



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 20 October 2000**

**12521/00**

**LIMITE**

**FISC 160**

**NOTE FROM THE CHAIR**

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To: Code of Conduct Group (Business Taxation)  
on: 23 and 24 October 2000

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Subject : Code of Conduct (Business Taxation)  
- Revised draft guidance on rollback and standstill

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Delegations will find attached a note from the Chair for consideration at the next meeting on 23 and 24 October 2000.

The Group agreed at its meeting on 4 October that members should be asked to provide comments on the draft guidance for rollback and standstill in the three areas – finance branches, holding companies and headquarter companies – set out in Annex B to the note from the Chair (11923/00 FISC 138).

Responses have been received from eight members of the Group: Belgium, Denmark, Germany, Ireland, Luxembourg, the Netherlands, Spain and the Commission.

In preparing the attached revised draft guidance (Annex A), the Chair has been guided by two criteria which reflect the views expressed by Group members in the discussion at the meeting on 4 October:

- guidance should not go outside the scope of the Code;
- guidance should not re-open or bring into question any of the Group's assessments.

The Chair proposes to introduce this revised draft guidance at the next meeting on 23-24 October.

The Group will also recall that Member States have been invited to provide information no later than Wednesday 18 October on the administrative and legislative processes which would be needed to remove the harmful features of their measures by 1 January 2003 and on the extent to which time-limited approvals are an issue in relation to their measures. A note from the Chair will be distributed to Group members once responses have been received.

**I. REVISED DRAFT GUIDANCE ON ROLLBACK AND STANDSTILL**

1. The purpose of this guidance is to assist Member States in achieving a balanced approach to rollback and standstill of measures which the Code of Conduct Group has found to be harmful in the 3 areas of finance branches, holding companies and headquarter companies.

2. The guidance does not replace the Code. The Code sets out the criteria agreed unanimously by ECOFIN for determining whether or not a measure is harmful, and final evaluation of whether or not the rollback and standstill conditions in the Code are satisfied must therefore be made against the criteria in the Code itself.

3. The Council and the representatives of the governments of the Member States, meeting within the Council, agreed on the scope and coverage of the Code of Conduct and established the criteria on which the Group should base its assessment of tax measures in the following terms:

A. *Without prejudice to the respective spheres of competence of the Member States and the Community, this code of conduct, which covers business taxation, concerns those measures which affect, or may affect, in a significant way the location of business activity in the Community.*

*Business activity in this respect also includes all activities carried out within a group of companies.*

*The tax measures covered by the code include both laws or regulations and administrative practices.*

B. *Within the scope specified in Paragraph A, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code.*

*Such a level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor.*

*When assessing whether such measures are harmful, account should be taken of, inter alia:*

- 1. whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or*
- 2. whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or*
- 3. whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or*
- 4. whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD, or*
- 5. whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.*

4. The code adds:

*C. Member States commit themselves not to introduce new tax measures which are harmful within the meaning of this code. Member States will therefore respect the principles underlying the code when determining future policy and will have due regard for the review process referred to in paragraphs E to I in assessing whether any new tax measure is harmful.*

*D. Member States commit themselves to re-examining their existing laws and established practices, having regard to the principles underlying the code and to the review process outlined in paragraphs E to I. Member States will amend such laws and practices as necessary with a view to eliminating any harmful measures as soon as possible taking into account the Council's discussions following the review process.*

5. It was further agreed that the Code of Conduct Group (Business Taxation) would select and review tax measures for assessment in accordance with Paragraphs E to G of the Code.

6. Paragraph F requires that the *assessment will take account of all the factors identified in paragraph B* and paragraph G *emphasizes the need to evaluate carefully in that assessment the effects that the tax measures have on other Member States* *inter alia in the light of how the activities concerned are effectively taxed throughout the Community.*

7. Paragraph G also states that *Insofar as the tax measures are used to support the economic development of particular regions, an assessment will be made of whether the measures are in proportion to, and targeted at, the aims sought. In assessing this, particular attention will be paid to special features and constraints in the case of the outermost regions and small islands, without undermining the integrity and coherence of the Community legal order, including the internal market and common policies.*

8. The Group presented a Report in November 1999 setting out its assessment of measures which it had evaluated against the criteria in the Code.

9. Rollback of a measure that the Group has found to be harmful may take the form either of :

- abolition of the measure; or
- removal of the harmful features of the measure.

10. Standstill means not introducing a new or replacement measure that contains harmful features.

11. The features set out below have led to measures in the areas of finance branches, holding companies and headquarter companies being evaluated as harmful under the criteria in the Code. Under rollback, Member States will either have to abolish such measures that have been found harmful, or remove from the measures the harmful features listed below. Under standstill, Member States will have to refrain from introducing new or replacement measures that contain such harmful features.

12. The features listed below do not replace the criteria set out in the Code. They are features that the Code of Conduct Group has taken into account in evaluating whether measures are harmful under the criteria in the Code. The final evaluation of whether or not the rollback and standstill conditions are satisfied must be made against the criteria in the Code itself.

13. **Transparency and exchange of information are important issues. In accordance with para B5 of the Code, particular reference should be made to whether measures lack transparency or are relaxed at administrative level in a non-transparent way. A measure will satisfy the criterion at B5 if details of the existence, scope and conditions of the measure are not published. Regard should also be made to paras E and K of the Code in respect of the provision and exchange of information.**

14. **The features that the Group took into account when evaluating whether the measures were harmful are:**

### Finance Branches

- **The measure permits the profits to be allocated between a Head Office and a branch at less than an arm's length rate.** *Allocation of less than the arm's length profit to the Head Office.* This may arise for instance where the allocation is **permitted to be** made in a formulaic way.
- Exemption of branch profits by the country of the Head Office in cases where the level of taxation in the country of the branch is significantly lower than in the country of the Head Office.

### Holding Companies:

- Exemption of foreign source dividends in circumstances in which the profits giving rise to the dividends:
  - have been taxed at a significantly lower level in the source country than they would have been if they had arisen in the Member State; and
  - **have not been subject to anti-abuse or countermeasures consistent with para L of the Code.** *have not been subject to CFC legislation in the Member State*

- **Asymmetrical measures where gains are exempt but losses are tax deductible.** ~~Exemption of capital gains on the disposal of subsidiaries in circumstances where losses on such disposals are tax deductible.~~

## Headquarter Companies

- Determination of profits other than in accordance with the OECD's Transfer Pricing Guidelines.
- In particular, use of cost plus and resale minus methods of determining arm's length profits when some or all of the following apply:
  - the methods are used in circumstances where a comparable uncontrolled price might reasonably be obtained
  - it is not clear that there is always an individual examination of the underlying facts of the particular case or that the mark-up or margin is reviewed regularly against normal commercial criteria
  - **the advantages are restricted in accordance with the criteria set out in paras B1 or B2 of the Code** ~~there is a requirement for the company concerned to be part of an international group~~
  - there is a reduction in the expense base taken into account for the purposes of determining taxable income.