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OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	14784/17
Subject:	Code of Conduct (Business Taxation) • Guidance on the interpretation of the fourth criterion (5 December 2017)

Delegations will find in the annex the Guidance on the interpretation of the fourth criterion of the Code of Conduct for business taxation, endorsed by the Council at its 3582nd meeting held on 5 December 2017 (see doc. 15446/17).

Guidance on the interpretation of the fourth criterion of the Code of Conduct for business taxation

1. Purpose of the Guidance

The guidance set out below is based on past decisions of the Code of Conduct Group and is intended to improve the transparency of the Code of Conduct Group's work. It is also intended to help Member States as well as third countries identify more easily potentially harmful tax measures.

The guidance neither replaces the principles and criteria of the Code of Conduct nor prejudges the harmfulness of any particular regime. The guidance presents a non-exhaustive list of elements and characteristics which indicate that a tax measure may be harmful when fully assessed against the criteria in the Code of Conduct. Every assessment will continue to be based on the five criteria of the Code of Conduct on a case-by-case approach.

The purpose of the text is to provide guidance on the application of the criteria in the Code of Conduct but it does not go beyond those criteria nor does it limit them. The guidance can never provide a safe harbour for a particular regime. A tax measure that is the object of particular scrutiny or that requires particular attention under the guidance may be found non-harmful by the Code of Conduct Group; likewise a measure that is not the object of particular scrutiny or that does not require particular attention under the guidance may be found to be harmful when assessed by the Group.

The purpose of the guidance is not to confine the Group to applying pre-determined general criteria; rather it should continue to subject each particular regime to a case-by-case examination against the Code of Conduct criteria in the light of the Group's guiding principles set out in document 16410/08 FISC 174.

2. Relationship with past assessments

Regimes for which the Group has agreed before this guidance enters into force that there was no need to assess them or that have been assessed as not potentially harmful, will not be affected by this guidance. The current procedure for reopening past assessments remains in place.

3. Review of the Guidance

The countering of harmful tax measures is an ongoing process; therefore the present guidance may be periodically reviewed by the Code of Conduct Group to ensure that it reflects future developments.

4. Guidance

Preferential business taxation measures will be the object of particular scrutiny by the Code of Conduct Group (business taxation) when interpreting the fourth criterion if one or more of the following circumstances are met:

1. The measure deviates from the arm's length principle as applied in accordance with the most recent update of the OECD Transfer Pricing Guidelines for profit determination, unless

   a. this deviation is proportionate and justified with reference to the size of the SMEs as defined in the Commission Recommendation 2003/361/EC, or

   b. the measure uses "safe harbour" rules for profit determination that are proportionate and justified with reference to the reduction of the administrative burden which the measure is expected to produce.

2. The measure provides for a reduction of the tax base by a specific percentage. However, a reduction in the tax base should not be considered as falling within the scope of the fourth criterion in any specific case where it results that:

- the tax base before the fixed reduction has been calculated in accordance with the arm's length principle, and

- the reduction leads to the same result as a reduced tax rate, and

- the reduction leads to a simplification of tax administration.

3. The measure deviates from the principle that the profits to be attributed to a permanent establishment (PE) are the profits that the PE would have earned at arm’s length, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise, regardless of the OECD approach chosen;

4. The measure deviates from the minimum standard committed to under OECD BEPS;

5. The measure allows a deduction for costs or losses that is not symmetrical to the determination of the taxable earnings.