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REPORT

From:	Code of Conduct Group (Business Taxation)
To:	Permanent Representatives Committee/Council
Subject:	Code of Conduct (Business Taxation) - Report to the Council

INTRODUCTION

1. On 1 December 1997, the Council and the Representatives of the Governments of the Member States, meeting within the Council, adopted a Resolution on a Code of Conduct for business taxation. This Resolution provides for the establishment of a Group within the framework of the Council to assess tax measures that may fall within the Code. In its report to the Feira European Council on 19 and 20 June 2000, the ECOFIN Council agreed that work should be pursued with a view to reaching agreement on the tax package as a whole, according to a parallel timetable for the key parts of the tax package (taxation of savings, Code of Conduct (business taxation) and interest and royalties).

2. On 9 March 1998, the Council confirmed the establishment of the Code of Conduct Group. The Group reports regularly on the measures assessed and these reports are forwarded to the Council for deliberation. This report from the Code Group encompasses the work of the Code Group in 2015 under the Luxembourg Presidency.

3. In accordance with the Procedural Aspects of the Group (16410/08 FISC 174), the Group should maintain to aim at a (broad) consensus to reflect the positions of the Member States in the Group in its reports to ECOFIN, to avoid losing the effectiveness of the Group, while respecting the principle of unanimity as laid down in the Council conclusions of 9 March 1998 concerning the establishment of the Code Group. In the case broad consensus cannot be reached, the Group's reports can express the various views mentioned.

PROGRESS OF WORK

4. The Code of Conduct Group met on 23 July, 17 September, 21 October and 18 November 2015 under the Luxembourg Presidency.

5. At the meeting of 23 July 2015 the Group confirmed a programme of work under the Luxembourg Presidency, agreeing to take forward work in the following areas:

(a) continue its work on rollback;

(b) continue existing work on standstill;

(c) continue work on the various aspects of the Group's Work Package 2011;

(d) contribute to the debate on the future of the Group

APPOINTMENT OF VICE CHAIRS

6. Pascale Toussing (Luxembourg) and Pieter Hasekamp (Netherlands) were confirmed as respectively the first and the second Vice-Chairs for the period up to the end of the Luxembourg Presidency.

STANDSTILL

Patent Box

7. In November 2014 the Group agreed, in co-ordination with developments at the OECD, on the modified nexus approach as the appropriate method to ensure that patent boxes require sufficient substance. The Group agreed that the EU patent box regimes which had been subject to examination by the Group are not compatible with the modified nexus approach. As a consequence, these EU patent boxes should be changed in line with the compromise and within the agreed timeline. The Group started a discussion in relation to the specifics of grandfathering arrangements and how such specifics will apply. The Group accepted the updated version of the nexus approach which was published by the OECD in October 2015.

8. The Council Conclusions of 11 December 2014 emphasised the need for Member States to start in 2015 the legislative process necessary to change the patent box regimes and asked the Group to monitor this process. Member States which currently have patent boxes need to begin the legal processes to close the regimes to new entrants from the end of June 2016 and end all benefits for existing claimants by June 2021. The Group agreed that the relevant Member States should submit a report on this issue with their annual notifications of rollback at the Group's first meeting in 2016. Member States will also have to notify the Group under the existing standstill procedure of any new patent box measures as soon as a political agreement on key points has been reached, to ensure that they comply with the nexus approach.

ROLLBACK

UK: Gibraltar – Income Tax Act 2010

9. The Group continued its examination of aspects of the Gibraltar tax regime. On the request of Spain, the group focused on "asset holding companies", the Commission drafted an agreed description of the regime. Following the discussion of the treatment of the asset holding companies under the Gibraltar Income Tax Act 2010 ("ITA") at the meeting on 21 October 2015, the Group asked the Commission services to prepare a paper giving a wider view of the territorial principle in the ITA.

10. The Group invited the Commission, Spain and the UK to elaborate the agreed description to include details of the types of income received by these companies, in order to then consider whether these companies are appropriately taxed.

