

WORK PACKAGES 2008 AND 2011

ADMINISTRATIVE PRACTICES: CROSS BORDER RULINGS & TRANSPARENCY AND EXCHANGE OF INFORMATION IN THE AREA OF TRANSFER PRICING

1. The Code of Conduct Group's work regarding Administrative Practices is currently carried on under two headings. The first is transparency and the exchange of information in the area of transfer pricing (2008 Work Package) and the second is the exchange of information on cross-border rulings (2011 Work Package).
2. Room document 3 of 30 January 2013 set out the background to these areas of work and updated the Group on progress with both the Model Instruction on cross-border rulings and the transfer pricing aspects.

Model Instruction on cross border rulings

3. In January the Commission reported that it did not expect the Model Instruction to be considered by the Committee for Administrative Co-operation on Taxation ('CACT') until its meeting in April. However CACT was in fact able to consider it at its meeting of 28 February.
4. At the meeting the Model Instruction was approved by CACT subject to several scrutiny reservations. With one exception, these were resolved by 11 March so the Model is now being communicated to the Code Group. The Model Instruction is in annex 1 of this document; Italy's scrutiny reservation is set out in annex 2.

Transparency and exchange of information in the area of transfer pricing

5. As reported at the last meeting, national delegates to the EU Joint Transfer Pricing Forum ('JTPF') reached agreement on the transfer pricing aspects of this work. JTPF members concluded that the exchange process should involve two stages based, if possible, on the standard e-form used for collaboration in the field of direct taxation. The first stage would be an exchange of important information about the APA which should enable the receiving state to decide whether it needs to ask for additional information.
6. A request for additional information by a MS is the second stage of the exchange process. Any information provided at that stage would be as a result of a specific request and so would not be a spontaneous exchange. The second stage of the exchange process is

therefore not covered by their conclusions. The JTPF's agreed conclusions regarding the first stage exchange are set out in the annex to room document 3 of 30 January 2013.

7. Forum members did not reach a consensus regarding which unilateral advance pricing agreements ('APAs') should be exchanged. This reflected a difference of opinion about the element of judgement which an officer considering a spontaneous exchange of information in this area should be allowed to exercise.
8. Broadly speaking the two differing views expressed in the Group were that;
 - the officer exchanging the information should not exercise any judgement; all unilateral APAs should be exchanged because, for example, it was difficult for one MS to judge what was in the interests of another to see;
 - the officer exchanging the information should exercise judgement because the Model Instruction concerned spontaneous exchanges and without an element of judgment it became an automatic exchange.
9. The conclusion of the Forum delegates was that this issue involved the interpretation of article 9 of Council Directive 2011/16/EU and should therefore be examined by CACT. At the last meeting the Group decided not to refer this matter to CACT, intending instead to discuss it itself.
10. The Group also agreed in January that it would like CACT to bring the two areas of work together but it did not discuss how this might be done. The Commission's preference would be for a single Model Instruction covering both cross-border rulings and unilateral APAs.

Questions for the Group

11. The Commission recognises that this long-awaited document deals with an important issue and has been circulated only shortly before the meeting on 20 March. However since the Model Instruction has become available earlier than expected the Commission thought it would be helpful to circulate it immediately.
12. Bearing this in mind, at the meeting on 20 March, MS are invited to make any initial comments they might have on the Model Instruction and how unilateral APAs might be best incorporated into it.
13. Subject to the outcome of the discussion at the meeting, MS are also invited to reply to the following questions by 26 April 2013;

- **Do you believe that the Model Instruction meets the requirements of the guidance on cross-border rulings agreed in 2010 (see annex 3)?**
- **If not, what specific changes would you make to the text?**
- **Do you agree that CACT should be asked to integrate unilateral APAs into the Model Instruction rather than creating a separate Model for transfer pricing?**

14. The Commission will circulate the replies it receives to these questions prior to the Code meeting on 27 May 2013. The Commission will also use the replies to prepare a draft note to CACT for circulation prior to the next Code meeting. The aim is to have a full discussion of this issue at the meeting in May.

