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From: General Secretariat of the Council

To: Delegations

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Subject: Council conclusions on the reform of the Code of Conduct for Business
Taxation

Delegations will find in the Annex the Council conclusions on the reform of the Code of Conduct for Business Taxation, approved by the Council at its meeting held on 8 November 2022.

Council conclusions
on the reform of the Code of Conduct for Business Taxation

The Council:

- WELCOMES the reform of the Code of Conduct (Business Taxation); in this regard NOTES that the works of the Code of Conduct Group are framed by its mandate as reflected in the Code of Conduct (Business Taxation); RECALLS that the Code of Conduct (Business Taxation) is a political commitment and does not affect the Member States' rights and obligations or the respective spheres of competence of the Member States and the Union resulting from the Treaties and INVITES the Code of Conduct Group to continue its work on developing or, where appropriate, revising the agreed guidance to enhance clarity and present its outcomes to the Council; in particular, INVITES the Code of Conduct Group to develop and submit for approval by the Council proposals for guidance on specific tax features of general application that fall within the scope of the revised Code of Conduct (Business Taxation);

- WELCOMES the steps taken enhancing the transparency of the Code of Conduct Group and improving its public communication. In this regard, NOTES that the revised Code of Conduct (Business Taxation) specifies that final documents, approved by the Council, will be made public and additional documents will be made public, as appropriate, in accordance with the applicable rules; INVITES the Code of Conduct Group to explore further steps in accordance with the applicable rules and report in this direction to the Council by 30 June 2023;

- APPROVES the Resolution of the Council and the representatives of the governments of the Member States, meeting within the Council, on a revised Code of Conduct for business taxation, set out in the Annex to the note.

RESOLUTION OF THE COUNCIL AND OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES, MEETING WITHIN THE COUNCIL, ON A REVISED CODE OF CONDUCT FOR BUSINESS TAXATION

THE COUNCIL OF THE EUROPEAN UNION AND THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES, MEETING WITHIN THE COUNCIL,

RECALLING the conclusions of the ECOFIN Council of 1 December 1997 concerning taxation policy in the light of the consideration that coordinated action at European level is needed in order to reduce distortions in the single market, prevent significant losses of tax revenue and help tax structures develop in a more employment-friendly way,

RECALLING the Resolution of the Council and the Representatives of the Governments of the Member States meeting within the Council of 1 December 1997 on a code of conduct for business taxation,

RECALLING the conclusions of the Council of 5 December 2017 on the EU list of non-cooperative jurisdictions for tax purposes and the latest international developments in the fight against tax avoidance and tax evasion,

ACKNOWLEDGING the positive effects of fair competition and the need to consolidate the competitiveness of the European Union and the Member States at international level, whilst noting that some tax measures might lead to harmful effects,

EMPHASIZING that the code of conduct is a political commitment and does not affect the Member States' rights and obligations or the respective spheres of competence of the Member States and the Union resulting from the Treaties,

EMPHASIZING that the code of conduct group operates as a peer-to-peer group between Member States with indispensable assistance of the Commission,

RECOGNISING the successful work of the code of conduct group with its elected chairs, which has allowed to roll back a large number of tax measures and to establish a constructive cooperation framework with third countries and jurisdictions,

NOTING that the secretariat functions for the Group are assumed by the General Secretariat of the Council,

ACKNOWLEDGING the development of agreed guidance notes to facilitate the successful work of the code of conduct group with relevance for procedural aspects as well as agreed guidance with relevance for substantive issues, which are all made public,

RECONFIRMING, therefore, the continuing need for a code of conduct for business taxation designed to curb harmful tax measures,

EMPHASISING that the fair treatment within the EU and with respect to third countries and tax jurisdictions continues to be essential for the coherent implementation of the principles of the code of conduct,

REITERATING the willingness to keep the application of the code of conduct for business taxation as transparent as possible without jeopardizing the confidentiality which is needed for a trustful exchange of views and sensitive information between the members of the group as well as with third countries and tax jurisdictions, since this ensures effective and result-oriented work under the code,

CONSIDERING that the existing code of conduct for business taxation set out in the Resolution of the Council and the Representatives of the Governments of the Member States meeting within the Council of 1 December 1997 should be revised to meet new challenges as efficiently as possible in an increasingly globalised and digitalised economic environment,

HEREBY APPROVE THE FOLLOWING REVISED CODE OF CONDUCT FOR BUSINESS TAXATION

Tax measures covered

A. Without prejudice to the respective spheres of competence of the Member States and the Union, this code of conduct, which covers business taxation (referred to as code), concerns those preferential tax measures and tax features of general application which affect, or may affect, in a significant way the location of business activity in the Union.