WORK PACKAGE

11. The Group continued its work on the Work Package 2011 under the Luxembourg Presidency.

<u>Anti-Abuse – Mismatches</u>

12. Technical work on Mismatches was continued in a Code of Conduct Sub-Group, which met on 14 October 2015. At the meeting on 18 November 2015 the Luxembourg Presidency presented a report on the work of the Sub-Group, where the focus was on hybrid entity mismatches involving third countries and a draft guidance concerning these mismatches. The Group agreed on the guidance and explanatory notes on hybrid entity mismatches involving third countries as set out in Annexes 1 and 2. The Group invited the sub-group to continue its work with regard to the analysis of hybrid permanent establishment mismatches involving third countries.

<u>Links to third countries</u>

Liechtenstein

13. Following the presentation made by Liechtenstein at the meeting of the Code of Conduct Group on 21 October 2015 and the ensuing exchange of views between Member States the Commission services provided a preliminary analysis of the compatibility of the relevant measures with the Code of Conduct for business taxation for the meeting of the group on 18 November 2015. The Group invited the Commission to continue its dialogue with Liechtenstein with regard to the following five measures:

- the full exemption for dividends and capital gains on participations;

- the exemption for capital gains combined with a tax deductible write down/value adjustment;

- the special regime for Private Asset Structures (PAS);

- the Liechtenstein royalty box; and

- the Liechtenstein notional interest deduction regime.

14. The Group invited the Commission to inquire whether Liechtenstein is practising rulings.

FUTURE OF THE CODE OF CONDUCT GROUP

15. The Group considered the future of the Code of Conduct in its meeting on 23 July 2015. On the basis of this discussion a report by the chairman of the Group was submitted to the High Level Working Party on 2 September 2015.

NEW WORK PACKAGE

16. As a replacement for the current Work Package the Group considered and adopted a new Work Package, as set out in Annex 3.

ANNEX 1

Guidance on Hybrid Entity Mismatches Concerning a Member State and a third state

1. For the purposes of this Guidance, which applies to the extent that a mismatch situation concerns a Member State and a third state
   1.1. an entity is treated as *transparent* for tax purposes
      1.1.1. where it is not a taxable entity and it is treated wholly or partly as *look-through*, in the sense that income derived, and expenditure incurred, by or through the entity are treated, for tax purposes, as income and expenditure of the holders of equity interests in the entity, in proportion to their respective interests, or
      1.1.2. where it is *disregarded* as a separate entity, in the sense of being treated for tax purposes as a part or branch of the entity that owns it;
   1.2. a *hybrid entity* is an entity that is treated for tax purposes as being transparent by a Member State and as not being transparent by a third state or vice versa;
   1.3. a *mismatch situation* for a Member State and a third state, in relation to a hybrid entity, is where the mismatched treatments of that entity by the two states, as being transparent and as not being transparent, are relevant to the treatment for tax purposes of a transaction involving the entity;
   1.4. a *double deduction* arises where a deduction or other tax relief is given in each of two states for the same payment, expense or loss made or incurred by a hybrid entity, insofar as that payment, expense or loss is deducted from or relieved against income that is not received by the hybrid entity;
   1.5. a *deduction without inclusion* arises in respect of so much of a payment or expense for which a deduction or other tax relief is given by a state but for which there is not a corresponding receipt recognized for tax purposes by any other state.

2. Where as a result of a mismatch situation for a Member State and a third state, in relation to a hybrid entity
   2.1. a double deduction would otherwise arise, then, for the purpose of preventing that double deduction,
      2.1.1. where the third state treats the entity as not being transparent, the Member State concerned should treat that entity as not being transparent, and
      2.1.2. where the third state treats the entity as being transparent, the Member State should treat the entity as being transparent,

   or
   2.2. a deduction without inclusion would otherwise arise, then, for the purpose of preventing that deduction without inclusion,
      2.2.1. where the third state treats the entity as being transparent the Member State concerned should treat that entity as being transparent, and
      2.2.2. where the third state does not treat the entity as being transparent, the Member State should treat the entity as not being transparent,

   notwithstanding the treatment of that entity that would otherwise apply.

