



**COUNCIL OF
THE EUROPEAN UNION**

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"A" ITEM NOTE

from: General Secretariat
to: Council
Subject:: Code of Conduct (Business Taxation)
= Draft Council Conclusions (Work Package)

1. Subsequent to the discussion that took place at the ECOFIN Council on 3 June 2008, the Code of Conduct Group (business taxation), at its meeting of 18 November 2008, agreed:
 - the procedural aspects of its future Work Package (as contained in Annex I);
 - the final version of the future Work Package (as contained in Annex II);
 - to discuss the other items of the future Work Package under the Czech, Swedish and Spanish presidencies, namely
 - 1) anti-abuse;
 - 2) transparency and exchange of information in the area of transfer pricing;
 - 3) administrative practices; and
 - 4) links to third countries

2. This agreement was confirmed at Coreper of 26 November 2008, which suggested that the Council adopt, as an A item at a forthcoming meeting, the following conclusions:

"The Council:

- Approves the Procedural Aspects of the Work Package (as contained in Annex I), as well as the Work Package itself (as contained in Annex II);
- Welcomes the fact that the Group already completed its work on the Procedural Aspects of the Work Package (Annex I) and invites the Group to continue its work on the other items of the Work Package namely anti-abuse; transparency and exchange of information in the area of transfer pricing; administrative practices; and links to third countries ;
- Invites the Group to report on its work to the Council before the end of the Czech Presidency."

FUTURE WORK PACKAGE: PROCEDURAL ASPECTS

Subject: Point 1 of the WP: Procedure and the role of precedence and comparability
Point 2 of the WP: Links with State aid proceedings

General guiding principles concerning evaluation of measures

- In order to build on the framework of the Code of Conduct and increase transparency, all new evaluations of the Code Group will have to be sufficiently substantiated taking into consideration all Code criteria, stating arguments and providing data where possible, while remaining within the mandate of the Code Group. The guiding principles for all evaluations are that they will take place on a case-by-case basis and take account of objective economic factors and impact data, and that they are carried out with a view to avoiding discrimination between Member States, so that similar cases will not be treated differently. This elaborated evaluation can then be used for future reference in case a MS claims precedence. As far as assessing criterion 1b is concerned, and without prejudice to the criteria in the Code, the Group will consider any economic factor and impact data that are brought to its attention. The Group will consider size and openness in order to ensure that there is no discrimination between Member States. Equally, it will not use these factors in a way which discriminates against larger or less open Member States. Together with size and openness the Group will consider other relevant factors, such as the transparency of the tax system and the significance of the economic effect on other Member States, in a similarly full and balanced way.
- Furthermore, the development or revision of guidance notes (e.g. on holding company regimes, R&D / royalty tax incentives and other regimes leading to a lower level of taxation) could help build on the results of the Group.

- In case a measure has been approved by the Group, the approval of this measure should not preclude a possible future reassessment of this measure in exceptional circumstances (after a reasonable timeframe and after MS's indications that their tax bases are significantly affected by this measure). Such reassessment will start only at the invitation of ECOFIN on the basis of an analysis of the facts made by the Group.
- The Group accepts that the Code assessments are not an exact science. In case of conflict of opinions, a more political discussion on precedence (or any other matter) cannot always be avoided.

1. Role of precedence and comparability

1.1. Guiding principles concerning 'Precedence'

- While each measure should be assessed on its merits under the peer review process, precedence has in the past and should in the future play a role in the Code of Conduct procedure. The claim for precedence as well as its assessment should be made in a transparent manner.
- The Group will take the following approach if a Member State (MS1) claims precedence on the basis of a regime of another Member State (MS2):
 - i) MS1 is required to provide a written document substantiating the claim for precedence, based on factors such as scope, design and general tax environment and (actual or estimate) data on the impact of the regime.
 - ii) the Group will compare the regimes of MS1 and MS2. In this respect a comparability table (as suggested in Annex 1) can be used as tool to structure and focus the discussion.
 - iii) in case the regime of MS2 was approved by the Group in the past with question marks on criteria 1b and 2b, MS2 can be requested to provide new information on economic impact in case these data are relevant for comparing them with MS1 economic data. MS 2 regime will not be automatically re-evaluated.

