COUNCIL OF
THE EUROPEAN UNION

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REPORT

from:	Code of Conduct Group (Business Taxation)
to:	Council (ECOFIN)
on	20 June 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 Hungarian 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 17 February, 11 April and 26 May 2011 under the Hungarian Presidency.

9. At the meeting of 17 February 2011 the Group also confirmed a programme of work under the Hungarian Presidency, agreeing to take forward work in the following areas:

(a) new round of rollback notifications;

(b) new round of standstill notifications;

(c) continue its existing work on standstill;

(d) discussion on the substantial aspects of the Group's Work Package, in particular:

- anti-abuse;
- administrative practises;
- links to third countries.

Appointment of Vice-Chairs

10. Mr Ádám Balog (*Deputy State Secretary for Taxation and Macroeconomic Affairs in the Ministry of Finance of Hungary)* and Mr Cezary Krysiak *(Head of Tax Policy Department in the Ministry of Finance of Poland)* were confirmed as the first and the second Vice-Chairs for the period up to the end of the Hungarian Presidency.

Rollback

11. 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 2010 concerning the implementation of rollback of the measures in its name which appears 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).

12. At its meeting on 11 April 2011, the Group was provided with information on all developments since January 2010 on the implementation of rollback.

13. As regards the following measures for which a transitional period applied till 31 December 2010, it was confirmed that no beneficiaries exist any longer as of that date:

A1– Co-ordination Centres (Belgium)
E7– Foreign Income (Ireland)
A13 – 1929 Holding Companies (Luxembourg)
B4 – International Financing (Netherlands)
C24 – 10% Manufacturing rate (Ireland)
ML5 – Dividends from (other) ML Cy's (Malta)
ML 7 –Investments Service Cy's (Malta)
PL1 –Special Economic Zones (Poland)

Existing work on Standstill

14. 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 Hungarian Presidency identified the following measures where further discussion under standstill was required:

- *UK: Jersey - Zero-Ten Corporate Tax Regime*
- *UK: Isle of Man - New Tax Legislation*
- *Hungary: Determining the tax base for interest payments received from abroad*
- *Luxembourg – Group Financing Companies – Advance Confirmation of Margins*

15. As regards UK: Jersey – Zero-Ten Corporate Tax Regime and UK: Isle of Man - New Tax Legislation, in its meeting on 23 September 2010 the Group was presented with the agreed descriptions of these measures. After discussion on the descriptions and an exchange of views with those concerned, the Group invited the Commission to prepare draft evaluations. The Group discussed these draft evaluations in its meeting on 19 November. The Group agreed that the measures give rise to harmful effects (16766/10 FISC 139, par.12).

16. On 31 January 2011 the Council High Level Working Party concluded that the regimes of Jersey and Isle of Man fall under the scope of the Code of Conduct (6054/11 FISC 14). On 15 February 2011 the ECOFIN agreed these conclusions as an A-item, and in its meeting on 17 February 2011 the Group assessed both regimes as harmful under the Code.

17. Both Jersey and the Isle of Man have informed the Group about the proposed legislative amendments to their respective legislation with a view to removing any harmful elements. The Group welcomed these developments and agreed to review such legislative amendments when discussing the rollback of these harmful regimes under the Polish Presidency.

18. With respect to the Hungarian tax measure on determining the tax base for interest payments received from abroad, the Group noted that this measure has been effectively abolished as of 1 January 2011 without any transitional measures. The Group agreed that there was no need for this measure to be assessed against the criteria of the Code of Conduct.

19. With respect to the Luxembourg tax measure concerning companies engaged in intra-group financing activities the Group discussed the agreed description at the meeting on 17 February 2011. Luxembourg informed the Group that Circular no. 164/2 dated 28 January 2011 determines the conditions for providing advance pricing agreements confirming the remuneration of the transactions. At the meeting on 11 April 2011, Luxembourg informed the Group that Circular no. 164/2bis dated 8 April 2011 ensured that advance confirmations granted prior to the entry into force of Circular no. 164/2 would cease to be valid by 31 December 2011. With the benefit of this information, the Group agreed that there was no need for this measure to be assessed against the criteria of the Code of Conduct.