3. A hybrid entity should be treated as being transparent or not being transparent, in accordance with this guidance and contrary to the treatment that would otherwise apply, only to the extent that is necessary for the purpose of preventing a double deduction or deduction without inclusion that would otherwise arise – taking into account other rules that neutralise the effects of hybrid mismatches – and not for any other purpose.

4. To assist the implementation of this guidance by Member States, each Member State should prepare, and update as necessary, for compilation and publication by the Commission, a list of entities

    4.1. that can be formed or created under its laws, and

    4.2. which it treats as transparent for tax purposes.

Explanatory notes on draft guidance on Hybrid Entity Mismatches Concerning a Member State and a third state

These notes are arranged in the order of the relevant paragraphs of the text of draft guidance.

- ***General comment on format of the draft text***

Paragraph 1 and its subparagraphs set out the meaning of certain terms for the purposes of the guidance. *Paragraph 2* does the main work of the guidance - specifying an alignment of treatments of hybrid entities where mismatched treatments would otherwise result in a double deduction or deduction without inclusion and adding a defensive rule for the situation where alignment cannot be ensured. *Paragraph 3* ensures that this alignment or the use of the defensive rule cannot be used to achieve unintended results: it is solely to prevent the double deduction or deduction without inclusion. *Paragraph 4* would assist the implementation of the guidance by providing for the gathering together of relevant information from Member States in relation to their treatment of entities.

- ***Paragraph 1 - introductory line***

> **1. For the purposes of this Guidance, which applies to the extent that a mismatch situation concerns a Member State and a third state —**

These introductory words signal that the meanings of terms set out in the paragraph are for the purposes of the guidance only and are not intended to have any wider significance.

They limit the application of the guidance, in addressing mismatched treatments, to situations that are relevant to the tax treatment of a transaction in Member States where the situation involves a third state. Situations concerning Member States only are not covered by this guidance

A triangular situation in which the entity was created in a Member State but where the mismatched treatment is by another Member State and a third state would also be covered.

Paragraph 1.1

1.1 an entity is treated as transparent for tax purposes

1.1.1 where it is not a taxable entity and it is treated wholly or partly as look-through, in the sense that income derived, and expenditure incurred, by or through the entity are treated, for tax purposes, as income and expenditure of the holders of equity interests in the entity, in proportion to their respective interests, or

1.1.2 where it is disregarded as a separate entity, in the sense of being treated for tax purposes as a part or branch of the entity that owns it*;*

In order to define *hybrid entity* for the purposes of the guidance, the term *transparent* must first be defined. The meaning of an entity being treated as *transparent* is a cornerstone of the draft guidance.

Although such instances may not be very frequent, the draft guidance explicitly addresses entities that are only *partly* transparent. Where the use of a partly transparent entity would otherwise result in a *double deduction* or *deduction without inclusion*, the draft guidance would prevent the achievement of those results.

The draft guidance focuses on the meaning of transparent rather than the meaning of opaque or non-transparent. Once transparent is defined, the meaning of not being transparent follows without the need for a separate definition: an entity will be treated as not being transparent if (a) it is a taxable entity *or* it is treated neither wholly nor partly as look-through *and* (b) it is not disregarded as a separate entity.

The second subparagraph of the meaning of transparent, which refers to an entity being disregarded as a separate entity, has been included for completeness and is principally relevant to an entity classification option[1] that does not appear to be currently provided by any Member State.

- ***Paragraph 1.2***

1.2. a *hybrid entity* is an entity that is treated for tax purposes as being transparent by a Member State and as not being transparent by a third state or vice versa;

There is no reference to *national classification rules* in the definition, as some Member States may not have specific classification rules, designating an entity as transparent or non-transparent.

[1] US “check the box” rules allow an election to disregard an entity as separate from its equity holder.

