Committee on Economic and Monetary Affairs

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DRAFT REPORT

on reforming the EU policy on harmful tax practices (including the reform of the Code of Conduct Group)
(2020/2258(INI))

Committee on Economic and Monetary Affairs

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

on reforming the EU policy on harmful tax practices (including the reform of the Code of Conduct Group)
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The European Parliament,

– having regard to Articles 113, 115 and 116 of the Treaty on the Functioning of the European Union (TFEU),

– having regard to the Resolution of the Council and the representatives of the governments of the Member States on a code of conduct for business taxation, adopted on 1 December 1997[1] with the objective of curbing harmful tax competition within the European Union,

– having regard to the Commission communication of 17 June 2015 entitled 'A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action' (COM(2015)0302),

– having regard to the Commission communication of 28 January 2016 on an external strategy for effective taxation (COM(2016)0024),

– having regard to the Council conclusions of 8 March 2016 on the code of conduct on business taxation[2],

– having regard to the Commission communication of 5 July 2016 on further measures to enhance transparency and the fight against tax evasion and avoidance (COM(2016)0451), which includes an explanation of the EU listing process for non-cooperative tax jurisdictions,

– having regard to 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,

– having regard to the outcome of the Economic and Financial Affairs (Ecofin) Council meeting of 5 December 2017,

– having regard to the Code of Conduct Group (Business Taxation): work programme during the Portuguese Presidency[3] of 9 February 2021,

– having regard to the Council's most recent update to the EU list of non-cooperative

[1] Annex I to the Conclusions of the Economic and Financial Affairs (Ecofin) Council meeting of 1 December 1997 concerning taxation policy – 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, OJ C 2, 6.1.1998, p.2.
[2] https://www.consilium.europa.eu/en/press/press-releases/2016/03/08/ecofinconclusions-code-conduct-business-taxation/
[3] https://data.consilium.europa.eu/doc/document/ST-6004-2021-INIT/en/pdf

jurisdictions for tax purposes of 26 February 2021[4],

– having regard to the Commission communication of 15 July 2020 entitled ‘An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy’ (COM(2020)0312),

– having regard to the Commission communication of 15 July 2020 on tax good governance in the EU and beyond (COM(2020)0313),

– having regard to its resolutions of 25 November 2015 on tax rulings and other measures similar in nature or effect[5], of 6 July 2016 on tax rulings and other measures similar in nature or effect[6], and of 26 March 2019 on financial crimes, tax evasion and tax avoidance[7],

– having regard to its resolution of 16 December 2015 with recommendations to the Commission on bringing transparency, coordination and convergence to corporate tax policies in the Union[8],

– having regard to its recommendation of 13 December 2017 to the Council and the Commission following the inquiry into money laundering, tax avoidance and tax evasion[9],

– having regard to its resolution of 21 January 2021 on reforming the EU list of tax havens[10] and to its questions to the Commission and to the Council on reforming the EU list of tax havens (O-000082/2020 – B9-0002/2021 and O-000081/2020 – B9-0001/2021),

– having regard to the Commission’s follow-up to the above-mentioned European Parliament resolutions and recommendation[11],

– having regard to the report prepared for the Commission by the Centre for European

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[4] OJ C 331, 7.10.2020, p. 3 and OJ C 66, 26.2.2021, p. 40.
[5] OJ C 366, 27.10.2017, p. 51.
[6] OJ C 101, 16.3.2018, p. 79.
[7] OJ C 108, 26.3.2021, p. 8.
[8] OJ C 399, 24.11.2017, p. 74.
[9] OJ C 369, 11.10.2018, p. 132.
[10] Texts adopted, P9_TA(2021)0022.
[11] The joint follow-up to the European Parliament (Committee on Economic and Monetary Affairs) resolution with recommendations to the Commission on bringing transparency, coordination and convergence to corporate tax policies in the Union and the European Parliament (Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect (TAXE 1)) resolution on tax rulings and other measures similar in nature or effect, adopted by the Commission on 16 March 2016; the follow-up to the European Parliament (Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect (TAX2)) resolution on tax rulings and other measures similar in nature or effect, adopted by the Commission on 16 November 2016; the follow-up to the European Parliament (Committee of Inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion (PANA)) non-legislative resolution of 12 December 2017 on the European Parliament draft recommendation to the Council and the Commission following the inquiry into money laundering, tax avoidance and tax evasion, adopted by the Commission in April 2018; and the follow-up of 27 August 2019 to the European Parliament (Special Committee on Financial Crimes, Tax Evasion and Tax Avoidance (TAX3)) resolution on financial crimes, tax evasion and tax avoidance.

