COUNCIL OF
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REPORT

from:	Code of Conduct Group (Business Taxation)
to:	Council (ECOFIN)
on	30 November 2011
Subject:	Code of Conduct (Business Taxation) - Report to the Council (ECOFIN)

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 2011 under the Polish 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 13 September, 20 October and 16 November 2011 under the Polish Presidency.

9. At the meeting of 13 September 2011 the Group confirmed a programme of work under the Polish Presidency, agreeing to take forward work in the following areas:

(a) continue its work on rollback;

(b) continue its existing work on standstill;

(c) discuss the Group's Work Package.

Appointment of Vice-Chairs

10. Mr Cezary Krysiak (Head of Tax Policy Department in the Ministry of Finance of Poland) and Mr Ivar Nordland (Deputy Permanent Secretary in the Ministry of Finance of Denmark) were confirmed as the first and the second Vice-Chairs for the period up to the end of the Polish Presidency.

Rollback

11. *UK: Jersey – Zero-Ten Corporate Tax Regime*
The Group discussed the rollback of the harmful aspects of Jersey's Zero-Ten Corporate Tax Regime on the basis of Amendment No. 38 to Jersey's Income Tax Law. The Group agreed that the measures taken by Jersey were adequate to achieve the rollback.

12. *UK: Isle of Man – New Tax Legislation:*
The Group discussed the rollback of the harmful aspects of the Isle of Man's New Tax Legislation on the basis of the amendments to the Isle of Man Income Tax Act 1970 introduced by the Income Tax (Repeal of the Attribution Regime for Individuals) Order 2011. The Group agreed that the measures taken by the Isle of Man were adequate to achieve the rollback.

Existing work on Standstill

13. 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 Polish Presidency identified the following measures where further discussion under standstill was required:
    - *UK: Gibraltar – Income Tax Act 2010*
    - *UK: Guernsey – Zero-Ten Corporate Tax Regime*

14. As regards UK: Gibraltar – Income Tax Act 2010, at its meeting on 20 October 2011 the Group agreed to proceed with the formal assessment of this measure against the criteria of the Code and requested the Commission Services to prepare agreed description of this measure, in consultation with the UK.

15. As regards UK: Guernsey – Zero-Ten Corporate Tax Regime, at its meeting on 20 October 2011 the Group agreed to resume its work in the absence of any conclusion to date of Guernsey's review of its corporate tax regime (doc 10033/10, FISC 47, par. 17) and requested the Commission Services to finalise the agreed description of this measure, in consultation with the UK. The Group will come back to this issue during the Danish Presidency.

16. Regarding developments in the French and the Dutch overseas territories (10033/10 FISC 47, par. 24), the Commission informed the Group that it continues bilateral contacts with France and the Netherlands and will keep the Group informed, with a view to further discussions in the Group, if necessary.

Work package

17. The Group continued its work on the Work Package, namely anti-abuse and links to third countries.

Anti abuse

18. Regarding the Profit Participating Loans the Group agreed that the legal implications of different ways for implementation of the solution contained in the Code Group's Report to the Council (ECOFIN) on 7 December 2010 (doc. 16766/10 FISC 139, par. 17) should be subject to further technical analysis in a Commission's Working Group. The Commission will keep the Code Group informed of the progress of this analysis.

Links to third Countries

19. Continuing the work undertaken under the Belgian Presidency (16233/09 FISC 163) and the Hungarian Presidency (10857/11 FISC 75) the Group discussed the issue of links to third countries at its meetings on 13 September, 20 October and 16 November 2011. In line with the Council Conclusions of 8 June 2010 (10595/10 FISC 57) the Group has concentrated on opening a dialogue with Switzerland and Liechtenstein.

20. As regards Switzerland, the Group took note of the state of discussions and reiterated that the aim is for Switzerland to apply the principles and criteria of the Code (doc. 10595/10 FISC 57). In that context, the Group encouraged the Commission to start the dialogue with Switzerland which, in the first place, would identify company tax issues that have the potential to distort business operations and opportunities, including ring-fenced tax regimes, would pursue possible technical solutions to the issues raised and would attempt to reach agreement on implementing any agreed solution. If satisfactory progress in this dialogue is not achieved by the end of the Danish Presidency, the Group will follow alternative approaches, including the unilateral assessment of the regimes.[1]

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1 Italy has a political reservation on the approach outlined in par. 20. In fact, Italy considers that, in order to maintain the credibility of the whole exercise and to ensure the effectiveness of the dialogue with third countries, a different approach should be followed, specifying aim, context, terms and criteria of such dialogue.
In particular, the dialogue should be: essentially aimed at preventing unfair tax competition and focused on potential harmful tax regimes; based on all principles and criteria of the Code. It should also include a framework for the evaluation of the regimes, its outcomes and possible consequences.

21. With regard to Liechtenstein, without prejudice to possible future analysis of other aspects of Liechtenstein's tax system, the Group agreed that at this stage the following issues should be addressed:

- Full exemption for dividends and capital gains;
- Exemption for capital gains combined with a tax deductible write down / value adjustment for participations decreasing in value;
- Special regime for Private Asset Structures.

The Group will come back to this issue during the Danish Presidency.

NEW WORK PACKAGE

22. Complementary to its normal, ongoing work on rollback and standstill and as a replacement for the former 2008 Future Work Package, the Group agreed a new Work Package 2011 as contained in Annex to this report.

ANNEX

WORK PACKAGE 2011
CODE OF CONDUCT GROUP

In addition to the ongoing work on monitoring standstill and the implementation of rollback and following the Work Package of the Group agreed by the Council (ECOFIN) in December 2008 (16410/08, FISC 174), the Code of Conduct Group proposes to take forward the programme of work within the existing mandate as set out below. It builds on work continued from the 2008 work package and it contains new topics.

The Group recognises that a significant part of its work concerns ongoing issues, but agrees to assess progress made on this work package by the end of the Irish Presidency.

(1) Anti-abuse

In the context of the Group's work on anti-abuse, the Group will proceed its work on mismatches (10200/1/09, FISC 69, par. 22). With regard to profit participating loans the Group will continue discussions about the various possible ways to effectively implement the agreed solution and on the best way to proceed in accordance with Community law.

(2) Administrative practices

Following work done under the 2008 Work Package, the Group will monitor developments in administrative practices of Member States in parallel with the annual round of standstill and rollback notifications. It acknowledges that this topic is an open issue.

(3) **Monitor the implementation of agreed guidance**

The Group has agreed on a series of guidance notes, most recently following discussions on the last 2008 Work Package. After having allowed Member States sufficient time to amend their laws or practices where needed, the Group will monitor actions undertaken by Member States to implement these guidance notes.

(4) **Preparing guidance or application notes**

While noticing that past assessments will not be affected, the Group will undertake efforts to consolidate, per type of regime, various case-by-case assessments into general guidance or application notes for future use. Initially, these efforts will concentrate on regimes concerning income from mobile capital (intangibles / debt claims) and on regimes for free zones or special economic zones.

(5) **Investment funds**

On the basis of cases provided by Member States and to the extent considered necessary the Group will examine policy responses available addressing potentially harmful tax planning by multinationals through the use of special tax regimes for investment funds possibly leading to a best practices solution.

(6) **Links to third countries**

The Group will continue its efforts in promoting the principles and criteria of the Code of Conduct towards third countries. In line with the Council Conclusions of 8 June 2010 (doc. 10595/10 FISC 57), work will concentrate on a dialogue with Liechtenstein and Switzerland.