Paragraph 1.3

1.3. a *mismatch situation* for a Member State and a third state, in relation to a hybrid entity, is where the mismatched treatments of that entity by the two states, as being transparent and as not being transparent, are relevant to the treatment for tax purposes of a transaction involving the entity;

A mismatch of treatments by a Member State and a third state is only of interest where each state concerned has a direct interest in the tax consequences of a transaction involving the entity (being a transaction relevant to the *double deduction* or *deduction without inclusion* referred to in paragraph 2). The term *mismatch situation* is, therefore, defined for the purposes of the guidance and then incorporated into paragraph 2 as a condition for the guidance to apply.

- ***Paragraphs 1.4 and 1.5***

In the draft guidance reference is made to two specific types of results of mismatch situations, i.e. *double deduction* and *deduction without inclusion*. The proposed guidance would apply to transactions that result in these effects.[2]

The terms *double deduction* and *deduction without inclusion* are given specific meanings to enable these results to be identified objectively.

- o It has previously in relation to the guidance on hybrid entity mismatches between two Member States been considered whether that guidance should only apply where the transaction involving the hybrid entity is between related parties (with appropriate anti-abuse provisions for back-to-back arrangements). The Subgroup did not favour this approach, considering *inter alia* that it would add complexity and could reduce the effectiveness of the guidance: it is not reflected in the proposed draft guidance. This reasoning is transposed to the guidance at issue.

- o Similarly, the Subgroup has in previous exercises not favoured an exception to the proposed guidance for *bona fide* commercial arrangements, as this could introduce an unwelcome subjectivity into the application of the guidance.

- ***Paragraph 1.4***

1.4 a double deduction arises where a deduction or other tax relief is given in each of two states for the same payment, expense or loss made or incurred by a hybrid entity, insofar as that payment, expense or loss is deducted from or relieved against the income that is not received by the hybrid entity;

[2] The proposed guidance would not apply to transactions resulting in other, unspecified, effects: *double deduction* and *deduction without inclusion* are the only categories of double non-taxation, resulting specifically from hybrid entity mismatches, which are identified.

This defines *double deduction* for the purposes of the guidance. The meaning set out is intended to be sufficiently wide in scope to cover situations where the relief is not given by direct deduction - for example, where the relief is given by tax credit.

The ending of sentence in paragraph 1.4 serves to ensure that for the purpose of the guidance term *double deduction* does not cover cases when expenses are deducted in computing hybrid entity income that is doubly taxed.

Reference to the "*same payment, expense or loss*" should be given its ordinary meaning— for example, where a deduction is given in one state under a group relief regime to a company other than the company that actually incurred the payment or expense, that deduction must be in respect of the same payment or expense for which the deduction is given in the other state.

- ***Paragraph 1.5***

  1.5 a *deduction without inclusion* arises in respect of so much of a payment or expense for which a deduction or other tax relief is given by a state but for which there is not a corresponding receipt recognized for tax purposes by any other state;

This defines *deduction without inclusion* for the purposes of the guidance. The guidance is concerned with double non-taxation that arises from the *mismatched* treatment of hybrid entities, causing deductible payments in one state not to be taken into account, for inclusion as income, by the other or the same state. The aim of the guidance, in the context of a *deduction without inclusion*, is to either deny the deduction of the payment in one state or to cause the receipt of the payment, which would otherwise disappear or be ignored for tax purposes, to be brought into account by any state.

The text makes clear that a part only of a deductible payment may not have been included as a receipt.

- This could happen where a payment through an entity goes to equity holders in different States— *State A* treating the entity as non-transparent, resulting in non-inclusion of its part of the payment, but *State B* treating the entity as transparent, resulting in inclusion of its part of the payment through the entity. This situation will only result in *deduction without inclusion* as respects the part of the payment that has not been included by *State A*.

- This could also happen - a part only of a deductible payment not being included as a receipt - by virtue of the treatment of a hybrid entity as being *partly* transparent by one of the **s**tates concerned in a mismatch situation.