Business activity in this respect also includes all activities carried out within a group of companies.

The preferential tax measures and tax features of general application (jointly referred to as tax measures) covered by the code include both laws or regulations and administrative practices.

B.1 Within the scope specified in paragraph A, preferential tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code.

Such a level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor.

When assessing whether such measures are harmful, account should be taken of, inter alia:

1. whether advantages are ring-fenced de facto or de jure from the domestic market, e.g., they are accorded only to non-residents or in respect of transactions carried out with non-residents, or they do not affect the national tax base, or
2. whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or

3. whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD, or

4. whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.

B.2 Within the scope specified in paragraph A, tax features of general application of a Member State, which create opportunities for double non-taxation or that can lead to the double or multiple use of tax benefits, in connection with the same expenses, amount of income or chain of transactions are to be regarded as potentially harmful and therefore covered by this code.

Such effects may occur by virtue of any relevant feature of a Member State national tax system that leads to lower tax liability, including no tax liability, other than the nominal tax rate or deferred taxation as a feature of a distribution tax system.

When assessing whether a tax feature of general application of a Member State is harmful, account should be taken of the following cumulative criteria and the existence of a direct causal link between them:

- 1) the tax feature of general application is not accompanied by appropriate anti-abuse provisions or other adequate safeguards and as a result, leads to double non-taxation or allows the double or multiple use of tax benefits in connection with the same expenses, amount of income or chain of transactions;
- 2) the tax feature of general application affects in a significant way the location of business activity in the Union. When evaluating whether the tax feature is a significant factor in determining the location of business activity in the Union, the Code of Conduct Group (Business Taxation) (referred to as the Group) should take into account the fact that the location of business activity can also be influenced by circumstances other than tax features.

Standstill and Rollback

Standstill

C. Member States commit themselves not to introduce new tax measures which are harmful within the meaning of this code. Member States will therefore respect the principles underlying the code when determining future policy and will have due regard for the review process referred to in paragraphs E to I in assessing whether any new tax measure is harmful.

Rollback

D. Member States commit themselves to re-examining their existing laws and established practices, having regard to the principles underlying the code and to the review process outlined in paragraphs E to I. Member States will amend such laws and practices as necessary with a view to eliminating any harmful tax measures, or to adopting appropriate anti-abuse provisions or other adequate safeguards in relation to harmful tax measures, as soon as possible taking into account the Council's discussions following the review process.

Review process

Notification

E.1 In accordance with the principles of transparency and openness Member States will inform each other by the end of each calendar year of existing and proposed tax measures which may fall within the scope of the code.

Member States concerned may also inform each other of existing or proposed tax measures in relation to which they want to obtain certainty about their compliance with the code.

In the absence of a notification under subparagraphs 1 and 2, Member States are called upon to provide at the request of another Member State or the Commission information on any tax measure which appears to fall within the scope of the code. Where envisaged tax measures need parliamentary approval, such information need not be given until after their announcement to Parliament.

E.2 Tax measures of a Member State that have not been notified under paragraph E.1, may be brought to the attention of the Group at the request of another Member State or the Commission. Before bringing such tax measures to the attention of the Group, the transmitting Member State or the Commission should inform the Member State concerned.

With regard to tax features of general application, the transmitting Member State or the Commission should present to the Group any information:

- i) that reasonably indicates the tax feature has at least one of the effects described in paragraph B.2, and
- ii) that can reasonably lead to the conclusion of a potentially significant impact on the location of business activities in the Union.

Agreed description

F.1 Any Member State or the Commission may request the opportunity to discuss and comment on a tax measure of a Member State notified under paragraphs E1 and E2. Member States then decide whether to follow up and to prepare the agreed description of such measure.

Assessment

F.2 The agreed description will permit an assessment to be made of whether the tax measures in question are harmful, in the light of the effects that they may have within the Union. In respect of preferential tax measures, that assessment will take into account all the factors identified in paragraph B.1. In respect of the tax features of general application, that assessment will take into account all the factors identified in paragraph B.2 and guidance under paragraph L in respect of specific tax features of general application.

G. In reviewing notified tax measures the Council also emphasizes the need to evaluate carefully the effects that they have on other Member States, inter alia in the light of how the activities concerned are effectively taxed throughout the Union and requests the Group to consider relevant economic factors and impact data that is brought to its attention, and to take into account the size and openness of the economy of the concerned Member State.

Insofar as the tax measures are used to support the economic development of particular regions, an assessment will be made of whether the measures are in proportion to, and targeted at, the aims sought. In assessing this, particular attention will be paid to special features and constraints in the case of the outermost regions and small islands, without undermining the integrity and coherence of the Union legal order, including the internal market and common policies.

