



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 18 November 2009

16233/09

LIMITE

FISC 163

PUBLIC

REPORT

from :	Code of Conduct Group (Business taxation)
to :	ECOFIN Council
on :	2 December 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 Swedish Presidency.
7. 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

8. The Code of Conduct Group met on 23 September and 18 November 2009 under the Swedish Presidency.
9. At the meeting of 23 September the Group also confirmed a programme of work under the Swedish Presidency, agreeing to take forward work in the following areas:
 - (a) standstill;
 - (b) anti-abuse issues within the sub-group;
 - (c) discussion on the substantial aspects of the Group's Work Package, in particular:
 - transparency and exchange of information in the area of transfer pricing;
 - administrative practices;
 - links to third countries.

Appointment of Vice-Chairs

10. Mr Carl Gustav Fernlund (President of the Administrative Court of Appeal in Gothenburg) and Ms Julia Martinez (Deputy Director General for International Tax Affairs in the General Directorate of Taxation in the Ministry of Finance of Spain) were confirmed as the first and the second Vice-Chairs for the period up to the end of the Swedish Presidency.

Standstill

11. 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 Swedish Presidency identified the following measures where further discussion under standstill was required:
 - *UK: Jersey - Zero-Ten Corporate Tax Regime*
 - *UK: Guernsey - Zero-Ten Corporate Tax Regime*
 - *UK: Isle of Man - New Tax Legislation*
 - *The Netherlands - Interest Box*

12. On the Zero-Ten Corporate Tax Regimes of Jersey and Guernsey and the New Tax Legislation of the Isle of Man, the Group was not yet able to finalise its views in the absence of an agreed description. The Group agreed to return to these measures under the Spanish Presidency of the Council.
13. As regards the Interest box measure, the Group previously discussed its description and agreed that it should be assessed against the Code criteria when State Aid proceedings were complete (15545/1/07). The State Aid proceedings being completed, at its meeting on 23 September 2009 the Group returned to the measure based on the amended description submitted by the Commission Services. The group discussed whether it was useful to have a discussion based on this description. The Netherlands clarified that it had not yet decided to amend the regime, and therefore the description was premature. It agreed to work with the Commission on an agreed description as soon as the legislative proposal to amend the envisaged measure had been issued.

Work Package

14. On 2 December 2008 the ECOFIN Council invited the Group to continue its work on 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). The Group agreed to 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 (10200/1/09 FISC 69).

Anti-abuse

15. Subsequent to the agreement of the Group on the further work in the area of anti-abuse (10200/1/09 FISC 69), the Council agreed to the establishment of a sub-group of the Code of Conduct Group to examine, with a view to establishing guidelines, anti-abuse issues related to inbound and outbound profit transfers and mismatches between tax systems, in particular as regards the treatment of hybrid entities and profit participating loans, and invited the Working Party on Tax Questions (Direct Taxation) to examine other anti-abuse issues in the framework of the coordination exercise (11967/09 FISC 96).
16. At its meeting on 23 September the Group agreed that the sub-group will be chaired by the representative of the Member State holding the Presidency of the Council.
17. The sub-group had its first meeting on 27 October 2009 and discussed inbound and outbound profit transfers as well as mismatches between tax systems. The sub-group agreed that further work on these issues needs to be undertaken, and the Commission agreed to submit further information to be discussed at a second sub-group meeting under the Spanish presidency planned in early 2010.

Transparency and exchange of information in the area of transfer pricing

18. As regards the issue of transparency and exchange of information in the area of transfer pricing, the Group agreed on a questionnaire to be filled out by Member States at its meeting on 29 June 2009. The replies of the Member States were discussed at the meeting on 23 September 2009 based on a document forwarded by the Commission, which summarised the replies from the Member States on that questionnaire.

19. The replies from the Member States showed that the agreed proposals set out in Annex 2 of the report to the ECOFIN Council of 26 November 2002 (14812/02) have not been properly reflected in Member States' practices. To the extent this was due to a lack of experience with the practical aspects of spontaneously exchanging information in the area in an efficient way. It was agreed to improve this situation by providing technical assistance in the context of the Fiscalis program in the form of a project group.

Administrative practices

20. In order to carry out the Work Package on "Administrative practices", the Group agreed on a questionnaire to revisit the work done in 1999 on a comparative study across Member States of administrative practices in taxation.
21. The fifteen Member States already covered by that previous study were asked for an update whereas the twelve Member States not covered by that study were asked to provide more general information on the legal basis related to administrative practices in the area of rulings. All Member States were requested to provide recent data on the type and number of rulings issued as well as the level of transparency applied to these rulings.
22. At its meeting on 18 November 2009, the Group discussed the replies of the Member States. After an exchange of views, the Group agreed that further discussion of this issue would be useful, in particular on the following points:
- definition of rulings,
 - improvements to transparency,
 - broader exchange of relevant information on rulings that may affect tax bases of other Member States.

The Commission agreed to submit further information to facilitate the discussion on these points.

Links to third countries

23. Continuing the work started under the Czech Presidency the Group discussed the issue of links to third countries at its meetings on 23 September 2009 and 18 November 2009.
24. At the meeting on 23 September 2009 the Group discussed how the promotion of the adoption of the principles of the Code of Conduct in third countries might be effectually realised. The Group agreed on the principles of a step by step approach including the following steps: (1) identification of third countries and/or regimes that would need closer investigation by the Group due to their potential qualification as harmful, (2) closer investigation by the Group on the basis of a description of those regimes, (3) assessment of the regimes and (4) further actions to be undertaken with regard to the regimes found to be harmful.
25. After further exchange of views at its meeting on 18 November, the Group agreed, with a view to identifying possible harmful tax regimes of third countries, to invite the Commission:
 - to take bilateral contact with all Member States, and
 - in the framework of its negotiations with third countries and the good governance clauses that form part of those negotiations, to make its own assessment of the possible harmfulness of the tax systems of these countries, and
 - on that basis to report back to the Group.