



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 13 June 2013

10242/13

LIMITE

FISC 112

PUBLIC

NOTE

from:	Chair of the Code of Conduct Group (Business Taxation)
to:	Coreper
Subject:	Code of Conduct (Business Taxation) - Reporting to the Council and draft Council conclusions

1. At its meeting on 29 May 2013, the Code of Conduct Group discussed the draft report from the Group to the Council. The report as adapted in the light of the discussions was subject to a silent procedure until 4 June 2013. Before this date, Spain broke the silent procedure on a paragraph relating to the rollback of the Gibraltar regime and contested the use of the words "broad consensus".
2. The rest of the Report did not give rise to any observations and is deemed as agreed by the Group (as set out in Annex I).
3. Despite intensive bilateral contacts with the two delegations concerned, it was not possible to agree on a revised paragraph relating to the rollback of the Gibraltar regime which could be included in the report of the Group and submitted to all Member States for agreement.

4. The Procedural Aspects of the Group (16410/08 FISC 174) provide that *"In case "broad consensus" can't be reached, the report to ECOFIN can then express the various views mentioned, indicating the number of Member States concerned without qualifying their views, and be edited in such way that ECOFIN can have a clear and focussed discussion on the key elements at stake"*. In line with that, the Chair redrafted the paragraph relating to the rollback of the Gibraltar regime in order to express, in a factual manner, various views mentioned and key elements at stake (as set out in Annex II).
5. This redrafted paragraph is to be submitted to Coreper as a report of the Chair (Annex II) unless agreed language can be found in Coreper, which could then be inserted into the overall report by the Group (Annex I)
6. Against this background, the Permanent Representatives Committee is invited
- (a) to forward the Report of the Group (Annex I) to the Council;
 - (b) to agree the drafting of Annex II and to consider whether it should be included in the Group's Report (Annex I) or forwarded to the Council as a Report of the Chair;
 - (c) to suggest that, as usual, the Council adopt the following conclusions :
- "With regard to the Code of Conduct (Business Taxation), the Council:
- welcomes the progress achieved by the Code Group during the Irish Presidency as set out in its report (Annex I) [and takes note of the report of the Chair (Annex II)];
 - asks the Group to continue monitoring standstill and the implementation of the rollback as well as its work under the Work Package 2011;
 - encourages the Commission to continue discussions with Switzerland as set out in the Group's Report and to keep the Group regularly informed of the progress;
 - invites the Group to continue its consideration of the draft guidance against hybrid entity mismatch planning under the Lithuanian Presidency;
 - invites the Group to report back on its work to the Council by the end of the Lithuanian Presidency."

DRAFT REPORT FROM THE CODE OF CONDUCT GROUP 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.
3. This report encompasses the work of the Code Group in 2013 under the Irish Presidency.
4. 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

5. The Code of Conduct Group met on 30 January, 20 March and 29 May 2013 under the Irish Presidency.
6. At the meeting of 30 January 2013 the Group confirmed a programme of work under the Irish Presidency, agreeing to take forward work in the following areas:
 - (a) new round of rollback notifications;
 - (b) new round of standstill notifications;
 - (c) continue existing work on standstill;
 - (d) continue work on the various aspects of the Group's Work Package 2011.

APPOINTMENT OF CHAIR AND VICE CHAIRS

7. Mr. Wolfgang Nolz was reappointed as Chair for another two-years-period. Mr. Eamonn O'Dea (Ireland) and Ms. Jurate Laurikenaite (Lithuania) were confirmed as respectively the first and the second Vice-Chairs for the period up to the end of the Irish Presidency.

ROLLBACK

8. 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 2012 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).

9. At its meeting on 20 March 2013, the Group was provided with information on all developments since January 2012 on the implementation of rollback.

STANDSTILL

10. Member States have made commitments not to introduce new tax measures that would be harmful within the meaning of the Code. The Group identified the following measures where further discussion under standstill was required:

- *UK: Patent Box*
- *UK: Isle of Man*
- *Cyprus: Patent Box*¹

As regards UK: Patent Box, the Group was provided with an agreed description of the measure. On the basis of that description, the Group asked the Commission to prepare a draft assessment, so that further decisions of the Group regarding assessment of this regime could be taken as soon as possible during the Lithuanian Presidency.

As regards UK: Isle of Man, the UK provided information on the new tax legislation in the Isle of Man. The Group considered that further information was necessary. The UK agreed to supply the requested information to the Group during the Lithuanian Presidency.

¹. Cyprus does not consider the IP regime as a “standstill” harmful regime which constitutes a harmful tax practice in the light of the criteria of the Code of Conduct group.