Procedure

H. The Code of Conduct Group, as set up by the Council conclusions of 9 March 1998, will continue to assess the tax measures that may fall within the scope of this code and to oversee the provision of information on those measures. The Council invites each Member State and the Commission to appoint a high-level representative and a deputy to this Group, which will be chaired by a representative of a Member State. The elected chairs are assisted by the General Secretariat of the Council, which provides secretariat functions for the Group. The Group, which will meet regularly, will select and review the tax measures for assessment in accordance with the provisions laid down in paragraphs E to G. The Group will report regularly on the measures assessed. These reports will be forwarded to the Council for deliberation. They will include the agreed descriptions and final assessments of the tax measures it has examined.

Final documents, as approved by the Council, will be made public and additional documents will be made public, as appropriate, in accordance with relevant rules.

I. The Council invites the Commission to assist the Group in carrying out the necessary preparatory work for its meetings and to facilitate the provision of information and the review process. To this end, the Council requests Member States to provide the Commission with the information referred to in paragraph E so that the Commission could prepare the draft descriptions and draft assessments referred to in paragraph F. The Commission should perform similar tasks for the assessments referred to in paragraph N. The Commission does not take part in the decision-taking of the Group. The outcomes of the Group's work are validated by the representatives of the Member States at the level of the Group and submitted to the Council for approval.

State aid

J. The Council notes that some of the tax measures covered by this code may fall within the scope of the provisions on State aid in Articles 107 to 109 of the Treaty on the Functioning of the European Union. The work of the Group is conducted without prejudice to Union law. In cases where the Commission opens state aid proceedings, the Group should suspend its examination of the measures concerned until the end of that state aid procedure. A preliminary description of the measure, drafted by the Commission in close consultation with the Member State concerned, can already be provided to the Group. A final description should be provided as soon as the state aid procedure has ended, if needed.

Action to combat tax avoidance and evasion

K. The Council calls on the Member States to cooperate fully in the fight against tax avoidance and evasion, notably in the timely exchange of information between Member States, in accordance with their respective national laws, Union law as well as international standards.

The Council invites the Group to hold, where this is deemed appropriate, exchanges on issues of common interest discussed in international fora that fall within the scope of the code.

L. When deemed appropriate, the Group could also submit to the Council for approval proposals for general guidance within the scope of its mandate, to the extent that the proposed general guidance is not already covered by Union legislation. Once approved by the Council, the final guidance will be published. In particular, the Group will submit for approval by the Council proposals for guidance on specific tax features of general application that fall within the scope of paragraph B2, and such features will be assessed with respect to Member States – in accordance with the preceding provisions of this code – taking account of such guidance.

M. The Council notes that anti-abuse provisions or defensive measures contained in national tax laws and in double taxation conventions play a fundamental role in counteracting tax avoidance and evasion, also with respect to the external strategy of the EU.

External Strategy of the EU and geographical scope of the code of conduct for business taxation

N. The Council considers it advisable that principles aimed at abolishing harmful tax measures should be adopted on as broad a geographical basis as possible. To this end, Member States undertake to promote their implementation at the global level by seeking cooperation with jurisdictions located outside the Union, including through the EU list of non-cooperative jurisdictions for tax purposes. The details of the listing process are set out in the Council conclusions of 5 December 2017 and subsequent updates and revisions, as well as the relevant procedural guidelines for the monitoring process.

To that end, the Group carries out regular assessments of relevant jurisdictions on the basis of objective criteria in relation to tax transparency, fair taxation and implementation of anti-BEPS measures.

The Group will regularly inform the Council of the progress made and recommend to the Council updates and revisions of the list.

O. Member States also commit to promoting the adoption of the principles of the code in territories to which the Treaty does not apply. In particular, Member States with dependent or associated territories or which have special responsibilities or taxation prerogatives in respect of other territories, provided that these are not in the scope of the EU list of non-cooperative jurisdictions for tax purposes, commit, within the framework of their constitutional arrangements, to ensuring that these principles are applied in those territories. In this connection, those Member States will take stock of the situation in the form of reports to the Group, which will assess them under the review procedure described above.

Application, monitoring and revision

P. The present code replaces, from 1 January 2023, the code of conduct for business taxation set out in the Resolution of the Council and the representatives of the governments of the Member States meeting within the Council of 1 December 1997. However, with regard to tax features of general application as defined in paragraph B.2, paragraphs E.1 to F.2 will apply from 1 January 2024, and will only be used for measures enacted or modified on or after 1 January 2023.

In order to ensure the even and effective implementation of the code, the Council invites the Commission to report to it annually on the implementation thereof and on the application of fiscal state aid. The Council and the Member States will review the provisions of the code, when appropriate, especially when there is a new international consensus on relevant issues.
