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From: General Secretariat of the Council

To: Delegations

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Subject: Code of Conduct (Business Taxation)

- Procedural Issues: Guidelines on setting working methods for an effective monitoring of Member States' compliance with agreed guidance (5 December 2017)
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Delegations will find in the annex the Guidelines on setting working methods for an effective monitoring of Member States' compliance with agreed guidance, endorsed by the Council at its 3582nd meeting held on 5 December 2017 (see doc. 15446/17).

Procedural Issues:

Guidelines on setting working methods for an effective monitoring of Member States' compliance with agreed guidance

Introduction

1. This note provides guidelines to the Code of Conduct Group ("the Group") regarding the working methods to follow in order to ensure an effective monitoring of Member States' compliance with *agreed guidance, guidelines or any other standards agreed by the Group* (hereafter referred to as 'agreed guidance').
2. It deals with the:
 - Scope of the monitoring;
 - Procedure for choosing the priority order in which the agreed guidance will be monitored;
 - Monitoring process;
 - Way the results of the monitoring are followed-up [rollback process];
 - Way the results of the monitoring process are publicised [transparency of the outcome of the monitoring].

Scope of the monitoring

3. During its monitoring exercises the Group shall verify Member States' compliance with agreed guidance. The monitoring shall verify in one horizontal exercise the compliance by all Member States.

4. The monitoring shall conclude if national provisions or practices ("national provisions") are "compliant" or "(partly) non-compliant" with the agreed guidance being monitored.
5. As soon as guidance is agreed by the Group, Member States must amend their national provisions to comply with the guidance within a reasonable timeframe, and at the latest within two years from its adoption, unless a different timeline is explicitly indicated by the guidance itself.
6. Monitoring Member States' compliance with agreed guidance shall thus verify whether national provisions *in force at the time of the monitoring* are in line with the agreed guidance being monitored.

Procedure for choosing the priority order in which the agreed guidance will be monitored

7. As a rule the Group shall, when adopting its Work Package (Work Program), decide on a priority list of agreed guidance to be monitored during the relevant period.
8. When setting the aforementioned priority list, the Group shall take account of circumstances such as i) the fact that Member States should be allowed reasonable time and at most two years to amend their laws or practices in order to comply with the relevant guidance, unless a different specific timeframe is provided by the guidance itself; ii) the political sensitivity of the guidance; iii) any other circumstance it considers relevant.
9. The Group may decide to expand the priority list, change the priority order or replace some of the topics initially chosen for monitoring. This may happen if during an ongoing Work Program other topics for example are considered more sensitive, or their immediate monitoring is needed, for example due to developments at the international level.
10. When implementing the priority list, the workload involved should be taken into account and as a principle only one guidance should be monitored at a time.

Monitoring process regarding compliance with agreed guidance

Reporting phase

11. First, the Group shall make an inventory of the relevant national provisions aiming at complying with the agreed guidance being monitored. To this end, the Group shall invite Member States to communicate their relevant national provisions.
12. The reporting shall be done preferably, and to the extent possible, by answering a questionnaire or checklist previously prepared by the Commission services and approved by the Group.
13. If it is not possible to follow the approach of a questionnaire/checklist because of the specificity of the guidance being monitored, a global (wider) reporting approach can be considered.
14. Regardless of the approach followed, the Group may decide whether a different weight is to be attached to the obligations stemming from the agreed guidance, according to their importance¹ and/or nature². This shall be done upon approval of the questionnaire/checklist, or when the decision to follow a global (wider) reporting approach is made.
15. The Member States shall provide the information in an open and transparent manner and within the agreed deadlines. As regards the quality and accuracy of the information to be provided, Member States are reminded of the note agreed by the Group on *Guidance on the provision of information in the review process*³.
16. Based on the information received, the Commission shall prepare an overview of the national provisions communicated.

¹ E.g. principal, secondary or auxiliary obligations

² E.g. substantive, procedural, reporting obligations

³ Annex 2 to ANNEX II) doc 14750/16, FISC 202

Reviewing phase

17. The reviewing phase starts with a preliminary assessment by the Commission of the compliance by each Member State with the agreed guidance being monitored.
18. The review process undertaken by the Group shall aim at ensuring a structured and consistent horizontal verification of the national provisions concerned. In order to conclude if national provisions are "compliant", "partly non-compliant" or "non-compliant" with the agreed guidance being monitored, the Group shall endeavour to apply a coherent and equal assessment, in light also of the *General guiding principles concerning evaluation of measures*⁴.
19. To this purpose and given the specificities of the individual agreed guidance, the assessment approach followed by the Group may differ. Where appropriate, the Group shall take into account the weight attached to the obligations complied with (or not) among all the obligations imposed by the agreed guidance, in order to reach a conclusion regarding the compliance by each Member State with the agreed guidance being monitored.
20. The Group shall do its best to complete this reviewing phase within two to three meetings.

Monitoring the follow-up of the results

21. The Member States whose national provisions are assessed by the Group as "partly non-compliant" or "non-compliant" with the agreed guidance should rollback their laws or practices, in order to comply with the relevant guidance.
22. As a general rule, two years should be sufficient for rollback, unless a different deadline is agreed by the Group in the view of the specificity of the agreed guidance being monitored.
23. The Member States concerned shall inform regularly and at least once during each Presidency period of the state of play of the national provisions adopted or planned for adoption in order to roll back the national provisions assessed as "non-compliant" or "partly non-compliant".

⁴ General guiding principles concerning evaluation of measures' agreed by the Group in November 2008 (doc. 16410/08 FISC 174).

24. In addition, and depending on the obligations set in the agreed guidance being monitored and failed to comply with, the Group may decide whether the national provisions assessed as "non-compliant" or "partly non-compliant" also constitute a national measure that otherwise is worth assessing separately against the Code criteria to conclude on its harmfulness or lack thereof.
25. The review process in the present Guidelines does not impact in any way the standard review process of tax measures set down in the Council Conclusions of 1 December 1997 establishing the Code of Conduct.
26. Furthermore, it is recalled that the '*General guiding principles concerning evaluation of measures*', agreed by the Group in November 2008 (doc. 16410/08, FISC 174) remains unchanged and will not be affected by the present Guidelines.

Transparency regarding the results of the monitoring process

27. In addition to the general report at the end of each Presidency reflecting the progress made during a specific monitoring exercise, every time a monitoring exercise is finalized, the Group shall report the results to the Council. A monitoring exercise is considered finalized when the Group will have assessed ("compliant", "partly non-compliant" or "non-compliant") all Member States' relevant provisions in respect of a particular agreed guidance.
28. Such final report may comprise:
 - the names of the Member States having complied with the agreed guidance, but also the name of those having failed to comply with the agreed guidance (assessed as "partly non-compliant" or "non-compliant") [if appropriate, accompanied by a summary explanation];
 - the deadline for rollback obligations.