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REPORT

From:	Code of Conduct Group (Business Taxation)
To:	Permanent Representatives Committee/Council
Subject:	Code of Conduct (Business Taxation) – Report to the Council

I. INTRODUCTION

(a) Background

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.

2. In its conclusions of 9 March 1998 (doc. 6619/98), the Council confirmed the establishment of the Code of Conduct Group. The Group reports regularly on the measures assessed and these reports are forwarded to the Council.

3. The Code of conduct provides that the Group reports "*will be forwarded to the Council for deliberation and, if the Council so decides, published*". Furthermore, the March 1998 Council conclusions indicate that these reports will reflect either the unanimous opinion of its members or the various opinions expressed in the course of the discussion. The procedural elements that were part of the 2008 Work Package (doc. 16410/08) further detailed that the report to ECOFIN can indicate the number of Member States 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*".

4. In accordance with the Procedural Aspects of the Group (doc. 16410/08), 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.

5. In its Conclusions adopted on 8 December 2015 (doc. 15148/15), the Council "*calls for having more substantial 6-monthly Group reports to ECOFIN, reflecting the main elements and views, which were discussed under specific items and reporting also on the monitoring concerning (non-) compliance with agreed guidance*" (paragraph 16).

6. This report from the Code Group encompasses the work of the Group in the second half of 2016 under the Slovak Presidency.

(b) Progress of work

7. The Code of Conduct Group met four times under the Slovak Presidency, on 21 July, 21 September, 19 October and 24 November 2016. The Group continued the work on the basis of the new Work Package adopted in November 2015 (doc. 14302/15, annex 3).

8. At the meeting of 21 July 2016, the Group confirmed a programme of work under the Slovak Presidency, agreeing to take forward work in the following areas:

(a) continue its work on rollback;

(b) continue existing work on standstill;

(c) continue work on the various aspects of the Group's Work Package 2015.

(c) Appointment of vice chairs

9. Tosko Beran (Slovakia) and Antoine Fiott (Malta) were confirmed as respectively the first and the second Vice-Chairs for the period up to the end of the Slovak Presidency.

II. STANDSTILL AND ROLLBACK

(1) Standstill

10. Two Member States notified measures which potentially fall within the scope of the Code. Croatia notified to have enacted a new Act on Investment Promotion which replaced the previous Act on Investment Promotion and Improving the investment Climate. The Netherlands notified the Group of some amendments made by Aruba (one of the fiscal autonomous countries within the Kingdom of the Netherlands) to its Imputation Payment Company (IPC) regime.

11. It was agreed that the Commission services would follow up on these issues bilaterally with the Member States concerned and report back to the Group on 24 November 2016. At the November meeting, the Group decided that the Commission prepares an agreed description on a bilateral basis with Croatia.

(2) Rollback: Patent boxes

12. In November 2014 the Group agreed, in co-ordination with developments at the OECD, on the modified nexus approach as the appropriate method to ensure that patent boxes require sufficient substance. The Group agreed that the EU patent box regimes which had been subject to examination by the Group are not compatible with the modified nexus approach. As a consequence, these EU patent boxes should be changed in line with the compromise; this approach was endorsed by the Ecofin Council in December 2014.

13. The Council Conclusions of 9 December 2014 emphasised the need for Member States to start in 2015 the legislative process necessary to change the patent box regimes and asked the Group to monitor this process. Member States which currently have patent boxes needed to begin the legal processes to close the regimes to new entrants from the end of June 2016 and end all benefits for existing claimants by June 2021.

14. Moreover, the Group agreed that the relevant Member States should submit a report on this issue with their annual notifications of rollback at the Group's first meeting in 2016.

15. During the Netherlands Presidency, all Member States which currently have patent box regimes, except France, have notified the Group of the steps taken to comply with their commitments.

16. At the meeting of 19 October 2016, the Group agreed to report to the ECOFIN that France is in contravention of the ECOFIN Council conclusions of 9 December 2014 (doc. 16846/14) and 8 December 2015 (doc. 14303/15). The Code of Conduct Group confirmed that the French Patent box regime, like all the other Member States patent box regimes will be examined against all criteria of the Code of Conduct in order to assess their potential harmfulness.