Economic Research (ZEW) GmbH entitled 'The Impact of Tax Planning on Forward-Looking Effective Tax Rates'[12],

– having regard to the report prepared for the Commission entitled 'Aggressive tax planning indicators'[13],

– having regard to the study entitled 'An overview of shell companies in the European Union', published by its Directorate-General for Parliamentary Research Services on 17 October 2018[14],

– having regard to the report of February 2021 of the UN High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (FACTI Panel) entitled 'Financial Integrity for Sustainable Development'[15],

– having regard to the ongoing work of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) on the tax challenges arising from digitalisation,

– having regard to Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (the 'Anti-Tax Avoidance Directive I' or 'ATAD I')[16] and Council Directive (EU) 2017/952 of 29 May 2017 amending the Directive (EU) 2016/1164 as regards hybrid mismatches with third countries ('ATAD II')[17],

– having regard to Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (the 'Interest and Royalties Directive')[18],

– having regard to Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (the 'Parent Subsidiary Directive')[19],

– having regard to Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (the 'Directive on Administrative Cooperation in the Field of Taxation' or 'DAC 1')[20], Council

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[12] Taxation Papers, Working Paper No 64, 31 August 2016, available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_paper_64.pdf
[13] Taxation Papers, Working Paper No 71, Institute for Advanced Studies in consortium with CPB and DONDENA, 2017, available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_papers_71_atp_.pdf
[14] Kiendl Krišto, I. and Thirion, E., *An overview of shell companies in the European Union*, European Parliament, Directorate-General for Parliamentary Research Services, Ex-Post Evaluation Unit and European Added Value Unit, 17 October 2018, available at: https://www.europarl.europa.eu/cmsdata/155724/EPRS_STUD_627129_Shell%20companies%20in%20the%20EU.pdf
[15] https://www.un.org/pga/75/wp-content/uploads/sites/100/2021/02/FACTI_Panel_Report-compressed.pdf
[16] OJ L 193, 19.7.2016, p. 1.
[17] OJ L 144, 7.6.2017, p. 1.
[18] OJ L 157, 26.6.2003, p. 49.
[19] OJ L 345, 29.12.2011, p. 8.
[20] OJ L 64, 11.3.2011, p. 1.

Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation ('DAC 3')[21], Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation ('DAC 4')[22] and Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements ('DAC 6')[23],

– having regard to Rule 54 of its Rules of Procedure,

– having regard to the report of the Committee on Economic and Monetary Affairs (A9-0000/2021),

A. whereas harmful tax practices (HTP) refer to measures put in place by States to compete with other States via preferential tax regimes or tax incentives which are isolated from the domestic economy, or tax advantages granted even in the absence of any real economic activity in their territory;

B. whereas anti-tax avoidance policies have led to a decline in preferential regimes all around the world, particularly in the Union; whereas new forms of HTP have emerged, notably through the transformation of preferential regimes into aggressive general regimes;

C. whereas aggressive tax planning means the deliberate exploitation of loopholes and mismatches within and between national tax systems to artificially reduce the tax contribution of companies, particularly multinational corporations, to national tax systems;

D. whereas concerns about HTP arose in the Union in the early 1990s when a Committee of Independent Experts was set up and delivered a report with recommendations on corporate taxation within the EU (the 'Ruding Report')[24]; whereas in 1997, the Council of the European Union established a Code of Conduct on Business Taxation (CoC); whereas a Code of Conduct Group (CoC Group) was set up within the Council to assess tax measures that could fall within the scope of the Code of Conduct;