The description of the non-inclusion of the payment – "*there is not a corresponding receipt recognised for tax purposes"* – is intended to target situations where, due to mismatched treatments of hybrid entities, payments "disappear", i.e. they are not brought into account as amounts received at all. A deductible payment can be tax-relieved in a cross-border context by reason either of domestic law or of double tax treaty reliefs and exemptions. Deductible payments which *have* been brought into account in the other state, but which are not taxable in that state because of an intended exemption or relief, will not be deemed to be part of a *deduction without inclusion* result for the purposes of the guidance.

- ***Paragraph 2***

2. Where as a result of a mismatch situation for a Member State and a third state, in relation to a hybrid entity

2.1. a double deduction would otherwise arise, then, for the purpose of preventing that double deduction

2.1.1. where the third state treats the entity as not being transparent, the Member State concerned should treat that entity as not being transparent, and

2.1.2. where the third state treats the entity as being transparent, the Member State should treat the entity as being transparent,

or

2.2. a deduction without inclusion would otherwise arise, then, for the purpose of preventing that deduction without inclusion,

2.2.1. where the third state treats the entity as being transparent the Member State concerned should treat that entity as being transparent, and

2.2.2. where the third state does not treat the entity as being transparent, the Member State should treat the entity as not being transparent,

notwithstanding the treatment of that entity that would otherwise apply.

Paragraph 2 contains the text that prevents the mismatched treatment of hybrid entities by Member States and third states from resulting in a *double deduction* or *deduction without inclusion*.

To do so, it draws upon the terms set out in *paragraph 1* to identify the elements that must be present for the guidance to apply, i.e.

- a *mismatch situation* involving a Member State and a third state,
- in relation to a *hybrid entity*,
- resulting in a *double deduction,* or *deduction without inclusion.*

This approach, of prescribing alignments, has been adopted as a clear and straightforward approach to anti-mismatch coordination:

- It provides the clearest basis for the alignment of treatments to eliminate mismatches resulting in *double deductions* and *deductions without inclusion* - the central purpose of the Guidance.

- It eliminates the need to refer to the treatment in the state under the laws of which the entity was *established.*

- It eliminates an administratively problematic scenario that could arise with other approaches. This theoretically possible, but improbable, scenario would involve the treatment of an entity being aligned *from* transparent *to* non-transparent to ensure the inclusion of income in a *deduction without inclusion* mismatch. In such circumstances the entity concerned - to which the income is to be attributed - might not be set up in the tax administration systems of the Member State concerned.[3]

Where these elements are present, *paragraphs 2.1.1 to 2.2.2* prescribe an alignment of the treatments of the hybrid entity, to prevent the mismatch that results in the *double deduction* or *deduction without inclusion*.

The agreed guidance relating to intra-EU hybrid mismatch arrangements covers three specific examples which are set out in annex C. Each of these examples involves a mismatch between two Member States, A and B. The guidance removes the mismatch with an "alignment" solution by which the Member States agree to treat the hybrid entity as either transparent or non-transparent. Extending this guidance to cover mismatches involving third countries needs to cover two different cases for each example, i.e. the Member State can be either state A or state B.

Paragraphs 2.1.1 and 2.2.1. are based on the existing intra-EU fixed alignment rules. They work also for those third state situations, in which the Member State can re-characterise the hybrid entity and solve the mismatch.

*Paragraphs 2.1.2. and 2.2.2.*are introduced as a consequence of the fact that this guidance deals with Member States relations to third states where it cannot be ensured that a fixed alignment approach can be used to eliminate the mismatch as a third state will not be bound by a guidance agreed by EU Member States.

[3] This might however occur in scenario 2 of Example 3, see annex C.

Paragraph 2.1.1.

This paragraph covers the situation of payments made by a hybrid entity that give rise to double deduction (see example 1). It is possible for the Member State to be either the state where the hybrid entity is not located (state A) or the state where the hybrid is located (state B).

<u>If the Member State is state A</u> then the existing, intra-EU fixed alignment rule also works for third states. This treats the hybrid entity as non-transparent. As a result A Co (the parent company) cannot deduct the interest.