17. In the Group's meeting of 24 November, it was agreed to split the process into rollback and standstill aspects. For the standstill procedure the OECD descriptions will be used and the measures will be assessed on the basis of the modified nexus approach and against all Code criteria.

18. The Group examined Member States compliance with the rollback commitment of the modified nexus agreement.

19. The Group decided that the Italian patent box – which was enacted after the agreement on the modified nexus approach in December 2014 – should be treated the same as the pre-existing patent boxes.

20. The Group agreed that all Member States with the exception of France and Italy were broadly in compliance with the rollback commitment of the modified nexus approach, but acknowledged that some technical issues remained to be resolved. The Group decided to return to the issue in the first meeting of 2017, in order to deal with the remaining aspects of rollback and to begin the standstill procedure.

III. ANTI-ABUSE MISMATCHES

21. At its meeting on 20 July 2016 the Group agreed that further work of the subgroup on hybrid mismatches is not required considering the recent Commission proposal for a Council Directive amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (doc. 13733/16 FISC 173 + ADD 1), which covers the full range of hybrid mismatches initially covered by the mandate of the subgroup.

IV. ADMINISTRATIVE PRACTICES: GUIDELINES ON THE ISSUANCE OF TAX RULINGS

22. As part of its 2015 Work Package the Group had agreed to develop a set of guidelines on the conditions and rules for the issuance of tax rulings, i.e. standard requirements for good practice by Member States based on general principles.

23. At the meeting on 21 September 2016, the group agreed on a set of guidelines (see Annex I), which will be submitted to the ECOFIN on 6 December 2016 for endorsement.

V. MONITORING AGREED GUIDANCE: INBOUND PROFITS

24. The Group endorsed guidance on Inbound profits in 2010 (doc. 16766/10). The guidance requires Member States that grant a corporate tax exemption on foreign source dividends (in intercompany situations) to apply either effective anti-abuse provisions (e.g. CFC rules) or a switch over provision (i.e. a provision according to which, under certain circumstances, relief from double taxation is granted via the credit method rather than by means of exemption). The objective is to ensure effective taxation of inbound profits.

25. It was agreed that work in this area should be carried out by using a "tool box" approach. The Commission developed two separate check lists, one for switch over provisions and another for CFC rules, which would enable it to make an assessment on whether an appropriate legal framework is in place as well as on its effectiveness.

26. Given the strong links between the topic at issue and the Commission proposal for an Anti-Tax Avoidance Directive (ATAD), the Group agreed at its meeting on 2 February 2016 that the ongoing discussions on ATAD should be taken into account and that the work will be completed by the end of the SK Presidency. The ECOFIN formally adopted the ATAD at its meeting on 12 July 2016.

27. In the light of this, with regard to Member States, the Group agreed that there is no need to continue the monitoring. However, Member States should report on how they implemented the 2010 guidelines.

28. With regard to dependant and associated territories, the Group agreed to return to the issue after the end of the screening of third country jurisdictions under the external strategy.

VI. OUTBOUND PAYMENTS

29. The Code of Conduct Group adopted a new Work Package under its report to the Council of 23 November 2015. In the new Work Package it is stated that:

"*The Group will consider the question of outbound payments. Its initial work will involve the identification of potential problems which arise when payments are made from the EU to a third country*."

30. At the meetings of the Code of Conduct Group on 20 July, 21 September, and 19 October the issue has been discussed.

31. A German paper for the Group's meeting on 20 July and a paper of the Commission Services identified the following problem: royalties as well as dividends can be transferred without taxation between EU Member States and that companies that wish to transfer their royalty or dividend income to third countries can use this to transfer such income to "conduit entities" in Member States with low or no withholding tax on payments bound to such third countries. The royalties or dividends can then be transferred from those Member States to third country recipients with no or very little withholding tax being paid. This means that taxpayers can potentially avoid taxation partly or completely on such payments. If those payments are transferred to third countries that do not levy tax on such payments, the end result is that no tax is paid on this type of income. In addition such structures may allow the "conduit companies" to avoid paying corporate tax in their Member State of establishment as they use costs generated by the arrangement to reduce their taxable profit.

32. Outbound payments may create problematic effects. Member States expressed different opinions on whether the issue of taxation of outbound payments should be discussed further in the Code of Conduct Group and if so which potential solutions would be suitable.

