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REPORT

From :	Code of Conduct Group (Business taxation)
to :	ECOFIN Council
on :	7 July 2009
Subject :	Code of Conduct (Business Taxation) = Report to the ECOFIN Council

I. 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 reported regularly on the measures assessed and these reports have been forwarded to the Council for deliberation.

3. Two interim reports of the Code of Conduct Group were presented to the ECOFIN Council on 1 December 1998 and 25 May 1999 respectively (12530/98 FISC 164 and 8231/99 FISC 119). Subsequently, the Group reported to ECOFIN on 25 November 1999 setting out the results of the Group's work (SN 4901/99) on the assessment of 271 tax measures under the Code where the Group considered 66 measures harmful.
4. On 13 October 2003, the Council welcomed a report by the Working Party on Enlargement (Tax Experts) (13213/03 ELARG 94 FISC 138) establishing a list of 30 measures found harmful under the Code in the Member States that acceded on 1 May 2004. The Council also agreed on the adequacy of the rollback measures envisaged or already undertaken for 27 of these measures.
5. On 11 July 2006, the Council took note of a report by the Working Party on Enlargement (10879/06 ELARG 66 FISC 96) establishing a list of 8 measures found harmful under the Code in the two Member States (Bulgaria and Romania), which acceded on 1 January 2007.
6. This report from the Code Group encompasses the work of the Code Group in 2009 under the Czech Presidency.
7. As required by the ECOFIN Conclusions of 9 March 1998, the Group's reports reflect either the unanimous opinion of the members of the Group or the various opinions expressed in the course of discussion.

II. PROGRESS OF WORK

8. The Code of Conduct Group met on 5 February, 15 May and 29 June 2009 under the Czech Presidency.
9. At the meeting on 5 February the Group also confirmed a programme of work under the Czech Presidency, agreeing to take forward work in the following areas:
 - (a) rollback;
 - (b) standstill;
 - (c) discussion on the substantial aspects of the Group's Future Work Package, in particular:
 - anti-abuse,
 - links to third countries.

Appointment of a New Chairman

10. On 12 November 2008, Mrs Jane Kennedy tendered her resignation as Chair of the Code of Conduct Group. In accordance with the Council conclusions of 9 March 1998, which govern the Group's procedures, a process was initiated to select a new Chair. At the meeting on 5 February, Mr Wolfgang Nolz (Director General in the Ministry of Finance of Austria) was appointed by common accord as Chair of the Code of Conduct Group for a period of two years from 5 February 2009.

Appointment of Vice-Chairs

11. At the meeting on 5 February, Mr Peter Chrenko (Deputy Minister of Finance in the Finance Ministry of the Czech Republic) and Mr Carl Gustav Fernlund (Justice of the Supreme Administrative Court of Sweden), were confirmed as the first and second Vice-Chairs respectively for the period up to the end of the Czech Presidency.

Rollback

12. To facilitate the Code Group's work on the implementation of rollback, each Member State was asked to provide written information on developments since the last round of rollback returns in spring 2008 concerning the implementation of rollback of the measures in its name which appear in:
- Annex C of SN 4901/99; or
 - in the case of the ten Member States which acceded on 1 May 2004, the Annex to the Enlargement Group (Tax Experts) report of October 2003 (13213/03 ELARG 94 FISC 138); or
 - in the case of the two Member States which acceded on 1 January 2007, the Annex to the report from the Working Party on Enlargement of June 2006 (10879/06 ELARG 66 FISC 96).
13. At its meeting on 15 May, the Group was provided with information on all developments since January 2008 on the implementation of rollback.
14. The Group was informed of the following developments:
- *Lithuania (Measure LT4 - Strategic Investors)*
Transitional period in respect of Lithuanian measure LT4 as indicated in the Annex to the Enlargement Group (Tax Experts) report of October 2003 (13213/03 ELARG 94 FISC 138) expired (last agreement with strategic investor expired on 12 March, 2008) and measure is no longer available.

- *Poland (Measures: PL1 - Special Economic Zones (original rules) and PL2 - Special Economic Zones (amended rules))*

In case of Poland, two regimes were classified as harmful. Both the possibility of granting export aid in Mielec Special Economic Zone and the possibility of issuing permits at Minister discretion were eliminated. However, two enterprises - one small- and one medium-sized have benefited from the export aid, and these enterprises have been covered by transitional periods granted by the Accession Treaty until 31st December 2011 and 31st December 2010, respectively.

- *Jersey (Measures: F045 - Tax Exempt Companies, F046 - International Treasury Operations, F047 - International Business Companies, F048 - Captive Insurance Companies)*

All 4 identified harmful regimes were abolished on 3rd June 2008 in accordance with the proposals set out in the Code Group report dated 26 November 2002 (14812/02). Certain FO47 companies retain a 'grandfathering' clause as agreed, due to expire by the end 2011. Jersey introduced new legislation into the Island's Parliament in stages from the 21 January 2007 with final Royal Assent making it law on 12th March 2008. The new regime came into force on 3 June 2008, in accordance with the Code Group report dated 26 November 2002 (14812/02) and accepted by ECOFIN on 3 June 2003.