Paragraph 2.1.2.

This paragraph covers the situation of payments made by a hybrid entity that give rise to double deduction (see example 1). It is possible for the Member State to be either the state where the hybrid entity is not located (state A) or the state where the hybrid is located (state B).

<u>If the Member State is state B</u> then it cannot ensure that A Co is denied the deduction. It can only deal with the situation by treating the hybrid entity as transparent. In the context of the Subgroup guidance this could be expressed as an alignment to transparent, which denies a deduction to the hybrid entity paying the interest.

Paragraph 2.2.1.

The paragraph covers the situation of payments made by a hybrid entity that give rise to deduction/non-inclusion (see example 2). It is possible for the Member State to be either the state where the hybrid entity is not located (state A) or the state where the hybrid is located (state B).

<u>If the Member State is state B</u> then the existing, intra-EU fixed alignment to transparent also works for third states. Treating the hybrid entity as transparent means it cannot deduct the interest it pays and as a result there would be no deduction in B Co under the group tax regime in state B.

Paragraph 2.2.2.

The paragraph covers the situation of payments made by a hybrid entity that give rise to deduction/non-inclusion (see example 2). It is possible for the Member State to be either the state where the hybrid entity is not located (state A) or the state where the hybrid is located (state B).

<u>If the Member State is state A</u> *then it cannot ensure that the hybrid entity is denied the deduction*. It can only deal with the situation by regarding the hybrid entity as non-transparent. In the context of the Subgroup guidance this could be expressed as an alignment to non-transparent, which has the effect of taxing the interest paid to A Co (the parent company).

Paragraphs 2.2.1. and 2.2.2. also cover the situation where payments made to a reverse hybrid give rise to deduction/non-inclusion (see example 3). It is possible for the Member State to be either the state where the hybrid entity is not located (state A) or the state where the hybrid is located (state B).

<u>If the Member State is state A</u> then the existing, intra-EU fixed alignment to transparent (paragraph 2.2.1.) also works for third states. Treating the hybrid entity as transparent means that the income is recognised in state A.

If the Member State is state B *then it cannot ensure that the income is recognised in state A*. However, an alignment to non-transparent (paragraph 2.2.2.) would ensure that the income was included as ordinary income of the hybrid entity in state B.

- ***Paragraph 3***

  3. A hybrid entity should be treated as being transparent or not being transparent, in accordance with this guidance and contrary to the treatment that would otherwise apply, only to the extent that is necessary for the purpose of preventing a double deduction or deduction without inclusion that would otherwise arise – taking into account other rules that neutralise the effects of hybrid mismatches – and not for any other purpose.

The Subgroup considered the scope for manipulation inherent in an unqualified alignment-based approach to the proposed guidance (e.g. it could create opportunities for loss-trafficking). *Paragraph 3* is intended to prevent any manipulation or abuse of the proposed guidance.

The requirement of a double deduction or deduction without inclusion caused by a hybrid mismatch implies that the guidance will only be applied if the effects of the hybrid mismatch are not neutralised by other rules. Paragraph 3 should also ensure that no more than is necessary is done to prevent hybrid entity mismatches delivering *double deductions* or *deductions without inclusion*.

- ***Paragraph 4***

  4. To assist the implementation of this guidance by Member States, each Member State should prepare, and update as necessary, for compilation and publication by the Commission, a list of entities

  4.1. that can be formed or created under its laws, and

  4.2. which it treats as transparent for tax purposes.

The purpose of the compilation of lists is to assist Member States in determining whether there are mismatched treatments in specific instances.

Each Member State will only be asked to list those entities, treated as transparent by that Member State, which can be established under its own laws.

Although this listing should not be an onerous requirement of each Member State, the collected listings should provide a comprehensive picture of the intra-EU treatment of entities, thereby enabling the identification, by taxpayers and tax administrations, of potential mismatches.