33. Some delegations referred to the already existing possibilities within the EU framework and double tax treaties to counteract "conduit companies". Other delegations referred to the fact that some initiatives have been agreed in the EU and in the OECD very recently. This would make the statistics presented by the Commission services less relevant as it only covers the situation under current rules. When the new initiatives have been implemented there may be no need for further action relating to outbound payments. As a result it is argued that the Code of Conduct Group should wait for the results of the implementation.

34. According to an analysis provided by the Commission's services for the Group's meeting on 19 October 2016 the recently introduced changes would only establish a minimum level of protection which could be improved through the introduction of more targeted measures. Some delegations consider that there is a need for new initiatives to counter the potentially harmful effects related to outbound payments. The following options for a solution were discussed:

    (a) Coordination of withholding taxes;

    (b) Coordination of national defensive measures;

    (c) Toolbox approach: the tool box approach would allow Member States to choose to apply one or more of a number of options to remedy a situation where it would be considered sufficient to apply one of the options. A tool-box for outbound payments could include specific defensive measures and a definition of minimum withholding tax rates.

35. At this stage, no agreement could be reached. It was concluded that further work is required on this issue.

VII. LINKS TO THIRD COUNTRIES

(1) Liechtenstein

36. The Code of Conduct Group continued its efforts to promote the principles and criteria of the Code of Conduct towards third countries, concentrating at this stage on a dialogue with Liechtenstein. The Commission informed the Group on the state of play of the dialogue with Liechtenstein.

37. The chairman of the Code of Conduct Group sent a letter to Liechtenstein inviting it to the Group for a dialogue related to its tax regimes at the meeting of 19 October 2016, but Liechtenstein was unable to attend.

38. The Group agreed that it was imperative to have the agreed descriptions of the identified Liechtenstein regimes in order to be able to progress and that no link could be made between the discussion of the Liechtenstein regimes and any issues on possible discrimination under the EEA Agreement as this does not fall under the mandate of the Code. However, the Commission asked delegations to provide comments on the information provided by Liechtenstein in relation to the application of the EEA Agreement in order to have a complete view of the factual situation.

(2) Switzerland

39. According to the 2015 Work Programme, the Group will monitor the outcome of past dialogues with third countries. The Commission updated delegates on recent developments in Swiss corporate tax policy, in order to monitor the implementation of the EU – CH Joint statement.

40. On 17 June 2016, the Swiss parliament approved the Corporate Tax Reform Act which will entail the abolition of the five tax measures under scrutiny. Such abolition is foreseen in the joint statement.

41. Various measures to replace existing regimes are being recommended in the adopted act and the probable adoption of such replacement measures and their compatibility with the Joint statement will be monitored by the Code of Conduct Group.

(3) Establishment of the EU list of non-cooperative jurisdictions

42. The ECOFIN Council, in its Conclusions of 25 May 2016 on an “External Strategy for Effective Taxation and Commission Recommendation on the implementation of measures against tax treaty abuse" invited "*the Code of Conduct Group to start work on an EU list of non-cooperative jurisdictions by September 2016, and to determine, on the basis of a first screening by the Commission, third Countries with which dialogues should start, with a view to establishing an EU list of non-cooperative jurisdictions and exploring defensive measures at EU level to be endorsed by the Council in 2017. Those defensive measures could be considered to be implemented in the tax as well as in the non-tax area*".

43. The Slovak Presidency has prioritised work on this dossier and arranged exchange of views in the Code of Conduct Group subgroup on third countries, the Code of Conduct Group and the High Level Working Party (HLWP).

44. The Code of Conduct Group subgroup on third countries, met six times since July 2016 and focused its work on the following areas:

i) establishing the criteria and guidelines to be used in the screening process;

ii) identifying the third country jurisdictions to be prioritised for screening; and

iii) potential defensive measures.

45. The Code of Conduct Group in its meeting of 19 October 2016 endorsed a report[1], reflecting the state of play of work on the process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes. Discussions on open issues took place at the HLWP on 27 October 2016, with a view to submission of this file to the ECOFIN Council.

