specific conflict of interest assessment and management to be performed by all Commission services concerned, on the basis of detailed standard declarations of interests to be completed by experts. These declarations shall be published on the Register of expert groups.

- As requested by the Parliament and the Ombudsman, the Commission will enhance **transparency** by releasing a **new version of the Register** of expert groups reflecting the above measures and ensuring publication of relevant documents produced by expert groups. In this context, for the first time synergies between the Register of expert groups and the Transparency Register will be ensured; for example, registration on the Transparency Register will be required in order for stakeholder organisations and individual experts representing a common interest to be appointed as expert group members, or to be able to continue to be members of expert groups, if appointed before the adoption of the new rules. Furthermore, the availability and reliability of data published on the Register of expert groups will be

improved, *inter alia* by introducing a meaningful and more accurate classification of members.

These positive developments clearly signal the Commission's determination to improving the management of its expert groups.

Regarding calls related to developing countries (TAXE 156, 158, 160)

The External Strategy dedicates an entire section to boosting EU support for developing countries in the area of taxation. This Strategy sets out the various actions that the EU must take to this end – including financial and technical support for developing countries to mobilise domestic resources and fight tax avoidance. It also underlines that the EU must support an inclusive international framework on tax good governance that includes developing countries and takes on board their specific needs.

Regarding the call for tax advisers (TAXE 162-163, 164)

The new Regulation on statutory audit (Regulation 537/2014, adopted in April 2014) will have an impact on the combined provision by audit firms of audit and tax services, including tax advice, to certain entities. Article 5 establishes a list of prohibited non-audit services applicable to all audit firms providing audit services to public-interest entities in the EU, in order to avoid conflicts of interest. The impact of the list of prohibited non-audit services will be assessed following the application of the Regulation in June 2016. The Commission does not intend to propose additional measures before the impact of the existing ones has been determined. The Commission notes that the Regulation also introduces a new tool to monitor developments in the market for providing audit services to public-interest entities. The Commission is working with Member States, national authorities and stakeholders, to facilitate an effective and coherent application of the new rules.

Regarding the calls for the Commission to provide support to tax administrations (TAXE 170)

Building strong and efficient tax administrations is a priority for the Commission because of their impact on the business environment but also their crucial contribution to budget consolidation. This is fully recognised under the European Semester and it is a priority under the Fiscalis work programme for 2016. The Commission is also building up capacity to support reforms of Member States' tax administrations. The training of tax officials is part of the services that the Commission offers to Member States under Fiscalis 2020.

Regarding access to documents (TAXE 174)

The Commission reiterates its willingness to be as transparent as possible towards the TAXE Committee. It is committed to the full respect of the inter-institutional agreement on relations between the European Parliament and the Commission from 2010. However, according to that agreement, the Commission can only forward confidential information from the Member States with their consent. Within this framework, the Commission has, since 3 June 2015, cooperated with the Committee to the greatest extent possible. It has sent 399 documents to the Committee and has made 59 documents available in meetings in camera during the autumn of 2015. The Commission is taking all necessary measures, including contacting Member States, to ensure full transparency. As a result, recently Member States have agreed to provide additional documents to TAXE. The Commission will continue sending documents relevant to TAXE.
