COUNCIL OF THE EUROPEAN UNION

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EF	**153**
ECOFIN	**641**
COMPET	**465**
IND	**116**
SOC	**608**
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NOTE

from:	Presidency
to:	Coreper
Subject:	a) Proposal for a Regulation of the European Parliament and of the Council on European Venture Capital Funds (EuVECA) b) Proposal for a Regulation of the European Parliament and of the Council on European Social Entrepreneurship Funds (EuSEF) = State of play

1. On 23 March 2012 the Permanent Representatives Committee (part 1) agreed on the mandate for the Presidency to start informal trilogues with the European Parliament on the above-mentioned proposals (docs. 8124/12 and 8132/12). This mandate was confirmed as the Council's general approach on 26 June 2012.

2. Informal trilogues between the institutions have taken place on 4 June, 12 June, 20 June, 21 June and on 25 June. Following the last trilogue there were further informal contacts between the institutions, and on 28 June a preliminary political agreement between the Presidency and the EP was reached, subject to the confirmation by the Council, on the outstanding issues on the basis of textual proposals, as set out in Annex.

3. The Working Party on Financial Services (attachés) examined the outcome of the negotiations on 9 July. It appeared that a large number of delegations could not give their agreement to the outcome, mainly because of the issue of tax havens (Articles 3a) and 3d) as well as the corresponding recitals), where many delegations consider that it is not appropriate to address taxation related issues in the financial services legislation.

4. In these circumstances the Permanent Representatives Committee is invited to:
   - take note of the state of play;
   - discuss the way forward with regard to the two files based on options that the Presidency will present.

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ANNEX

New recitals

(x) A qualifying venture capital fund should not be established intax havens or uncooperative jurisdictions, such as third countries characterised in particular by no or nominal taxes, a lack of appropriate cooperation arrangements between the competent authorities of the home Member State of the qualifying venture capital fund manager and the supervisory authorities of the third country where the qualifying venture capital fund is established, or a lack of effective exchange of information in tax matters. A qualifying venture capital fund should also not invest in a jurisdictions displaying any of the above criteria.

(y) The purpose of this Regulation is to support growth and innovation in small and medium-sized undertakings in the Union. Investments in qualifying portfolio undertakings established in third countries can bring more capital to qualifying venture capital funds and thereby benefit small and medium sized enterprises in the Union. However, under no circumstances should investments be made into third country qualifying portfolio undertakings that are located in tax havens or uncooperative jurisdictions.

Article 3(a) (iii) - qualifying venture capital fund

(a) a 'qualifying venture capital fund' means a collective investment undertaking that

(iii) is established within the territories of a Member State, or in a third country so long as that the third country:

- does not provide for tax measures which entail no or nominal taxes or where advantages are granted even without any real economic activity and substantial economic presence within the third country offering such tax advantages;

- has appropriate cooperation arrangements with the competent authorities of the home Member State of the venture capital fund manager which entails that an efficient exchange of information can be ensured within the meaning of Article 21 of this Regulation that allows the competent authorities to carry out their duties in accordance with this Regulation;

- is not listed as a Non-Cooperative Country and Territory by FATF; or

- which has signed an agreement with the home Member State of the venture capital fund manager and with each other Member State in which the units or shares of the qualifying venture capital fund are intended to be marketed, so that it is ensured that the third country fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements;

Article 3(d) (iii) (d) – Qualifying portfolio undertaking

(d) 'qualifying portfolio undertaking' means an undertaking that:

(iv) is established within the territories of a Member State, or in a third country so long as that the third country:

- does not provide for tax measures which entail no or nominal taxes or where advantages are granted even without any real economic activity and substantial economic presence within the third country offering such tax advantages

- is not listed as a Non-Cooperative Country and Territory by FATF; or

- has signed an agreement with the home Member State of the venture capital fund manager and with each other Member State in which the units or shares of the qualifying venture capital fund are intended to be marketed, so that it is ensured that the third country fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements;