- **Do MS agree with the proposed way forward on this work?**

Annex 1



EUROPEAN COMMISSION

DIRECTORATE-GENERAL TAXATION AND CUSTOMS UNION

Direct taxation, Tax Coordination, Economic Analysis and Evaluation
Direct Tax Policy & Cooperation

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FOR OFFICIAL USE ONLY

COMMITTEE ON ADMINISTRATIVE COOPERATION FOR TAXATION

MODEL INSTRUCTION FOR CROSS-BORDER RULINGS

MEETING N° 5 OF 27-28 FEBRUARY 2013

Model Instruction for cross-border rulings

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INTRODUCTION

The purpose of this Model Instruction is to provide practical guidance with a view to improving the effectiveness of the arrangements for spontaneous exchanges of information. It is particularly focused on motivating tax officials to initiate spontaneous exchanges of information on cross-border rulings.

Information provided spontaneously is potentially very effective as the information selected by the (local) tax officials draws on their own practical experience regarding what will be relevant to the levying of taxes. Spontaneous exchange of information relies heavily on the active participation and co-operation of tax officials. Therefore it is important for all Member States to develop strategies that aim to encourage and promote the use of spontaneous exchange of information by their tax officials in accordance with Council Directive 2011/16/EU. This Model Instruction supports the implementation of such strategies in the Member States' internal guidelines, procedures and awareness programs for spontaneous exchange of information. It highlights the importance and suggests practical steps to facilitate the exchanges. This Model Instruction also emphasizes the importance of sending feedback on the effectiveness of the information provided.¹

Although this Model Instruction specifically targets the spontaneous exchange of cross-border rulings, it should be stressed that this does not intend to convey that the spontaneous exchange of any other information that may be relevant to another Member State is less important. The general principles set out in this note (legal basis for spontaneous exchange, the use of the standard forms and the common communication network (CCN), time limits and other practicalities) also apply to spontaneous exchange on other issues, e.g. information detected during a tax audit or investigation.

When communicating with countries outside the EU, the bilaterally agreed procedures must be followed by the competent authority.

¹ To localize this Model Instruction, the Member States can, if needed, add an additional paragraph to describe their own national procedures (how to contact the competent authority, notification procedure etc.).

LEGAL BASIS COUNCIL DIRECTIVE 2011/16/EU

Article 9 Scope and conditions of spontaneous exchange of information

The competent authority of each Member State shall communicate the information referred to in Article 1(1)² to the competent authority of any other Member State concerned, in any of the following circumstances:

the competent authority of one Member State has grounds for supposing that there may be a loss of tax in the other Member State;

a person liable to tax obtains a reduction in, or an exemption from, tax in one Member State which would give rise to a tax liability in the other Member State;

business dealings between a person liable to tax in one Member State and a person liable to tax in the other Member State are conducted through one or more countries in such a way that a saving in tax may result in one or the other Member State or in both;

the competent authority of a Member State has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;

information forwarded to one Member State by the competent authority of the other Member State has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Member State.

The competent authorities of each Member State may communicate, by spontaneous exchange, to the competent authorities of the other Member States any information of which they are aware and which may be useful to the competent authorities of the other Member States.

Article 10(1) Time limits

- (1) The competent authority to which information referred to in Article 9(1) becomes available shall forward that information to the competent authority of any other Member State concerned as quickly as possible, and no later than one month after it becomes available.

² Article 1(1) : "This Directive lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2".

BACKGROUND

The Code of Conduct for Business Taxation and the Code of Conduct Group

The Code of Conduct for Business Taxation addresses harmful tax competition inside the EU. This is an important factor in reducing distortions in the single market and in preventing significant losses of tax revenue. It is a non-binding instrument of a political character containing political commitments. It was agreed by a "Resolution of the Member States meeting within the Council" in December 1997.

The Code of Conduct contains two central features:

- (1) The commitment from Member States to amend their laws and practices as necessary with a view to eliminating any harmful measures as soon as possible (rollback), and
- (2) The commitment from Member States to refrain from introducing any new tax measures which are harmful within the meaning of the Code (standstill).

In March 1998 the Code of Conduct Group was established to assess harmful business tax measures that may fall within the scope of the Code of Conduct for Business Taxation and to monitor their abolishment. It is a special high-level Council Working Group.