E. whereas the CoC Group was efficient in deterring preferential tax regimes; whereas it has nonetheless failed to prevent aggressive tax competition between Member States; whereas the CoC Group remains of purely intergovernmental nature;

F. whereas the CoC Group was successful in opening a dialogue with third-country jurisdictions that are invited to repeal their HTP in order to avoid being included on an EU list of non-cooperative jurisdictions for tax purposes (the 'EU list'); whereas the current EU list only comprises 12 jurisdictions[25] and regretfully leaves out notorious tax

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[21] OJ L 332, 18.12.2015, p. 1.
[22] OJ L 146, 3.6.2016, p. 8.
[23] OJ L 139, 5.6.2018, p. 1.
[24] Available at: https://op.europa.eu/en/publication-detail/-/publication/0044caf0-58ff-4be6-bc06-be2af6610870
[25] American Samoa; Anguilla; Dominica; Fiji; Guam; Palau; Panama; Samoa; Trinidad and Tobago; US Virgin Islands; Vanuatu; Seychelles.

havens; whereas the EU list is established on the basis of criteria defined in the CoC;

Current EU policies tackling harmful tax practices in the Union

1. Stresses that tax evasion and tax avoidance result in an unacceptable loss of substantial revenue for Member States; recalls the conservative estimates by the OECD on BEPS which costs around 4-10 % of global corporate income tax revenues, or USD 100-240 (EUR 84-202) billion annually[26]; recalls that Parliament's estimates of corporate tax avoidance range from EUR 160 to 190 billion when both BEPS and other tax regimes are considered[27];

2. Notes the variety of EU instruments adopted to address HTP inside the Union, which include ATAD I and II, the Interest and Royalties Directive, the Parent Subsidiary Directive, the Directive on Administrative Cooperation in the Field of Taxation, and, in particular, DAC 3, 4 and 6 (on tax rulings, country-by-country reporting and mandatory disclosure rules for intermediaries), the various Commission recommendations to the Council, the CoC, and the Council recommendations in the framework of the European Semester dealing with aggressive tax planning;

3. Welcomes the internal and external dimension of the work conducted by the CoC Group on HTP; notes that the external dimension of HTP is mainly dealt with by the CoC Group with the application of the 'Fair Taxation' criterion; deplores the lack of coherence between the criteria on HTP applied to Member States and the tougher criteria, in particular on economic substance, applied to third-country jurisdictions in the listing process;

4. Recalls that a Forum on Harmful Tax Practices (FHTP) was created within the OECD in 1998 with the task of monitoring and reviewing tax practices, and with a focus on the characteristics of preferential tax regimes; highlights that the FHTP evaluations have a determinant impact on the qualification of harmful regimes in the EU listing process;

Recommendations for future EU work on HTP

5. Welcomes the proposed Pillar II reform of the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework), which aims to address remaining BEPS challenges and to set out rules giving jurisdictions a right to tax back where other jurisdictions have not exercised their primary taxing rights or the payment is otherwise subject to low levels of effective taxation, to combat harmful tax practices and impose an effective tax rate[28];

6. Welcomes the fact that the proposal put forward by the US Administration for 'The Made in America Tax Plan' could facilitate a deal on Pillar II by mid-2021;

[26] https://www.oecd.org/tax/beps/

[27] Drover, R., Ferrett, B., Gravino, D., Jones, E. and Merler, S., *Bringing transparency, coordination and convergence to corporate tax policies in the European Union*, European Parliament, Directorate-General for Parliamentary Research, European Added Value Unit, 24 November 2015. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2015/558773/EPRS_STU(2015)558773_EN.pdf

[28] OECD/G20 Base Erosion and Profit Shifting Project, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*, OECD Publishing, Paris, 2020, p. 12. Available at: https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-two-blueprint.pdf

7. Calls for the current scope of the CoC to be progressively updated in order to look into the general characteristics of a tax system to determine whether they have harmful effects;

8. Calls for the adoption of a definition of ‘minimum level of economic substance’, preferably based on a formulaic approach, and which would evolve progressively as reported income increases, which could be used to assess whether a tax regime is potentially harmful; highlights the economic substance requirement already included in the EU list’s ‘Fair Taxation’ criterion;