46. In its meeting of 8 November 2016, the ECOFIN Council has agreed Conclusions on the "criteria for and process leading to the establishment of the EU list of non-cooperative jurisdictions for tax purposes".[2] The ECOFIN Council invited the Code of Conduct Group and its relevant subgroup to finalise by January 2017 its work on selection of the jurisdictions for screening on the basis of the European Commission's Scoreboard and to continue exploring defensive measures at EU level to be endorsed by the Council, in line with the Council Conclusions of May 2016.

47. In its meeting of 24 November 2016, the Group agreed on the identification of third country jurisdictions to be prioritised for screening. The subgroup will *inter alia* continue work on clarification of criteria 1.3 and 2.2.

(4) Tax good governance clause

48. In its Conclusions on an external taxation strategy and measures against treaty abuse from 25 May 2016 (doc. 9452/16 FISC 85) the Council also supported "*the need to update the principles of tax good governance to be used as the new standard provision in future negotiations with third countries"* and invited the Code of Conduct Group *"to examine key elements which should be contained in a clause to be inserted in agreements between the EU and those countries*".

1 Doc. 13496/16 FISC 158 ECOFIN 934 LIMITE + COR 1.
2 Doc. 14166/16 FISC 187 ECOFIN 1014.

49. In its meeting on 20 July 2016 the Group agreed that Code of Conduct subgroup on third countries should deal with this issue. The subgroup held initial discussions on this issue on 14 September 2016.

VIII. PROCEDURAL ISSUES

(1) Interpretation of the gateway criterion

50. In its conclusions of 8 December 2015 (doc. 15148/15, FISC 184) the ECOFIN Council invited the Code of Conduct Group "*to further develop, where appropriate, guidance notes on the interpretation of the criteria of the Code, including the gateway criterion, and their application*". In its conclusions of 8 March 2016 the ECOFIN recalled that the Code of Conduct Group was "*to develop guidance on the interpretation of the gateway criterion and its application*" (doc. 6900/16 FISC 35).

51. The Group discussed this issue in its meeting on 20 October 2016 and agreed that there is no need for guidance concerning the gateway criterion as it now stands. More substantial changes could only be introduced via a revision of the criterion and this work would need to be done in the HLWP.

(2) Guidelines on the notification of Tax measures and the provision of information to the Group

52. The 2015 work package says that in order to improve its working practices the Group will develop guidelines covering the provision of information by Member States to the Group under paragraph E.

53. At the meeting on 21 September the Group agreed on a set of guidelines (Annex II). The guidance deals with:

- the annual timetable for the notification of tax measures;
- the identification of measures that should be notified to other Member States;
- the identification of in which year a measure should be notified, and;
- the content of notifications.

(3) Clarification of the third and fourth criteria

54. The Council conclusions of December 2015 on the future of the Code of Conduct (doc. 15148/15, paragraphs 12-13) invited the Group to "*clarify the third criterion by developing guidance on the basis of OECD BEPS conclusions on Action 5*" and "*the fourth criterion by developing guidance in the light of the OECD Transfer Pricing Guidelines, as amended by OECD BEPS conclusions on Actions 8-9-10*".

55. The Work Package 2015 underlined that "*the Group will develop guidelines covering (…) the interpretation of criterion 3, focussing on the application of a nexus approach to preferential regimes other than patent boxes (…) [and] the interpretation of criterion 4, focussing on which internationally agreed standards are relevant and the role of the arm's length principle in identifying potentially harmful measures*".

56. The Council conclusions of March 2016 (doc. 6900/16, paragraph 10) supported the creation of the new subgroup to deal with the clarification of the interpretation of Code's criteria 3 and 4: "*The Council (…) DECIDES that a subgroup will deal with the clarification of the third and the fourth criteria of the Code*".

57. At the meeting on 20 July 2016 the Group confirmed this mandate and requested the new Subgroup to prepare Council conclusions on this issue.

58. At the meeting on 21 October 2016 the Slovak Presidency presented a report on the work of the Subgroup and draft Council conclusions, which were endorsed by the Group. [3]

59. The Code of Conduct Group will continue to work on guidance concerning other international agreed principles, such as the arm length principle.

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[3] Doc. 14566//16 FISC 198 ECOFIN 1057.

ANNEX I

Code of Conduct: guidelines on the conditions and rules for the issuance of tax rulings – standard requirements for good practice by Member States

The following guidelines apply to the issuing of tax rulings to taxpayers by Member States. For the purposes of these guidelines a ruling is any advice, information or undertaking provided by, or on behalf of, the government or the tax authority of a Member State, or any territorial or administrative subdivisions thereof, to a taxpayer or group of taxpayers concerning their tax situation and on which they are entitled to rely.

