

## **WORK PACKAGES 2008 AND 2011**

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

#### **MEMBER STATES' RESPONSES**

1. Before the Code of Conduct Group meeting on 20 March 2013 the Commission circulated the draft Model Instruction on cross-border rulings that had been prepared by the Committee for Administrative Co-operation on Taxation ('CACT'). The draft Model Instruction was contained in annex 1 of room document 4 of 20 March 2013. [deleted]
2. Room document 4 of 20 March 2013 also described the transfer pricing aspects of the Group's work in this area.
3. At the last meeting MS were asked for the comments in reply to the following questions;

- **Do you believe that the Model Instruction meets the requirements of the guidance on cross-border rulings agreed in 2010 (see annex 3 of room document 4 of 20 March 2013)?**
- **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?**

4. Of the fifteen replies received only one MS believed that the Model Instruction did not meet the requirements of the guidance ([deleted]).
5. Two MS did not think that the transfer pricing aspects should be incorporated into the Model Instruction on cross border rulings ([deleted]).
6. Some specific changes were suggested by MS, particularly with regard to how the implementation of the policy adopted by the Group might be effectively monitored.
7. [deleted] reported that it does not enter into APAs and Greece said that it does not give advance rulings.

8. Annex 1 to this room documents contains the replies received.

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**ANNEX 1**

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

**MEMBER STATES' COMMENTS**

**[deleted]**

Please find below [deleted] comments on the CoC working paper "Work Package 2011: Administrative Practices - Model Instruction":

*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?*

Yes, it meets the requirements.

The decision whether feedback is sent should be made by the MS sending the information. So we think that the para beginning with "Even if the sending MS has not requested feedback ..." should be altered:

"If the sending MS has not requested feedback, the other MS, however, considers it useful to send it nonetheless, it may do so."

With a view to the "history" and objective of this guideline it seems appropriate and useful to have specific statistic information on its implementation by MS. The relevant CACT guidelines (to date document CACT 016 rev x) should provide for that.

Finally a more technical remark: The layout could be improved. At least in our copy the numbering has been left out in Annex 1, but cross references (see eg. to para 3.2 and 6 under the heading "National organization..." on p 9) were kept. In the same chapter under "Each MS ..." the subparas are centered right.

*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?*

Yes.

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

We agree.

**[deleted]**

*Do you believe that the Model Instruction meets the requirements of the guidance on cross-border rulings agreed in 2010?*

We consider that the Model Instruction meets the requirements of the agreed guidance on cross-border rulings as it encompasses the definition of a cross-border ruling, the criteria for spontaneous exchange of information, the way the information should be sent, measures for overcoming the obstacles that may hinder the effective exchange and other issues.

*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? –*

In [deleted] the revenue administration has no authority to establish non-legislative taxation rules. Therefore, [deleted] tax authority does not conclude any APAs with individual taxpayers. Having this in mind, we do not see any obstacles the Model Instruction to encompass the unilateral APAs, too.

**[deleted]**

In response to your request for comments on the room document #4 of the Code of Conduct Group meeting on 20/3/2013, please note the following:

[deleted] legislation does not provide for advance rulings, therefore we will not be able to exchange information according to the guideline of the Code of Conduct. So, the fact that we will not exchange this type of information will in no way mean that we do not apply the principle of reciprocity. We could accept though, that perhaps another m-s could, according to par. 3 of article 17 of Directive 2011/16/EU, deny sending such information to Greece according to reciprocity.

We agree with the view of the Commission to adopt a common standard both for advance rulings and APAs. Furthermore, we believe that it should be specified if article 9 of Directive 2011/16/EU on spontaneous exchange of information applies to exchange of information of cross border rulings and APAs prior to the entry into force of the Directive.

In addition, as regards document [deleted], we would like to note the following:

1. Taking into account that this exchange of information takes place in the context of article 9 of Directive 2011/16/EU, this exchange should be made according to the competence of the respective authority of the m-s, according to the provisions of the Directive and the criteria of par. 1 article 9 of the Directive should apply to it.
2. Paragraph 8 page 10 of the above mentioned document ("This instruction gives. are otherwise met") should be deleted, because the referred examples of cross border rulings are of a non exhaustive nature.
3. Paragraph 1 page 12 of the above mentioned document ("Even if the sending Member State. between Member States") should be deleted, because the provisions of the Directive as regards feedback (article 14) set the clear obligation for a m-s to provide feedback to the other m-s, only when the other m-s requests for this feedback. So the mention of the fact that feedback is voluntarily given from one to another m-s is redundant.
4. In the last paragraph of page 12 of the above mentioned paper, a footnote should be inserted to the document [redacted] of the Commission, which provides guidelines to the supply of statistical data from m-s.

**[deleted]**

Please find below the answers of [deleted] regarding the working paper "Work Package 2011: Administrative Practices - Model Instruction" as requested in the last Code of Conduct group:

*Do you believe that the Model Instruction meets the requirements of the guidance on cross-border rulings agreed in 2010 (see annex 3)?*

Yes [deleted] believes that the Model Instruction meets the requirements of the guidance on cross-border rulings agreed in 2010.