9. Calls on the Commission to produce guidelines on how to design tax incentives with fewer risks of distorting the Single Market;

10. Notes that the Commission recognises that a future minimum global taxation standard would have to be integrated into the EU actions on fair tax competition, and that if no consensus is found at global level on such a standard, it should nonetheless be included in the CoC[29]; calls on the Commission to already assess the legislative proposals that will be necessary to implement Pillar II at Union level, including a revision of ATAD and of the Interest and Royalties Directive, and the reform of the CoC and of the criteria in the EU listing of non-cooperative jurisdictions;

11. Insists that the future implementation of new EU tools against HTP should prioritise the recourse to legislative instruments and explore the provisions of the TFEU allowing decision-making to be facilitated, such as qualified majority voting;

12. Calls on the Commission to evaluate the effectiveness of patent boxes and other intellectual property (IP) regimes under the new nexus approach defined by Action 5 of the BEPS Action Plan on HTP;

Reform of the Code of Conduct on Business Taxation

13. Welcomes the fact that the CoC has assessed 480 regimes since its creation, deeming around 130[30] harmful[31]; recognises the positive effect of the Union’s work on HTP, which has led to a quasi-disappearance of preferential tax regimes within the Union;

14. Highlights the non-binding nature of the CoC; deplores the fact that Member States could maintain a harmful regime without facing any repercussions;

15. Calls for a revision of the criteria, the governance and the scope of the CoC through a legally binding instrument that should replace the current intergovernmental arrangements and allow for a transition to qualified majority voting; requires that Parliament be included in the process of designing and adopting new policies and criteria to combat HTP;

16. Considers the reform of the criteria of the CoC to be a matter of urgency and that it should assess all regimes proposing a tax rate below the future internationally agreed

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[29] COM(2020)0313.

[30] Exchange of views of the Subcommittee on Tax Matters (FISC) with Lyudmila Petkova, Chair of the Code of Conduct Group, held on 19 April 2021.

[31] https://data.consilium.europa.eu/doc/document/ST-9639-2018-REV-4/en/pdf

minimum effective tax rate in the framework of Pillar II of the Inclusive Framework as being potentially harmful, unless the revenues qualifying for a deduction or a reduced tax rate comply with robust and progressive economic substance requirements;

17. Urges an enlargement of the scope of the CoC, notably by including preferential personal income or capital tax regimes, or personal income and wealth tax regimes that could lead to significant Single Market distortions;

18. Requires that the CoC Group appear at least once a year before Parliament;

19. Welcomes the publication of the biannual reports of the CoC Group to the Council; believes that a dedicated online tool should be created to avoid relying only on Council conclusions to retrieve essential information about tax policy at EU level;

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20. Instructs its President to forward this resolution to the Council and the Commission and the governments and parliaments of the Member States.

EXPLANATORY STATEMENT

The phenomenon of aggressive tax competition became a concern for the Union already in the early 1990s as potentially putting at risk the integrity of the Single Market. In order to fight against harmful tax practices the Union adopted in 1997 a Code of Conduct on Business Taxation followed by the setting up of a Code of Conduct Group to assess tax measures that could fall within the scope of the Code of Conduct.

At a time when new challenges are emerging, such as the globalisation and digitalisation of the economy and the increased role of multinational enterprises (MNEs) in the global economy, the Union continues to have a significant role to play in curbing unfair tax competition. It is essential not only that Member States cooperate better between them and increase transparency in tax matters, but also that they build up consensus around common objectives in this area, in particular the regulation of financial markets and the fight against tax optimisation, tax avoidance, tax fraud and tax evasion, both inside and outside the Union.