- *Isle of Man (Measure - Distributable Profits Charge)*

The Island introduced a new general reform of its tax system from 6th April 2006, the start of its first fiscal period after the 31 December 2005. At its meeting on 16 October 2007, the Code Group found the Distributable Profits Charge (DPC) aspect of the IoM's new general tax reform harmful. The IoM abolished the DPC on 5 April 2008.

- *Gibraltar (Measure B012 - Exempt (offshore) Companies and Captive Insurance)*

The Government of Gibraltar closed B012 to new entrants from 30 June 2006, with some limited benefits for existing beneficiaries continuing until 2010.

Standstill

15. Member States have made commitments not to introduce new tax measures that would be harmful within the meaning of the Code. The Group's work programme for the Czech Presidency identified the following measures where further discussion under standstill was required:

- *Belgium – Profit Participating Loan*
- *Slovakia – Investment Aid Tax Credit*
- *UK: Jersey – Zero-Ten Corporate Tax Regime*
- *UK: Guernsey – Zero-Ten Corporate Tax Regime*
- *UK: Isle of Man - New Tax Legislation*

16. The Group examined the Belgian PPL issue. On the basis of the present state of the file, the Group came to the conclusion that:

- it is not possible and therefore¹ there is no need to assess the Belgian PPL measure against the criteria of the Code now;
- potentially harmful aspects of PPL type measures could result from disparities between the tax systems of the Member States, which is a general issue that should be subject to discussion on a general basis;
- an assessment of all PPL measures against the criteria of the Code will be made if necessary on the basis of the outcome of that discussion.

On this issue Belgium noted the following:

"The Belgian rulings on PPL follow the general rules applied by Belgium and OECD on the subject, and that has never been contested. To that extent Belgium considers that, referring to point B of the Code of Conduct, the Belgian regime is out of the scope of the Code of Conduct. It follows that the five criteria for the evaluation of the harmfulness of this regime cannot be applied here. Sixty one similar situations were identified within the EU by a study made on request of the Belgian delegation (Deloitte study).

¹ Estonia and Belgium agree to this paragraph but not to the use of the word "therefore".

Maintaining the possibility that the Belgian PPL regime could be considered as harmful would paralyse activity of the Ruling Department and would be particularly harmful to the Belgian economy in the present context of the financial crisis."

17. The Group discussed the Slovak Investment Aid Tax Credit on the basis of the submission by the Slovak Republic. The Group agreed that there was no need for this measure to be assessed against the Code criteria.
18. With regard to the UK, the Group discussed the Jersey and Guernsey Zero-Ten Corporate Tax Regimes and the New Tax Legislation in the Isle of Man. The Group agreed to request the Commission Services to prepare descriptions of these measures, in consultation with the UK.
19. In view of the ongoing commitment not to introduce new tax measures that would be harmful within the meaning of the Code, each Member State was invited - in accordance with the Group's established practise - to assist the Group in its work by notifying any new measures, which potentially fall within the scope of the Code of Conduct and which have been enacted in the twelve months to end - January 2009. In this respect, at its meeting on 15 May, the Group was provided with information on all developments since January 2008. One new measure was notified to the Group: Bulgaria - tax relief for activity carried out in the field of agriculture, the processing industry, production, high technology and infrastructure. The Group agreed that the question of this measure shall be addressed after current State Aid procedure will be completed. The UK also notified the situation with respect to Gibraltar corporate tax reform. As that regime is the subject of an appeal by the Commission to the European Court of Justice in relation to State Aid the Group decided to return to the issue after the ECJ has ruled on the matter.

Taking forward the Future Work Package

20. On 2 December 2008 the ECOFIN Council welcomed the fact that the Group had already completed its work on the Procedural Aspects of the Work Package and invited the Group to continue its work on the other items of the Work Package, namely anti - abuse, transparency and exchange of information in area of transfer pricing, administrative practices and links to third countries (16410/08 FISC 174).
21. The Group agreed on 5 February 2009 that it will consider the workstreams and take forward discussion related to key issues at each of its meetings under the Czech, Swedish and Spanish Presidencies, aiming for its completion by the end of the Spanish Presidency. Furthermore, it was agreed that the Chair will prepare these meetings in discussion with the Member States and the Commission.
22. On 15 May 2009 the Group started its discussion on anti-abuse. The Group agreed that as regards common political understanding of the latest position in European law on anti - abuse and in particular what genuine economic activity means, the issue should be further examined in the Council's Working Party on Tax Questions (Direct Taxation), which would be invited to inform the Code of Conduct Group of the progress achieved. The Group reached consensus that anti - abuse examination should also include inbound and outbound profit transfer and mismatches, in particular hybrid entities and profit participating loans¹, and that in order to assist this work of the Group a sub-group should be established.
23. On 15 May 2009 the Group started its discussion on links to third countries and agreed that further consideration is required, in particular within the context of Communication of Commission on Promoting Good Governance in Tax Matters (9281/09 FISC 57), and the Commission agreed to submit further information on this issue.

¹ Note by Belgium: 62 mismatches were identified in a report by Deloitte Tax Consultant.