Definition of a cross-border ruling and examples of cross-border rulings to be sent spontaneously

The Code of Conduct spells out, inter alia, five criteria for assessing whether a tax measure is harmful. One of these criteria is lack of transparency. This element has been given particular emphasis by the Code of Conduct Group in its considerations with respect to the advance interpretation or application of tax provisions by a tax administration to a specific fact pattern of a specific taxpayer (tax rulings). While recognising the potentially positive aspects of such administrative practices, the Code of Conduct Group also agreed on the need to improve the exchange of relevant information specifically for cross-border rulings that may affect tax bases of other Member States. Therefore, in June 2010 the Code of Conduct Group established the following general guidance:

"If a Member State provides advance interpretation or application of a legal provision for a cross-border situation or transaction of an individual taxpayer (hereafter: cross-border ruling), which is likely to be relevant for the tax authorities of another Member State, the tax authorities of the first Member State will spontaneously exchange the relevant information regarding this cross-border ruling in accordance with Community law provisions with the latter Member State in order to assure coherent overall taxation.

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By means of a non-exhaustive list, this would specifically concern the following types of cross-border rulings:

- (1) MS 1 gives clearance on the absence of a PE in MS 1 to a company resident in MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in the reverse situation);
- (2) MS 1 gives clearance on specific items related to the tax base of a PE in MS 1 to a company resident in MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in the reverse situation);
- (3) MS 1 gives clearance on the tax status of a hybrid entity resident in MS 1 which is controlled by residents of MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in the reverse situation);
- (4) MS 1 gives clearance to a company resident in MS 1 regarding the tax value for depreciation for an asset that is acquired from a group company in MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in the reverse situation).

NATIONAL ORGANIZATION AND ENSURING EFFECTIVE EXCHANGE REGARDING CROSS-BORDER RULINGS

This Model Instruction covers cross-border rulings involving companies. Examples of the cross-border rulings to be exchanged spontaneously can be found in paragraph 3.2 of this Model Instruction. The cross-border rulings as well as feedback (please see paragraph 6) shall be sent by using standard electronic forms. National procedures will indicate who is responsible for filling in those forms in the Member States (for example the decision maker preparing the cross-border ruling or the competent authority). For sending the cross-border rulings, the general parts A and B, and specifically section C3 "Other spontaneous information", should be used in the electronic form for spontaneous exchange of information (SIF). To assist the use of the electronic forms, the Commission has together with the Member States prepared an eLearning program on the use of the electronic forms. Please find an empty scanned SIF attached to this document.

Information exchanged shall, as far as possible, be provided by electronic means using the common communication network (CCN) between the competent authorities. Timing of the exchanges has to be in line with Article 10 of the Council Directive 2011/16/EU.

Member States shall ensure that cross-border rulings that fulfil the criteria detailed in Article 9 (1) of the Council Directive 2011/16/EU are exchanged with other Member States. In order to ensure that each Member State has sufficient national procedures in place, the following criteria are to be followed:

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Each Member State ensures that their resource availability, procedures and network for spontaneous exchange of information allows fulfilment of the requirements of the Council Directive 2011/16/EU, in particular that:

The national network for spontaneous exchange of information in general provides the possibilities for effective exchange regarding cross-border rulings;

There is a clear communication channel from the decision maker to the competent authority that sends the information to another Member State.

Each Member State ensures that good quality training is organized and national guidance is prepared for the decision makers who prepare cross-border rulings.

The decision makers must have knowledge about the requirements set by Article 9 (1) of the Council Directive 2011/16/EU and thus be able to identify relevant cross-border rulings that are to be exchanged. They will also be informed and have knowledge of any additional clarifications and practical arrangements to spontaneous exchange of information regarding cross-border rulings such as this instruction;

The decision makers must have sufficient knowledge on the national information exchange procedure to be able to transfer a relevant cross-border ruling to another Member State through the designated national competent authorities.

Each Member State will take all reasonable measures to overcome any additional obstacles that might hinder the effective exchange of information on cross-border rulings,, in particular that:

This instruction gives a definition of cross border rulings and examples of cross-border rulings to be sent spontaneously in paragraph 3.2, but that the definition should not be interpreted too narrowly. If there is some doubt as to whether or not the definition is met the default position of the decision maker should be to exchange if the conditions of spontaneous exchange conditions (under Article 9(1) Council Directive 2011/16/EU) are otherwise met.

CONTENT OF CROSS-BORDER RULING INFORMATION TO BE SENT SPONTANEOUSLY

When sending spontaneous information on cross-border rulings, the sending Member State should take into consideration some obstacles, which may result in limited use of such information such as language barrier and complexity of the cross-border ruling. Therefore information, which will finally be sent, should be as clear and comprehensive as possible.