Annex C – Examples

Example 1

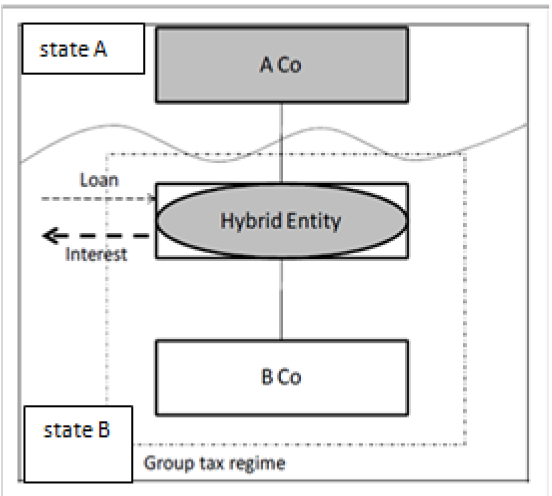
- hybrid entity is
  - transparent for state A purposes so interest is deductible in state A
  - non-transparent in state B so interest is deductible in state B
- **double deduction** arises

Scenario 1 (MS = state A)

- if *alignment to non-transparent treatment* of hybrid entity in state A and state B then:
- state A would treat Hybrid entity as non-transparent— and the interest would only be deductible in state B

Scenario 2 (MS = state B)

- If state A does not treat the Hybrid entity as non-transparent then:
- State B would align its action and treat the Hybrid entity as transparent – and the interest would only be deductible in state A.



Example 2

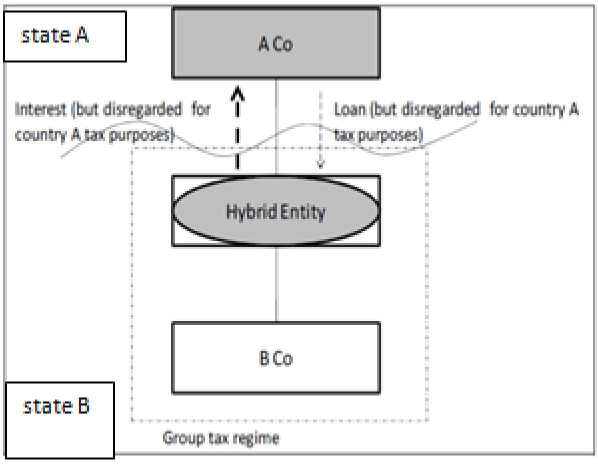
- hybrid entity is
  - transparent for state A purposes so the loan and interest is disregarded
  - non-transparent in state B so interest is deductible in state B
- **deduction without inclusion** arises

Scenario 1 (MS = state B)

- if *alignment to transparent treatment* of hybrid entity in state A and state B then:
- the entity, loan and interest would be disregarded and there would be no deduction in state B

Scenario 2 (MS = state A)

- if state B does not treat the Hybrid entity as transparent and allows a deduction then:
- state A would align its action and treat the Hybrid entity as non-transparent – and the receipt of interest would be recognized in state A.



Example 3

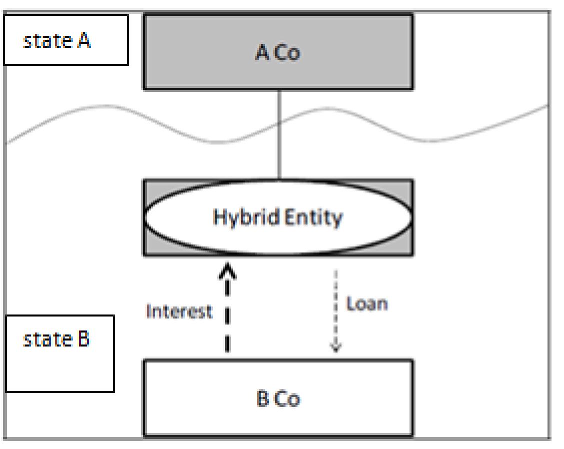
- hybrid entity is
  - non-transparent for state A tax purposes, so the interest arises in a non-resident corporation for state A purposes
  - transparent in state B, and no PE in state B, so interest is deductible in state B in B Co and is not taxable in state B
- **deduction without inclusion** arises

Scenario 1 (MS = state A)

- if *alignment to transparent treatment* of hybrid entity in state A and state B then:
- receipt of interest would be recognized in state A

Scenario 2 (MS = state B)

- if state A does not treat the hybrid entity as transparent then:
- state B would align its action and treat the Hybrid entity as non-transparent – interest income would be included as income of hybrid entity.