However, in order to reduce the administrative burden on Member States, and to ensure consistency with Council Directive 2011/16/EU as amended, these guidelines will not apply to domestic rulings solely for a particular person or a group of persons, excluding those conducting mainly financial or investment activities, with a group-wide annual net turnover, as defined in point (5) of Article 2 of Directive 2013/34/EU of the European Parliament and of the Council[4], of less than EUR 40 000 000 (or the equivalent amount in any other currency) in the fiscal year preceding the date of issuance, amendment or renewal of the rulings.

A. Process of granting a ruling

a. Official rules and administrative procedures for rulings should be identified in advance and published, and they should include: (i) the conditions for the applicability of the ruling process; (ii) the grounds for denying a ruling; (iii) the fee structure, if applicable; (iv) the legal consequences of obtaining a ruling; (v) possible sanctions for incomplete or false information provided by a taxpayer; (vi) the conditions for revoking, cancelling or revising a ruling; and (vii) any other guidance that is deemed necessary in order to make the rules sufficiently comprehensive and clear to taxpayers and their advisors.

[4] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

b. Tax rulings should be issued, and any administrative discretion in granting a ruling should be exercised, only within the limits of, and in accordance with, the country's relevant domestic tax law and administrative procedures, and should be limited to determining how that law and/or any administrative procedures apply to one or more specific operations or transactions intended, planned or undertaken by the taxpayer.

c. Tax rulings should respect applicable international obligations that are incorporated into domestic tax law, for instance, obligations under relevant bilateral treaties and EU law.

d. Tax rulings should be issued in writing.

e. Tax rulings should only be issued by the competent government office or authority in charge of this task. Where a ruling is granted by another government office, it should be subject to approval by the competent office.

f. It is recommended that at least two officials are involved in the decision to grant a ruling or there is at least a two-level review process for the decision, in particular in cases where the applicable rules and administrative procedures explicitly refer to discretion or the exercise of judgement by one of the relevant officials.

g. Tax rulings should be binding on the tax authority (to the extent permitted by domestic law and the principle of legitimate expectation), provided that the applicable legislation and administrative procedures and the factual information on which the ruling is based do not change after the ruling has been granted.

h. Taxpayers should apply for a ruling in writing and provide a full description of the underlying operations or transactions for which a ruling is requested. The information should be included in a file supporting the ruling application (the "ruling file"). The ruling file should also include information on the methods and facts for determining the key elements of the tax authority's view. Any additional information or relevant facts which are brought to the attention of the tax authority (i.e. in meetings or oral presentations) should be recorded in writing and also be included in the ruling file.

i. Information concerning the applicant (including taxpayer's name, tax residency, tax identification number, commercial register number for corporations and companies) and tax advisor/tax consultant involved should be included in the ruling file and/or the ruling itself.

j. Before taking a decision, the person/s providing the ruling should check that the description of the facts and circumstances is sufficient and justifies the envisaged outcome of the ruling. They should also check that the ruling outcome is consistent with any previous rulings concerning similar legal issues and factual circumstances.

k. In the area of transfer pricing, Member States should also apply the EU guidelines for advance pricing agreements published in the annex to the Commission Communication of 26 January 2007 (COM(2007) 71 final).

B. Term of the ruling and subsequent audit/checking procedure

a. APAs should only be for a fixed period of time and should be subject to review before being extended.

b. Taxpayers should notify the tax authority about any material changes in the facts or circumstances on which a taxpayer-specific ruling (including an APA) was based, as soon as possible so that the tax administration can assess whether to exchange this information with another country. As part of this notification process, taxpayers should notify tax administrations of any material changes to the related parties with which they transact (for transactions covered by the ruling) and any other changes which would impact on who information should be exchanged with.

c. Effective administrative procedures should be in place to periodically verify that the factual information relied upon and assumptions made when granting taxpayer-specific rulings remain relevant throughout the period of validity of the ruling. This may be particularly necessary in the case of APAs where any underlying assumptions and decisions could be affected by changes in economic circumstances.

d. Rulings should be subject to revision, revocation or cancellation, as the case may be, in the following circumstances:

1. if the taxpayer makes a misrepresentation or omission in applying for the ruling that calls into question the validity of the ruling;

2. if the relevant laws change;

3. if there is a relevant and significant change (i) in the facts or circumstances upon which the ruling was based or (ii) in the validity of the assumptions made.