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Firstly it should be remembered that the purpose of this information is to give the receiving Member State sufficient facts to take a decision as to whether or not the case is potentially significant. Therefore, it is strongly recommended that when sending information about cross-border rulings the sending Member State adheres to the set of principles and guidance contained in this Model Instruction.

At this stage it is up to the sending Member State to determine which information, for example the full text of the cross-border ruling in the original language or any other material, would be considered useful. However at a minimum it is important that a short summary, preferably in English or any other language bilaterally agreed, should be provided and should contain the following information(in the free text box in the SIF Part C Section C3):

- (1) Reference number of the cross-border ruling where available;
- (2) Details of the issue for which the taxpayer requires an answer;
- (3) Administration's response and reasoning. In the case when an administration publishes rulings on its website, inserting a direct link to such ruling would facilitate the work of the receiving Member State;
- (4) Information on whether or not the ruling is binding;
- (5) In the case that it is a binding ruling, information should be supplied regarding who is bound by this ruling (administration and/or taxpayer), and whether this ruling is final (accepted by both parties) or if the ruling can be still appealed against by the taxpayer. As an appeal period may vary from Member State to Member State, the sending Member State should decide whether information about the ruling should be exchanged immediately when the ruling is issued or when the ruling is considered to be final. In making this decision it should be borne in mind that time limit restrictions may be an issue for the recipient Member State of the information;
- (6) Finally, the sending Member State should consider limitations arising from Article 17(4)³ of the Directive.

FEEDBACK

If the sending Member State has requested feedback, the decision maker/auditor in the receiving Member State shall provide feedback to its competent authority. The competent authority shall send feedback as soon as possible and no later than three

³ Article 17(4): "The provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy."

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months after the outcome of the use of the requested information is known (article 14(1))⁴.

Even if the sending Member State has not requested feedback, it is of good practise to always send feedback to the sending Member State. Feedback on information sent will encourage administrative cooperation between Member States.

MONITORING

The Member States are responsible for providing statistics in line with the existing guidelines for statistics on spontaneous exchange of information.

⁴ Article 14(1): "Where a competent authority provides information pursuant to Articles 5 or 9, it may request the competent authority which receives the information to send feedback thereon. If feedback is requested, the competent authority which received the information shall, without prejudice to the rules on tax secrecy and data protection applicable in its Member State, send feedback to the competent authority which provided the information as soon as possible and no later than three months after the outcome of the use of the requested information is known. The Commission shall determine the practical arrangements in accordance with the procedure referred to in Article 26(2)."

[deleted]

Guidance on cross-border rulings – extract from document 10033/10 FISC 47

Report of Code of Conduct Group to the ECOFIN Council (25 May 2010)

35. With respect to improving exchange of information for cross border rulings, all Member States except [deleted] supported the following guidance^{1 2}:

- *If a Member State provides advance interpretation or application of a legal provision for a cross border situation or transaction of an individual taxpayer (hereafter: cross border ruling), which is likely to be relevant for the tax authorities of another Member State, the tax authorities of the first Member State will spontaneously exchange the relevant information regarding this cross border ruling in accordance with Community law provisions with the latter Member State in order to assure coherent overall taxation.*
- *By means of a non-exhaustive list, this would specifically concern the following types of cross border rulings:*
 - *MS 1 gives clearance on the absence of a PE in MS 1 to a company resident in MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in reverse situation).*
 - *MS 1 gives clearance on specific items related to the tax base of a PE in MS 1 to a company resident in MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in reverse situation).*

¹ [deleted] considers that these guidance notes, being part of a soft law process, do not properly identify which specific information should be exchanged. Taking also into account that administrative practises may significantly vary among Member States, these guidance notes may lead to an uncertain and unbalanced implementation of the political commitment, unless a substantial reciprocity in the exchange of information is assured.

² [deleted] notes that further legal investigation in the Netherlands is needed regarding this guidance as well as the application of the principle of reciprocity.

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- *MS 1 gives clearance on the tax status of a hybrid entity resident in MS 1 which is controlled by residents of MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in reverse situation).*
- *MS 1 gives clearance to a company resident in MS 1 regarding the tax value for depreciation for an asset that is acquired from a group company in MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in reverse situation).*