20. In 2010 the Group was notified of the Bulgarian remit of corporate tax for agricultural producers. The Group agreed to address this measure once the State aid procedure on it was completed (10033/10 FISC 47, par. 21). The Bulgarian delegation informed the Group that the State aid procedure was completed and that the measure was found to constitute compatible State aid under article 107, paragraph 3 of the TFEU (EC decision No 546/2010). The Group agreed that that there was no need for this measure to be assessed against the criteria of the Code of Conduct.

21. 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.

New round of Standstill notifications

22. Member States have made commitments not to introduce new tax measures that would be harmful within the meaning of the Code. In view of this ongoing commitment, each Member State was invited - in accordance with the Group's established practise - to assist the Group in its work by notifying any new measures, which potentially fall within the scope of the Code of Conduct and which have been enacted in the twelve months to end-January 2011.

23. In this respect, at its meeting on 11 April 2011, the Group was provided with information on all developments since January 2010. One new measure was notified to the Group:

- UK: Gibraltar Income Tax Act 2010.

The Group requested the UK to provide more detailed information on this measure with an emphasis on the taxation of inbound and outbound interest and royalty payments. Following the discussions on 26 May 2011, Member States were invited to send the requests for further information to the Commission. The UK agreed to address these requests in the next meeting of the Group.

Work Package

24. The Group continued its work on the other items of the Work Package, namely anti-abuse, administrative practices and links to third countries under the Hungarian Presidency.

Anti abuse

25. Regarding **Profit Participating Loans**[1]**,** the Group agreed that the legal implications of different solutions for implementation of the guidelines contained in the Code Group's Report to ECOFIN Council on 7 December 2010 (16766/10 FISC 139, par. 17) should be further analysed with a view to further discussion under the Polish Presidency. The Group invited the Commission to carry out such an analysis and to report back in the next meeting of the Group.

Administrative practices

26. With a view to starting a review process of administrative practices, the members of the Group were invited to share their knowledge or suspicion about harmful administrative practices of other Member States with the Group. In the absence of any notifications, the Chair proposed to consult with the Commission on potential alternative ways for identifying potentially harmful administrative practices, including the possibility of an external study in this matter.

Links to third Countries

27. Continuing the work undertaken under the Belgian Presidency (16766/09 FISC 139), the Group discussed the issue of links to third countries at its meetings on 17 February, 11 April and 26 May 2011.

[1] The Netherlands, Belgium, Luxembourg and Estonia consider that the Code Group is not the appropriate body to discuss measures on tax coordination aimed at resolving mismatches resulting from disparities as this falls outside the mandate of the Code of Conduct Group.

28. With regard to Switzerland, the Group encouraged the Commission to continue the discussions aimed at the application of the principles and criteria of the Code, on the basis of the Council conclusions adopted on 8 June 2010 (doc. 10595/10 FISC 57), concentrating in this context as a first step on a non-exhaustive list of relevant, potentially harmful tax measures. The Group took the view that at this stage of discussions between the EU and Switzerland it could not consider anti-abuse measures being part of the discussions.

29. With regard to Liechtenstein, the Group held an initial discussion on the new Liechtenstein Tax Act, on the basis of preliminary evaluation by the Commission services. The Group agreed that further analysis was necessary. The Chair invited the Member States to provide the Commission with any relevant input for the next round of discussions. The Group will come back to this issue in its next meeting.

FUTURE WORK PROGRAMME

30. The Group held an initial discussion about a potential future work programme for the Code of Conduct Group at its meeting on 16 February 2011. It continued discussions at its meeting on 11 April 2011 on the basis of a discussion paper prepared by the Commission Services suggesting various different possible areas for future work. At its meeting on 26 May 2011 the Group discussed a possible review of special tax regimes for (collective) investment funds leading to a possible abuse by multinational companies. The Group invited the Commission to deepen its analysis on the relevance of the distinction between disparities and harmful tax practices in this specific area. The Group will come back to this issue under the Polish Presidency.