C. Exchange of information

a. Under EU law relevant rulings will also need to be spontaneously or automatically exchanged with other tax authorities. Rulings may also fall within the scope of other exchange mechanisms such as the OECD framework for compulsory spontaneous exchange of information on rulings, the EU "Model Instruction" or bilateral treaties.

D. Publication

a. Where a tax ruling has horizontal application to the affairs of other taxpayers in similar situations (also referred to as general rulings by the OECD), it should be published and made easily accessible to other tax administrations and taxpayers. Ideally, such rulings should be published on the tax administration's website. If not published in full, the website should contain short summaries with links to where the ruling is accessible in full. Publication should take place as soon as it is practicable after the ruling is granted and, at the latest, within six months.

b. If a Member State does not publish such rulings, for reasons of taxpayer confidentiality, it should however ensure that the conclusions reached in them are published on the tax administration's website. This can be in the form of either updated guidance, or more general conclusions, and will therefore be available to other taxpayers and tax administrations. This publication can be in an anonymous form without any reference to the taxpayer and thereby respect the principle of taxpayer confidentiality.

ANNEX II

Code of Conduct Group – Work Package 2015

Procedural Issues: Guidance on the notification of tax measures under paragraph E of the Code

1. This note provides guidance for Member States regarding the notification of existing and proposed tax measures to the Code of Conduct Group.

2. Standstill notifications should cover any new measures which potentially fall within the scope of the Code and which were enacted in the previous year. Rollback notifications should cover developments regarding measures to which the obligation in paragraph D applies.

3. The guidance deals with:

    - the annual timetable for the notification of tax measures;
    - the identification of measures that should be notified to other Member States;
    - the identification of in which year a measure should be notified, and;
    - the content of notifications.

4. The guidance covers standstill and rollback notifications. Member States should not face any difficulty in identifying measures that should be included in a rollback notification because these will already have been discussed by the Group. However, the question of when a measure has been enacted is relevant for both standstill and rollback.

5. As set out in the Code, where a proposed measure needs parliamentary approval, the information referred to in paragraph E does not have to be given to the Group until after the measure's announcement to Parliament.

Annual Timetable for the notification of tax measures

6. Beginning in October 2016 the Chair will ask Member States to submit their standstill and rollback notifications in time for them to be discussed at the first meeting of the following year. The Chair will set a deadline for the submission of the notifications.

7. The notifications sent to the Chair for discussion in 2017 should cover the 11 month period from 1 February to 31 December 2016. After that notifications should cover the period 1 January to 31 December each year.

8. Member States' standstill and rollback notifications should cover all tax measures which have been enacted in the previous year.

The identification of measures that should be notified to other Member States

9. The fundamental principle is that Member States will notify each other of existing and proposed tax measures which may fall within the scope of the Code. In particular, Member States should provide information on any measure which appears to fall within the scope of the Code.

10. Member States should not interpret their obligation to notify other Member States of relevant tax measures narrowly.

11. When deciding whether to notify a measure Member States must consider the scope of the Code as set out in paragraphs A and B and the breadth of opinion that exists within the Group rather than just their own view of the matter.

12. The annex to this guidance contains a list of different types of measures that have been notified to the Group in the past. As measures of this type have been previously discussed by the Group, Member States should regard the list as indicative of measures that would be notified to it in the future.

13. Amendments to existing measures should be regarded as separate measures and identified by Member States using the principles outlined above.

14. Amendments to existing measures should be notified whether or not the original measure was notified to the Group.

The identification of in which year a measure should be notified

15. In many cases a measure will be proposed and enacted in the same year. Where this is not the case a proposed measure should be notified if it is sufficiently well developed to be discussed in the Group. The presumption is that measures which have been announced in public will be sufficiently well developed to be discussed and therefore should be notified in the January following the announcement (normally the announcement to Parliament, see paragraph E, last sentence of the Code of Conduct).