WORK PACKAGE

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

Anti-Abuse – Mismatches

12. Technical work on Mismatches was continued in a Code of Conduct Sub-Group, which met on 31 January, 21 March and 15 May 2013. At the meeting on 29 May 2013 the Irish presidency presented a report on the work of the Sub-Group, where the focus was on mismatch arrangements involving hybrid entities in the EU. The Group welcomed the Report, which states (in paragraph 5.2) in relation to the draft guidance annexed to the Report that "it could represent a significant first step in coordination by Member States against hybrid entity mismatch planning but requires further consideration". The Group will come to this issue during the Lithuanian Presidency.
13. Monitoring the implementation of agreed guidance on Inbound Profit Transfers
14. The Group continued its monitoring exercise regarding the implementation of the previously agreed guidance on inbound profit transfers (doc. 16766/10 FISC 139, par. 16). Commission provided further information on the different options for reaching an agreement on effective anti-abuse provisions, which the Group will continue to discuss under the Lithuanian presidency.

Preparation of guidance or application notes

15. The Group continued its work on the preparation of guidance notes for regimes offering beneficial treatment to interest, royalties, intermediate companies and special economic zones. The proposed guidance notes should be based on characteristics and elements that are critical in the review of such regimes, relating these characteristics and elements to the Code criteria. The Group reached a consensus regarding regimes concerning intermediate companies and special economic zones but has not yet reached agreement on the guidance notes as a whole. Further discussion under the Lithuanian presidency is yet required.

Administrative Practices²

16. The Group was informed on progress made by CACT and JTPF in developing a Model Instruction to improve the spontaneous exchange of information of cross border rulings and in the area of transfer pricing. A draft of the Model Instruction was circulated to the Group before its March meeting. Most Member States could accept this model instruction. Further work is however required with respect to an efficient and transparent monitoring and the question of rulings, which are not laid down in writing. The Group invited the CACT to deal with the aspect of efficient and transparent monitoring.

². While supporting the process in order to ensure the effectiveness of exercise, Italy considers necessary the development of reporting and monitoring measures aimed at ensuring the effective implementation of the Model Instruction of cross-border rulings and the parallel exercise in the area of transfer pricing, in line with the principle of transparency in the area of administrative practices. Notably Italy believes that the above paragraphs concerning the administrative practices are not able to guarantee that all kinds of tax rulings, on which the guidance is focused, are spontaneously exchanged between Member States involved, therefore jeopardising the expected result of effectiveness of the exercise.

17. The Group would now like to ask CACT to incorporate unilateral advance pricing arrangements into the Model Instruction on the basis of the JTPF's Conclusions. The Commission will prepare a technical document similar to the one presented at the CACT meeting last July concerning cross-border rulings.

As regards spontaneous exchange of information, if a Member State provides advance interpretation or application of a legal provision for a cross border situation or transaction of an individual taxpayer (hereafter: cross border ruling), which is likely to be relevant for the tax authorities of another Member State, the tax authorities of the first Member State will spontaneously exchange the relevant information regarding this cross border ruling in accordance with the provisions of the Directive on Mutual Assistance with the latter Member State in order to assure coherent overall taxation (doc. 16766/10).

Links to third countries

18. As asked by the Council (ECOFIN), the Commission intensified discussions with Switzerland with the aim of reaching acceptance by the latter to apply the principles and criteria of the Code. The Group was informed of the progress in the dialogue at the meetings on 30 January, 20 March and 29 May 2013. The Group proposes that the dialogue with Switzerland continues under the Lithuanian Presidency. This is because the Group noted that progress on reaching the objective of that dialogue with Switzerland can be made. This is based on reports from the Commission and discussions between members of the group and representatives of Switzerland on 29 May 2013. Those representatives informed Members of the Group that Switzerland is willing to revisit five of its company tax measures on which the Group has concerns. The Group recommends to invite the Commission to continue the dialogue until 31 December 2013.

**DRAFT REPORT OF THE CHAIR OF THE CODE OF CONDUCT GROUP
TO THE COUNCIL**

ROLLBACK

UK: Gibraltar - Income Tax Act 2010

The Group discussed the rollback of selected elements of the Gibraltar's Income Tax Act 2010 covering those aspects seen as relevant for the application of the Code criteria, which were found to be harmful by the Group. During the Group's meeting on 29 May 2013, the Chair noted that there was broad consensus that the legislation, which Gibraltar was planning to enact, was adequate to achieve the rollback of those elements; Spain indicated that it would send written observations (footnote) on this issue. This was reflected in the Code of conduct Group report, which was subject to a silent procedure until 4 June 2013. Before this date, Spain objected, under the 2008 procedural aspects of the Group, to the use of the wording "broad consensus" considering that it is therefore necessary to complete the rollback procedure of the Income Tax Act 2010 by analysing as soon as possible the remaining relevant elements of the regime.
