

ROOM DOCUMENT #2
Code of Conduct Group (Business Taxation)
12 April 2016
ORIGIN: Commission Services

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

Standstill and Rollback

Background

1. Paragraph E of the Code of Conduct says that MS 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 review process through the annual submission of standstill and rollback notifications by Member States. It also underlies the drafting of agreed descriptions and assessments (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 to ensure that;
 - Member States are clear when they should inform the Group of measures which may fall within the scope of the Code, and;
 - such measures are notified by reference to clear and objective criteria.¹
3. A draft of the guidelines is contained in annex 1. It covers;
 - streamlining the notification system;
 - the identification of measures that should be notified to other Member States;
 - the identification of in which year measures should be notified, and;
 - the content of the notifications.

Streamlining the notification system

4. Under the current system the Chair requests the notifications at the first meeting of the year. Standstill notifications should cover any new measures which potentially fall within the scope of the Code and which were enacted in the previous year.
5. Rollback notifications should cover developments regarding measures to which the obligation in paragraph D of the Code applies.
6. This means that the notifications are received before the second meeting of the year which limits the opportunity to report any progress at the June ECOFIN. In order to improve this situation and align the Code reports more closely with the Presidency timetable, the Commission Services propose that in future the standstill and rollback notifications should be

sent to the Chair before the first meeting of the year and so that they can be discussed earlier than is currently the case. The Commission Services would suggest that the Chair should send out the relevant request to delegates in October including a deadline for the submission of the notifications.

7. Moving the deadline for submitting the notifications would also mean that the reporting period could be aligned with the calendar year. The notifications sent to the Chair for January 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.

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

8. The fundamental principle in the Code is that Member States will notify each other of existing and proposed tax measures which may fall within the its scope. In particular, Member States should provide information on any measure which appears to fall within the scope of the Code. The wording of paragraph E therefore makes it clear that Member States should not interpret their obligation to notify other Member States of relevant tax measures narrowly.
9. Decisions in the Group are made on the basis of a “broad consensus”. However, in any discussion about a tax measure or administrative practice in a specific Member State, that Member State’s views are not taken into account when considering whether or not a broad consensus exists.² Therefore, a Member State’s opinion about its own measure – that it does not fall within the Code or that it is not harmful – should not be the decisive factor in the provision of information under paragraph E. In 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 and not just their own view of the matter.
10. Using the Group’s previous reports to ECOFIN it is possible to identify different types of measures that have been notified to the Group in the past. This list is contained in the annex to the draft guidance. As measures of this type have been previously discussed by the Group, it would be appropriate for Member States to assume that such measures should be notified to the Group in the future.
11. As this list is taken from previous reports it reflects some measures which are clearly harmful and that no Member State would consider introducing in future. The Commission Services believes that such examples should stay on the list as they may exist in some third countries. By indicating the type of measures that have been discussed by the Group, the guidance may also be useful in the context of discussions with third countries.
12. Amendments to existing measures should be regarded as separate measures and identified by Member States using the principles outlined above. Amendments to existing measures should be notified whether or not the original measure was notified to the Group.
13. As noted above, the Code refers to “existing and proposed” measures. The guidance must therefore cover both.

² Document 16410/08 FISC 174.

The identification of in which year a measure should be notified

14. Member States have different legislative procedures so the guidance needs to identify general principles which can be used to determine in which year a measure should be notified. In general, a proposed measure should be notified once it is sufficiently well developed to be discussed in the Group. Notification will therefore typically be in the January after the measure has been publicly announced (normally the announcement to Parliament, see paragraph E, last sentence of the Code of Conduct).
15. In other situations, such as where a measure is proposed and enacted in the same year, the draft guidance states that it should be regarded as enacted on the earlier of;
 - the date on which tax advantages first begin to be available to taxpayers, or;
 - the date on which the relevant legislative processes are substantially complete.
16. The date on which tax advantages begin to become available to taxpayers is to the point at which taxpayers are theoretically entitled to the benefits. It does not mean the date on which taxpayers actually claim them or make tax returns incorporating the benefits.
17. This date is an important one because it can be assumed that at this point the purpose and design of the measure will be sufficiently clear for the Member State to be able to discuss it – even if the legislative process is not complete.
18. The detail of a measure will obviously also be clear once the legislative process is substantially complete. The phrase “substantially complete” should be interpreted to mean the point at which the government of the Member State does not expect any significant changes to be made to the measure.
19. Additional guidance is needed to take account of the different ways that a Member State can introduce a tax measure. For example, the point at which tax advantages first become available to taxpayers can be defined in a number of different ways. These include;
 - a. linking availability of the benefits to the date on which the measure is announced, e.g. making them available;
 - i. from the date of the announcement;
 - ii. for accounting periods beginning on or after the date of the announcement, or;
 - iii. for accounting periods ending on or after the date of the announcement (which may have a retrospective effect for some taxpayers).
 - b. linking availability of the benefits to a future date, which can be before or after the legislative process has been completed;
 - c. making the benefits available retrospectively, and;
 - d. not specifying any date when the benefits will be available, e.g. where the measure creates a power that the government can choose to exercise at a later stage.

20. These possibilities are set out in examples in the draft guidance.
21. The tax measures covered by the Code include both laws or regulations and administrative practices. Broadly speaking most of the draft guidance applies to laws or regulations. Therefore a specific provision has been included saying that an administrative provision should be considered to have been “enacted” when it is adopted, regardless of whether or not the relevant authority makes any instruction or guidance public.

Content of notifications

22. The draft guidance makes some general comments about the content of notifications but it does not make any detailed suggestions.

Questions for Member States

23. The Commission Services would like to hear delegates’ comments on the guidance. In particular, delegates should consider whether;
- the guidance on the meaning of “enacted” is useful in the context of their national procedures;
 - any other types of measure should be added to the list in the annex to the guidance, and;
 - the draft guidance should address any other issues.

Annex 1**Code of Conduct Group – Work Package 2015****Procedural Issues: DRAFT 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 in future assume that similar measures should 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.

Annex – 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)¹

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
8. Intangible assets
9. Interest box
10. Intra-group finance companies
11. Investment funds

¹ 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.

12. Manufacturing or distribution activities
13. Offshore activities
14. Patent box
15. Shipping

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 2011²
4. Ruling regimes

² 6054/11 FISC 14.