Code of Conduct Group

Work Package 2015

Following the Work Package agreed by the Council (ECOFIN) in December 2011 (17081/11, FISC 144), the Code of Conduct Group proposes to take forward the work package within the existing mandate as set out below. It builds on work continued from the 2011 work package and it contains new topics.

The Group recognises that a significant part of its work concerns ongoing issues and agrees to assess progress made on this work package by the end of the Maltese Presidency.

1. Monitoring of standstill and the implementation of rollback

The Group will

a. continue to monitor standstill and the implementation of rollback, and;

b. monitor the legislative action necessary to give effect to the changes required to patent box regimes in order to ensure that they conform with the compromise agreement reached in December 2014 (16553/14 FISC 225 REV 1) and the final agreement to be reached in December 2015.

2. Administrative practices

The Group will

a. monitor developments in administrative practices of Member States in parallel with the annual round of standstill and rollback notifications.

b. monitor the implementation of the "model instruction" on the exchange of information relating to cross-border rulings (10608/14 FISC 95) until it is superseded by the Council Directive on the mandatory automatic exchange of information in the field of taxation (COM(2015) 135 final);

c. monitor developments in the exchange of information relating to cross-border rulings following the implementation of the Council Directive on the mandatory automatic exchange of information, and;

d. develop a set of guidelines on the conditions and rules for the issuance of tax rulings by Member States.

3. Anti-abuse

In the context of the Group's work on anti-abuse, the Group will continue with its work on mismatches (16488/12 FISC 173).

4. Links with third countries

The Group will

a. continue its efforts in promoting the principles and criteria of the Code of Conduct towards third countries. In line with the Council Conclusions of 9 December 2014 (16846/14 FISC 233), work will concentrate on a dialogue with Liechtenstein;

b. identify certain other third countries where potentially harmful regimes may exist for a systematic review and;

c. monitor the outcome of past dialogues with third countries.

5. Monitoring agreed guidance

The Group will monitor agreed guidance in accordance with the conclusions reached under section 7b of the Work Package. The guidance to be monitored will be selected from the following list according to the priorities of the Group;

- Inbound profits (16766/10 FISC 139);
- Model Instruction (10608/14 FISC 95);[*]
- Relevant BEPS Actions focussing initially on issues which are already a major part of the Group's current work. These are Action 2 (neutralise the effects of hybrid mismatch arrangements), Action 5 (counter harmful tax practices more effectively, taking into account transparency and substance) and other relevant BEPS issues.

[*] See point 2.

6. Outbound payments

The Group will consider the question of outbound payments. Its initial work will involve the identification of potential problems which arise when payments are made from the EU to a third country.

7. Procedural issues

In order to improve its working practices the Group will develop guidelines covering;

a. the provision of information by Member States to the Group under paragraph E of the Code of Conduct to ensure that;

    i. Member States are clear when they should inform the Group of measures which may fall within the scope of the Code, and;

    ii. such measures are notified by reference to clear and objective criteria.

b. the monitoring of Member States' compliance with existing guidance or other standards agreed by the Group. The guidelines will set out;

    i. a clear process for monitoring the results of the Group's work, and;

    ii. how the results of the monitoring process will be publicised.

c. the interpretation of criterion 3, focussing on the application of a nexus approach to preferential regimes other than patent boxes, and;

d. the interpretation of criterion 4, focussing on which internationally agreed standards are relevant and the role of the arm's length principle in identifying potentially harmful measures.