*If not, what specific changes would you make to the text?*

N/A

*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?*

[deleted] agrees that CACT should be asked to integrate unilateral APAs into the Model Instruction rather than creating a separate Model for transfer pricing.

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

[deleted] agrees with the proposed way forward on this work.

**[deleted]**

*Do you believe that the Model Instruction meets the requirements of the guidance on cross-border rulings agreed in 2010 (see annex 3)?*

Generally, the [deleted] can agree with the text of the Model Instruction in terms of the practical aspects of information exchange (application of the Directive EU/2011/16, using of existing e-forms relevant to the spontaneous exchange of information and feedback). Nevertheless, actual content of the future exchange of information on crossborder rulings is not entirely clearly defined, although guidance on cross-border rulings (10033/1 O FISC 47), 25 May 2010 Report of the Code of Conduct, provides certain examples of rulings, which are likely to be relevant for the tax authorities of another Member State.

The [deleted] has identified two specific additional areas for the potential future exchange of information so far, namely:

1. assessing whether it is possible to apply a tax loss as a deductible item from the tax base for cross-border restructuring;
2. decision on granting exemption for income from licence fees and interest on credits and loans.

Considering the diversity of national tax systems it may be difficult, without explicit definition or the existence of a list of possible cross-border rulings of State, to ensure the effectiveness of cooperation in this field or to maintain a certain degree of reciprocity.

We also take note that according to the Model Instruction if the sending Member State has requested feedback, the decision maker/auditor in the receiving Member State shall provide feedback to its competent authority.

*If not, what specific changes would you make to the text?*

No specific changes required.

*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?*

Yes, the issue of APA should be included in the current Model Instruction.



**[deleted]**

As you suggested to submit comments and answer the questions concerning the Model Instruction, please find the [deleted] replies below.

*Do you believe that the Model Instruction meets the requirements of the guidance on cross-border rulings agreed in 2010?*

Yes, we believe that the Model Instruction broadly meets the requirements of the guidance. We do not have any specific changes 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?*

Yes, we agree that APAs can be integrated to the same Model Instruction.

**[deleted]**

*Do you believe that the Model Instruction meets the requirements of the guidance on cross-border rulings agreed in 2010?*

[deleted] believes that the Model Instruction should clearly provide for rules concerning the monitoring of the effective implementation of the instruction contained in the 'Model' in order to comply with the requirements of the guidance on cross-border rulings, and in particular with the principle of transparency in the area of administrative practices. [deleted]

*If not, what specific changes would you make to the text?*

[deleted] would like to reiterate the comments proposed in the context of eFDT Steering Group, namely amendments to the text of paragraph 7 – MONITORING, as indicated below:

#### MONITORING

The Member States are responsible for providing statistics in line with the existing guidelines for statistics on spontaneous exchange of information which provide for a punctual analysis of data referring to the number of cross-border rulings sent and received per country.

The Commission, based on statistical data provided by the countries, will prepare summary tables on cross border rulings and will monitor on the material effectiveness of the exchange made. Any results or conclusions of the monitoring process conducted by the Commission will be submitted to the Code of Conduct Group for its evaluation and further measures.

*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?*

[deleted] believes that is too early for the CACT to start working on a draft Model for transfer pricing.

Moreover, the open question on whether the spontaneous exchange of information on unilateral APAs can be subject to a discretionary element of judgment by the officer in charge of the EOI must be cleared before starting the draft.

The CACT could start drafting a Model Instruction on APAs only after the scope of the exchange has been made clear since otherwise the CACT will have serious concerns on how to proceed.

As to how, as a second step, the CACT should proceed in practice [deleted] would prefer the creation of a separate Model for the spontaneous exchange of information on unilateral APAs.

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

Yes. [deleted] would also like to stress the political feature of the discussion concerning the interpretation of article 9 of Council Directive 2011/16/EU with respect the element of judgment which an officer considering a spontaneous exchange of information in the area of unilateral APAs should be allowed to exercise.

In this respect [deleted] believes that the officer exchanging the information on unilateral APAs should not exercise any judgment; all unilateral APAs contain information within the

meaning of art 9 of Council Directive 2011/16/EU for the Member States in which counterparties of the controlled transactions are resident. A different interpretation on this aspect (i.e. allowing a discretionary power to the sending country) would jeopardize the level playing field in this area of spontaneous EOI since each Member State could interpret the relevance of the information contained in the unilateral APAs in a different manner.

**[deleted]**

Please find below the opinion of [deleted] regarding questions raised in the room document No 4 of the meeting 20 March 2013.

*Do you believe that the Model Instruction meets the requirements of the guidance on cross-border rulings agreed in 2010?*

[deleted] is of the view that the Model Instruction meets the requirements of the aforementioned guidance.

*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?*

[deleted] supports the view that CACT should be asked to integrate unilateral APAs into the Model Instruction rather than creating a separate Model for transfer pricing.