1.2. Guiding principles concerning 'Comparability':

- A comparison of tax measures should be based on the characteristics of the measure which are relevant from a Code of Conduct perspective.

- In order to enable the Group to make a relevant comparison between tax measures a table (as suggested in Annex 1) can be used as a tool to specify the comparables in cases of claims for precedence. As preliminary remarks:
 - the elements in the table should not be used as a cumulative requirement list since requiring 100% comparability would undermine and erode the principle of precedence and equal treatment;
 - the left column of the comparability table contains a full list of the elements derived from the Code of Conduct that are relevant in the comparison. The list of comparables, in the right column of the table, sets out factors which may be considered relevant for the Code of Conduct but is in principle non-exhaustive;
 - 'type of income' is a relevant comparable since the Code focuses on measures that affect the location of business activities. The Group could consider that if a measure targets a type of income which is relatively mobile, one could argue that the measure is more likely to affect the location of business activities than a measure that targets a less mobile type of income (determined on the basis of the actions needed and risks run by relocating the underlying asset or activity that generates the income or the possibilities to re-route a flow of income from the companies actually paying the income). On the basis of the measures the Group reviewed in the past, the Group could try and develop a table to be used as a more detailed comparability tool.

2. Procedure

- The procedures in question relate to the way conclusions are reached in the Code of Conduct Group. In this context, the Group should maintain to aim at a (broad) consensus to reflect the MSs positions in the Code of Conduct Group in future reports to ECOFIN, to avoid loosing the effectiveness of the Code Group, while respecting the principle of unanimity as laid down in paragraph 14 of the Council conclusions concerning the establishment of the Code of Conduct Group (9 March 1998, 98/C99/01).

- Therefore, the Group considers that the Code of Conduct reports to ECOFIN can still use the terms 'the Group' and 'broad consensus':
 - in the case that all MSs (minus the one MS concerned) share an opinion;
 - in other cases where MSs, other than the MS concerned, have a dissenting opinion, and none of these MSs oppose the use of the wording 'the Group' and 'broad consensus' (e.g. in case MSs might technically object to an evaluation of a measure but do not politically object to the end result of the Group at ECOFIN level).
- In case the Group does not reach 'broad consensus', the Chair will consider calling for an additional Code of Conduct Group meeting where all MSs will be urged to participate at high level (political) as is foreseen in paragraph 11 of Council Conclusions concerning the establishment of the Code of Conduct Group (9 March 1998, 98/C 99/01), with the aim of having a more political discussion (and perhaps solve any problem that the Group could not solve on a more technical level). Such a Code Group meeting could also address more general Code issues, not specifically relating to a measure, in preparation for the ECOFIN Council.
- In case “broad consensus” can’t be reached, the report to ECOFIN can then express the various views mentioned, indicating the number of MSs 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 order to raise more awareness of the Code of Conduct at the level of Ministers and our present work, an ECOFIN Council meeting with the Code on the agenda could be used to re-affirm the commitment of all MSs to combat harmful tax competition and make clear that in future more discussions will follow at ECOFIN (whereas in the past most Code reports passed as a I/A item).

3. Situations where measures are affected by State aid proceedings

- Paragraph J of the Code states that some of the tax measures covered by this code may fall within the scope of the provisions on State aid. However, the paragraph does not provide any procedure for the fact that both State aid proceedings and Code of Conduct discussions can take place in ‘parallel’.

- In cases where a measure is part of an ongoing State aid procedure (after the formal opening of the State aid procedure), the Group will suspend the Code of Conduct discussion until the Commission's State aid procedure has taken its course. A preliminary description of the measure, drafted by the Commission in close consultation with the MS concerned, can already be provided to the Group. A final (possibly revised) version of a description should be provided immediately after the end of the State aid procedure, if need be.
 - The Group should be reminded that a Code of Conduct evaluation is not necessarily the same as a Commission State aid decision (or vice versa). The two procedures are separate and follow their own set of rules and criteria. MSs should therefore explicitly recognize that a COM State aid decision does not affect the outcome of a Code of Conduct evaluation (and vice versa).
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ANNEX to ANNEX I
Code of Conduct comparability table