16. Standstill notifications also cover measures "enacted" in the previous year. To ensure a consistent approach Member States should use the following guidance to identify when a measure should be regarded as "enacted".

17. A measure will be regarded as "enacted" on the earliest of the following dates;

- the date on which tax advantages become available to taxpayers;

  Example: on 7 December 2016 the government announces that a new relief will be introduced. The relief will apply to transactions taking place on or after the date of the announcement. The parliamentary processes are completed on 10 July 2017 and the measure becomes law.

  This measure would be regarded as "enacted" on 7 December 2016 because that is the day on which the benefits become available to taxpayers. It should be reported to the Code Group in January 2017.

- the date on which the parliamentary processes necessary to introduce the measure are substantially completed, even if tax advantages have not become available to taxpayers;

  Example: on 7 December 2016 the government announces that a new relief will be introduced. The relief will be available from 1 April 2018. The parliamentary processes are completed on 10 July 2017 and the measure becomes law.

  This measure would be regarded as "enacted" on 10 July 2017 and should be reported to the Code Group in January 2018.

- the date on which the parliamentary processes necessary to introduce the measure are substantially completed, even if there is no fixed date on which tax advantages will become available to taxpayers or if the availability of the tax advantages depends on further action by the Member State, including the introduction of further legislation;

  Example 1: on 7 December 2016 the government announces that a new relief will be introduced but it will not be available until certain macroeconomic conditions are met. The parliamentary processes are completed on 10 July 2017 and the measure becomes law. It is not known when tax benefits will begin to be available to taxpayers.

  This measure would be regarded as "enacted" on 10 July 2017 and should be reported to the Code Group in January 2018.

  Example 2: on 7 December 2016 the government announces that a new relief will be introduced but not until certain political conditions are met. Draft legislation is published on 11 January 2017 which enables the government to write regulations setting out the nature and scope of the relief. The parliamentary processes are completed on 10 July 2017 and the measure becomes law. No regulations are written and none are planned. It is not known when tax advantages will become available to taxpayers.

  This measure would be regarded as "enacted" on 10 July 2017 and should be reported to the Code Group in January 2018, even though the detail of the relief has not been published.

- the date on which tax advantages with a retrospective effect are announced;

  Example 1: on 7 November 2016 the government announces that a new relief will be introduced. The tax advantages will be available for accounting periods ending on or after 7 November 2016. This means that the benefits will be available to some companies during 2015, e.g. for a company with a 12 month accounting period ending on 30 November 2016 the benefits would be available from 1 December 2015.

  This measure would be regarded as "enacted" on 7 November 2016 and should be reported to the Code Group in January 2017.

  Example 2: on 7 November 2016 the government announces that an existing relief will be extended as a result of a decision of the national courts. The amended relief will be backdated to 1 April 2015.

  This measure would be regarded as "enacted" on 7 November 2016 and should be reported to the Code Group in January 2017.

18. An administrative practice will be regarded as enacted on the date on which it is adopted by the relevant authority in the Member State (that is the first date on which taxpayers can benefit from the practice), regardless of whether or not any relevant instruction or guidance has been made public.

Content of notifications

19. Standstill notifications should enable the Group to decide whether a measure needs to be considered further. In general, clearer and more detailed notifications will make it easier for the Group to reach a decision efficiently.

20. The relevant authorities in Member States will already have prepared summaries and briefings on new tax measures as part of the national legal and administrative processes. Member States should seek to re-use such documents when notifying the measures to the Group.

21. Rollback notifications will typically deal with the amendment or abolition of a measure. If the measure is being amended, the notification should make it clear how the changes address the harmful aspects previously identified by the Group.

Types of measures previously discussed in the Code of Conduct Group

A. Investment incentive measures

1. Development zones
2. New business/start up reliefs
3. R&D tax credits
4. Reinvestment reliefs
5. Rules applying at a regional or local level
6. Special depreciation rules (including capital allowances)
7. Special enterprise zones, free zones, etc.
8. Tax holidays

B. Measures providing for adjustments to the tax base

1. Deductions for notional expenses
2. Downward adjustments of profits (such as "excess profits" or capital contributions)[5]

C. Measures applying to particular types of activities or profits

1. Air transport
2. Capital gains
3. Film/television industry
4. Finance branches
5. Headquarters/coordination companies
6. Holding companies
7. Insurance companies

[5] As discussed in OECD, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 - 2015 Final Report* (October 2015), chapter 5.