Fierce tax competition between Member States allows the tax engineering of MNEs to make a substantial fraction of their profits escape taxation. Profits that should be taxed in the Member State where they are made very often end up being taxed in a more lenient fashion (or not taxed at all) in a different Member State where tax policies have been conceived and designed to favour large corporations and MNEs. The nature of HTP has evolved over the last decades and new forms of HTP have emerged, notably via the transformation of preferential regimes into aggressive general regimes and therefore the CoC should be provided with the necessary tools to assess the harmful nature of tax systems in general terms. The objective would not be to prevent Member States from adopting efficient and reasonable tax measures connected to the real economy that could make their economy grow to the benefit of their citizens and companies, but to impede that the tax measures they adopt are harmful and unfairly erode the tax base of other Member States.

Governments lose EUR 1 000 Billion annually through tax fraud and tax evasion and avoidance. Every euro that is owed and not paid to where it belongs is a euro stolen from workers, the unemployed and the sick. It is a blow to solidarity.

The proliferation of tax scandals in the last decade (Lux Leaks, Panama Papers, Paradise Papers, etc.) involving multinational corporations and net worth individuals has revealed the extent and seriousness of these phenomena and the urgency of finding definitive solutions to overcome them. Unrestrained tax competition between Member States is the expression of an unfortunate breakdown in solidarity within the Union and must be brought to an end.

Aggressive tax competition between Member States have also the perverse effect of discriminating against small and medium-size undertakings (SMEs), which lack the capacity of taking advantage of loopholes in national tax systems or are straightforwardly or sinuously excluded from tax policies conceived and put in place to the exclusive benefit of MNEs. Moreover, when taxpayers see MNEs legally avoiding income tax, it undermines voluntary compliance by all taxpayers.

There is a need for common European rules. Tax competition between the Member States is harmful to the European economy. It is essential that all Member States work together to find viable fiscal and economic solutions for both public services and businesses to establish a common system of taxation that is fair, efficient and conducive to sustainable economic development. The lack of harmonisation of tax rules is a real windfall for MNEs and puts SMEs at a disadvantage. It is unacceptable that Member States aggressively compete with each other within a Union based on the principle of solidarity and for MNEs to be able to do 'tax shopping' within the Union. This competition favours intra-European relocations and essentially encourages MNEs to look for places with lower tax costs to the detriment of the Member States where profits are actually made.

Aggressive tax competition is not a phenomenon limited to the European Union. It has been considered a major headache also at international level, with the OECD instituting already in 1998 a Forum on Harmful Tax Practices (FHTP) to fight preferential tax regimes resulting in base erosion and profit shifting. More recently, Action Item 5 of the BEPS Action Plan commits the FHTP to revamping its work on Harmful Tax Practices with a priority on improving transparency and on requiring substantial activity for any preferential regime for it to not be deemed harmful.

Furthermore, The OECD has recently resumed the negotiations under BEPS 2.0 structured around two pillars.

Pillar 1 seeks to adapt the international income tax system to new business models emerged in the digital economy through changes to the profit allocation and nexus rules applicable to business profits. It is expected that Pillar 1 will provide a satisfactory answer, inter alia, to the considerable and profitable economic activity that is immune to taxation because of the lack of a 'permanent establishment'.

Pillar 2 is focused on a global minimum tax intended to address remaining BEPS issues. It focuses on the right to tax where other jurisdictions do not exercise taxation rights or tax 'too low' and, in this way, it is expected that it will significantly contribute to the eradication of aggressive tax competition. Pillar 2 is designed to ensure that MNEs pay a minimum level of tax regardless of where they are headquartered or the jurisdictions they operate in.

Negotiations on these two international instruments were delayed owing to reticence from the U.S. Trump Administration but have recently resumed after the election of President Biden, with his administration actively reengaging with the OECD Inclusive Framework. While efforts are being made to find solutions under Pillar 1 that can satisfy all parties, President Biden has already expressed firm support for Pillar 2 in his policy document 'The Made in America Tax Plan' (https://home.treasury.gov/system/files/136/MadeInAmericaTaxPlan_Report.pdf).

The OECD aims to reach an agreement on the Pillar 1 and 2 proposals by mid-2021. Your rapporteur is of the opinion that this should be the ambition also of the European Union and urges the Commission to set up a plan for a swift and proper implementation of both Pillars, including by using the outcome on Pillar II to redefine what harmful practices are and to monitor them with a reformed CoC.