	Code of Conduct elements	Comparables
A	Affects business location	<p>Which type of business or income is covered by the regime?</p> <p>Does the measure attract genuine economic business or artificially shiftable mobile tax bases?</p> <p>Attraction of tax bases of other MSs? Can the tax base easily be shifted (mobility)?</p> <p>Is the measure targeted at MNEs (intra group)?</p>
B	Lower level of taxation	Design of the reduction of the tax base or rate
1a	Benefits accorded to non-residents or transactions with non-residents	To what extent does the measure, de jure, benefit foreign-owned companies.
1b	De facto	<p>To what extent does the measure, de facto, benefit foreign-owned companies.</p> <p>Impact assessment required, economic effects. (e.g. number of foreign owned companies benefiting as a percentage of total companies benefiting) (Without prejudice to the criteria in the Code, the Group will consider any economic factor and impact data that are brought to its attention. The Group will consider size and openness in order to ensure that there is no discrimination between Member States. Equally, it will not use these factors in a way which discriminates against larger or less open Member States. Together with size and openness the Group will consider other relevant factors, such as the transparency of the tax system and the significance of the economic effect on other Member States, in a similarly full and balanced way).</p>

2a	Protection of the tax base	Does the measure affect the domestic tax base? Is the domestic tax base protected in any way? If yes, in which form?(e.g. no domestic companies allowed or limitation of deductibility of transactions with domestic companies).
2b	De facto	To what extent (budgetary) is the domestic tax base protected? Impact assessment needed, economic effects
3	Substance	Which substance requirements are in place? Personnel, investments in fixed assets, other.
4	Profit determination (transfer pricing)	OECD Transfer Pricing Guidelines - fixed margins vs case by case approach - periodical review of the transfer price - exchange of information
5	Transparency	Procedure for granting of the benefits (discretionary powers?)
C	Other elements:	Such as general tax environment, to the extent that it is relevant for the measure under consideration. (e.g. general tax rate, deviation of the incentive from the general tax rate, historic context of the tax measure which is used for the claim of precedence, or how the activities concerned are effectively taxed throughout the Community (paragraph G of the Code))

**FUTURE WORK PACKAGE
WITHIN THE EXISTING MANDATE OF THE CODE**

In addition to the ongoing work on monitoring standstill and the implementation of rollback, the Code of Conduct Group proposes to take forward the programme of work within the existing mandate as set out at (1) to (6) below. The Group considers that it should be able to complete this programme of work over the next eighteen months under the Czech, Swedish and Spanish Presidencies.

(1) Procedure and the role of precedence and comparability

In accordance with the conclusions of the Council of December 1997 considering as potentially harmful a tax measure which provides for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question and while not reopening assessment of measures that have been finalised, the Group would reflect on the pros and cons of relying purely on precedence, or of considering each measure in isolation, or alternatively somewhere in between.

The Group would also explore how it might be possible to improve the way it works within the context of the Council Conclusions of 9 March 1998, including the way conclusions are reached.

(2) How the Group copes with the situation where measures are affected by State aid proceedings

The Group would discuss the interaction of State aid proceedings and evaluation under the Code to see whether there is any scope for better managing the interaction.

(3) Anti-abuse

While noting the Commission's work on coordination in this area, the Group would discuss what potential there is for a common political understanding of the latest position in European law and in particular what 'genuine economic activity' means within the context of anti-abuse rules in the EU.

(4) Transparency and exchange of information in the area of transfer pricing

The Group would follow up on the Group's work in 2002 on transparency and exchange of information in the area of transfer pricing, and discuss the extent to which the agreed proposals set out in Annex 2 of the report to the ECOFIN Council of 26 November 2002 (14812/02) have been reflected in Member States' practices.

(5) Administrative practices

Preceded by a comparative study on transparency of administrative practices, the Group would revisit the work done in 1999 when Member States provided comments on a comparative study across Member States of administrative practices in taxation, and discuss the extent to which Member States' administrative practices, including practices at regional or local level, relax measures to the point that they may be considered harmful.

(6) Links to third countries

With regard to the first paragraph of Paragraph M of the Code on the promotion of the adoption of the principles of the Code of Conduct in third countries, the Group would explore the potential ways to help Member States to increase their influence in this respect.