Article 11 (1) – annual report and audit

The venture capital fund manager shall make available an annual report to the competent authority of the home Member State for each qualifying venture capital fund under management no later than 6 months following the end of the financial year. The report shall describe the composition of the portfolio of the qualifying venture capital fund and the activities of the past year. It shall contain the audited financial accounts for the qualifying venture capital fund. The audit shall confirm that money and assets are held in the name of the fund and that the venture capital fund manager has established and maintained adequate records and controls in respect of the use of any mandate or control over the money and assets of the qualifying venture capital fund and its investors, and shall be conducted at least once a year. The annual report shall be produced in accordance with existing reporting standards and the terms agreed between the venture capital fund manager and the investors. The venture capital fund manager shall provide the report to investors on request. Venture capital fund managers and investors may agree to make additional disclosures to each other.

Art. 12 (1) (b) – disclosure to investors

(b) a description of the investment strategy and objectives of the qualifying venture capital fund, including a description of where the qualifying fund manager establishes, or intends to establish, its qualifying venture capital funds, a description of the types of the qualifying portfolio undertakings and non-qualifying investments which the qualifying venture capital fund may make, the techniques it may employ, and any applicable investment restrictions.

Art. 13 (1) (e) – new – registration

(e) a list of Member States and third countries where the venture capital fund manager has established, or intends to establish, qualifying venture capital funds.

Art. 13 (2) (c) – new- registration

(c) the list notified according to point (e) of paragraph 1 reveals that all of the qualifying venture capital funds are established in accordance with Article 3(a)(iii) of this Regulation.

Art. 15 (1) – home/host notifications

Immediately after the registration of a venture capital fund manager, the addition of a new qualifying venture capital fund, the addition of a new domicile for the establishment of a qualifying venture capital fund or the addition of a new Member State where the venture capital fund manager intends to market qualifying venture capital funds, the competent authority of the home Member State shall notify this to the Member States indicated in accordance with point (d) of Article 13 (1) and to ESMA.

Article 20 – revocation

1. The competent authority of the home Member State shall, while respecting the principle of proportionality, take the appropriate measures referred to in paragraph 2 where a venture capital fund manager:

(a) fails to comply with the requirements that apply to portfolio composition in breach of Article 5;

(b) markets, in breach of Article 6, the units and shares of a qualifying venture capital fund to non-eligible investors […];

(c) uses the designation "EuVECA" without being registered with the competent authority of their home Member State in accordance with Article 13.

(d) uses the designation "EuVECA" for the marketing of funds which are not established in accordance with Article 3(a)(iii) of this Regulation.

(e) obtained a registration through false statements or any other irregular means in breach of Article 13;

(f) fails to act honestly with due skill, care and diligence and fairly in conducting their business in breach of Article 7(a);

(g) fails to apply appropriate policies and procedures for preventing malpractices in breach of Article 7(b);

(h) repeatedly fails to comply with the requirements under Article 11 regarding the annual report;

(i) repeatedly fails to comply with the obligation to inform investors in accordance with Article 12;

2. In the cases referred to in paragraph 1 the competent authority of the home Member State shall take the following measures, as appropriate:

(aa) take measures to ensure that a venture capital fund manager complies with Articles 3(a)(iii), 5, 6, 7(a), 7(b), 11, 12 and 13 of this Regulation;

(a) prohibit the use of the designation "EuVECA" and remove the venture capital fund manager from the register.

Art. 24 (be) – new – review clause

(be) the geographical location of qualifying venture capital funds and whether additional measures are necessary to ensure that qualifying venture capital funds are established in accordance with Article 3(a)(iii) of this Regulation.

Article x – new – Dispute settlement

In case of disagreement between competent authorities of Member States on an assessment, action or omission of one competent authority in areas where this Regulation requires cooperation or coordination between competent authorities from more than one Member State, competent authorities may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010, in so far as the disagreement is not related to Article 3 (a) (iii) or Article 3 (d) (iv) of this Regulation.