**[deleted]**

Room document n° 4 dated March 20th 2013

As to the question concerning the integration of APAs into the Model Instruction, we would like to emphasize that we do not believe that APAs fit with the proposed Model Instruction.

Due to the specificity of transfer pricing, we are convinced that the setting up a specific model to deal with APAs would represent an appropriate solution.

**[deleted]**

At the meeting of the Code of Conduct Group on 20 March [deleted] reserved its position with regard to the Model Instruction on cross-border rulings (point 3 on the agenda). I am glad to inform you now on our position with regard to the questions in Room document #4.

*Do you believe that the Model Instruction meets the requirements of the guidance on cross-border rulings agreed in 2010 (see annex 3)?*

Yes. However, in order to attain a level playing field it is important that it is clear from the Model instruction that informal rulings (for as far as not laid down in writing) fall under the definition of cross-border rulings that need to be communicated to other Member States on the basis of this Model instruction.

*If not, what specific changes would you make to the text?*

See the previous answer. CACT can take this into account when adjusting the Model instruction to the integration of APAs.

*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?*

Yes.

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

Yes.

**[deleted]**

In response to questions contained in the RD#4 for the CoC Group meeting on 20 March 2013 please be kindly informed as follows:

- Model Instruction on cross-border rulings - [REDACTED] accepts the proposal. We believe that it meets the requirements of the guidance on cross-border rulings. We are of the opinion that the scope of information to be transmitted to another MS is adequate and we also agree that sending feedback on information as a rule will encourage cooperation between MS.
- APA – The most important in this case is to determine whether art. 9 of Council Directive 2011/16/UE allows for exchange of information on APA. Assuming that the answer to this question is positive, we tend to the approach of integration APAs into the Model Instruction on cross-border rulings.

**[deleted]**

As agreed in the last meeting of the Code of Conduct Group meeting on 20 March 2013, we are sending comments on the Model Instruction for cross-border rulings (RD # 4, Code of Conduct Group - Meeting on 20 March 2013):

[deleted] strongly supports an increased administrative cooperation to strengthen exchange of information, in particular with a view to combating tax fraud and tax evasion and to tackle any kind of abusive avoidance.

In our view, a common system to exchange information should be as global as possible, in order to simplify procedures and adopt pragmatic solutions, avoiding significant administrative costs or administrative burdens.

Whereby, the exchange of information should be made through standardised forms, formats and channels of communication, in a way that, simultaneously, increases the effectiveness of exchange of information and minimizes costs for governments or businesses.

The Model Instruction approved by CACT seems to be a proper instrument that is able to meet the requirements on the guidance on cross-border rulings agreed in 2010 and assure efficiently exchange of information on cross-border rulings at UE level.

We agree that a single global Model Instruction, that also integrates information about unilateral APAs, will be a better alternative as that will ensure the consistency and total integration of the cooperation mechanisms and will help to increase the effectiveness of exchange of information.

We have no objections about the way forward on this work, as it was proposed by the Commission.



**[deleted]**

The [deleted] welcomes the work of CACT and the Commission on preparing the Model Instruction in order to achieve effective spontaneous exchange of information. Referring to the questions in room document 4 submitted to the Code of Conduct Group at the last meeting on 20 March 2013, we would like to notify on behalf of the Slovak Republic the following:

We agree with the draft of the Model Instruction, it meets the requirements of the guidance on cross-border rulings agreed in 2010. We would prefer just one single Model Instruction on exchange of information on cross-border rulings and on unilateral APA. This approach is more transparent and provides greater legal certainty. We believe that CACT could be asked to integrate unilateral APA into the Model Instruction as proposed by the Commission in room document 4.

In the context of the Model Instruction it is necessary to clarify its status, i.e. whether the Model Instruction after its approval will be binding for the EU Member States.

**[deleted]**

[deleted] would like to give the following input regarding the questions in Room Document # 4 to the Code of Conduct Group's meeting on 20 March 2013, which deal with administrative practices.

We believe that the Model Instruction meets the requirements of the guidance on cross-border rulings which the Group agreed in 2010. We also consider that it would be a good idea to ask CACT to integrate the guidance on spontaneous EOI concerning unilateral APAs in the Model Instruction. It would not be efficient to create two separate models. It's better to build on work that has already been undertaken. We can also agree with the Commission's proposal on how to move forward with the work on administrative practices.

**[deleted]**

*Do you believe that the Model Instruction meets the requirements of the guidance on cross-border rulings agreed in 2010?*

Yes.

*If not, what specific changes would you make to the text?*

No changes needed.

*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?*

Yes. It seems logical to bring these two related strands together to avoid duplication of work, and avoid the risk of inconsistency. The best solution is to have one Model Instruction that applies to unilateral APAs as well as for transfer pricing.

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

[deleted] is content with the proposed approach going forward. However, we would welcome the European Commission bringing forward proposals as to how they and Member States should report and monitor progress on information exchange to ensure effective implementation.