

ROOM DOCUMENT #3
Code of Conduct Group (Business Taxation)
12 April 2016
ORIGIN: Commission Services

Work Package 2015 – procedural issues: provision of information to the Group

Review Process

Background

1. Paragraph E of the Code of Conduct says that Member States will inform each other of existing and proposed tax measures which may fall within the scope of the Code. This requirement is used to support the drafting of agreed descriptions and assessments in the review process. It also underlies the annual submission of standstill and rollback notifications by Member States (dealt with in a separate room document).
2. 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.¹
3. A draft of the guidelines is contained in annex 1. It covers;
 - the description of the measure;
 - the relevance of factual information about the *de facto* effect of a measure, and;
 - situations where insufficient factual information is provided by the Member State.

Draft guidance

4. Paragraphs 3 to 9 describe the process for writing the draft description of a measure. They are based on current practice. Paragraphs 10 to 12 address the situation where contradictory information is given to the Group, e.g. by another Member State.
5. The draft guidance proposes that the Member State whose measure is being reviewed should be initially responsible for clarifying the situation. However, the Commission Services believe that a “tie-breaker” provision is necessary and has therefore proposed that where disagreement continues the Group should decide how to interpret the information provided to it.
6. However, in reaching agreement on this issue the definition of “broad consensus” should be modified so that it excludes the Member State which provided the additional information as well as the Member State whose measure is being considered.
7. Paragraphs 13 to 16 provide some guidance on how to draft assessments where insufficient factual information about the effect of a measure has been provided. It suggests that the existing practice of marking criteria with question marks should continue and that in such cases

¹ Document 14302/15 FISC 159.

Member States should consider whether the measure should be considered harmful under criterion 5 due to a lack of transparency.

Questions for delegates

8. The Commission Services would like to hear delegates' views on the draft guidance and whether it could address any other issues.

Annex 1**Code of Conduct Group – Work Package 2015****Procedural Issues: DRAFT 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.¹
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.

¹ Document 16410/08 FISC 174.

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.