8. Intangible assets

9. Interest box

10. Intra-group finance companies

11. Investment funds

12. Manufacturing or distribution activities

13. Offshore activities

14. Patent box

15. Shipping (excluding tonnage tax regimes)

D. Miscellaneous

1. "0/10" type regimes (i.e. nil or very low general rate of CT combined with higher rate for a limited number of activities)

2. Special rules affecting an entity's territory of residence

3. Personal tax measures similar to those described in the conclusions regarding the scope of the Code, as agreed by the Council High Level Working Party on 31 January 2011[6]

4. Ruling regimes

[6] 6054/11 FISC 14.

Code of Conduct Group – Work Package 2015

Procedural Issues: Guidance on the provision of information in the review process

1. This note provides guidance for Member States regarding the provision of information under paragraph E of the Code for the purposes of reviewing a tax measure.

2. It deals with;

   - the description of the measure;
   - the importance of factual information about the effect of a measure;
   - situations where insufficient or contradictory factual information is provided to the Group, and;
   - drafting assessments where insufficient information is available.

The description of a measure

3. The description of a measure will be drafted on a bilateral basis by the Commission Services and the Member State concerned. The description should explain the purpose of the measure, the relevant legal framework, the main elements of its design and factual information about its *de facto* effect.

4. If the Commission Services and the Member State cannot reach agreement on the draft description, the Commission Services should circulate a draft which reflects its own understanding of the situation, noting the areas of disagreement.

5. The Member State should provide the Group with information and reasoning which supports its own view. The Group will then agree a final version of the description.

Importance of factual information about the *de facto* effect of a measure

6. The importance of factual information about the effect of a measure was set out in 2008 in the Group's guiding principles concerning the evaluation of measures. These say that assessments will be made on a case-by-case basis and take account of objective economic factors and impact data so that similar cases will not be treated differently. The Group will also consider size and openness of Member States' economies 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.[7]

[7] Document 16410/08 FISC 174.

7. In particular, assessing a measure under criteria 1b and 2b requires a consideration of its *de facto* effect. The agreed description should therefore include factual information concerning the operation of the measure and its effects. Such information may also be relevant to the consideration of the other criteria.

Descriptions of recently introduced measures

8. In the case of a recently introduced measure a Member State may have little or no factual information about its actual effect. In such cases the description should instead include;

    - an analysis of the policy underlying the measure, based on consultation documents, impact assessments or other sources prepared when it was introduced, and;

    - relevant statistical information, including for example, the estimated costs and/or benefits of the measure, the number of taxpayers expected to use it, etc.

Lack of factual information about the de facto effect of a measure

9. If a Member State has not provided relevant factual information about the effect of the measure the Commission Services shall complete the draft description so far as is possible and circulate it to the Group, noting the lack of factual information and the reason for it.

Information from sources other than the Member State concerned

10. The guiding principles concerning the evaluation of measures make it clear that the Group will consider any economic factor and impact data that are brought to its attention. Therefore factual information on the effect of a measure can be provided by any Member State or the Commission Services.

11. In the event that information provided by a Member State or the Commission Services contradicts information provided by the Member State whose measure is being reviewed, the onus will be on the Member State whose measure is being reviewed to resolve the contradiction.

12. If the contradiction cannot be resolved in this way, the Group will need to decide how the information should be interpreted. In reaching a broad consensus on this issue the Group shall exclude the views of the Member State whose measure is being reviewed and of the other Member State (or Member States) which provided information.

Drafting assessments on the basis of insufficient information

13. If a Member State does not provide sufficient relevant factual information about the effect of a measure, the Group can still ask the Commission Services to write a draft assessment of the measure.

14. In some cases, assessments under criteria 1b and 2b have been marked with a question mark to indicate that the Member State did not supply any factual information. The Commission Services should continue to have this option when drafting assessments.

15. When considering an overall assessment of a measure the Group should take account of criteria assessed with a question mark by considering whether the lack of available information suggests that the measure is harmful under criterion 5 due to a lack of transparency.

16. In such cases the Group should also consider, as a separate matter, whether the Member State concerned has fulfilled its standstill and rollback obligations under paragraph C or D of the Code.