



Euro Tax Flash from KPMG's EU Tax Centre



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ECOFIN adopts conclusions on the Code of Conduct Group's activities during the Bulgarian EU Presidency

Code of Conduct Group (Business Taxation) – Harmful Tax Practices – Preferential Tax Regimes – EU Blacklist - Patent Box – Interest Deduction Regime – Guidance on Third Criterion – Multiannual Work Package

On June 22, 2018, the ECOFIN Council adopted conclusions on the work of the Code of Conduct Group during the first half of 2018. The Member States particularly welcomed the progress made by the Group with regard to the EU blacklisting process and endorsed a new multiannual work program.

Background

The Code of Conduct Group (the "Group") was set up in 1998 to examine potentially harmful tax measures in EU Member States. The Group initially focused on the Member States' commitment to eliminate existing harmful tax practices (rollback process), while refraining from implementing new ones (standstill process). Nevertheless, Member States also agreed on promoting the adoption of transparency and good governance principles by third countries. Accordingly, the ECOFIN Council invited the Code of Conduct Group in May 2016 to start work on an EU list of non-cooperative jurisdictions and exploring defensive measures at the EU level. On December 5, 2018, conclusions on the EU list of non-cooperative jurisdictions for tax purposes ("EU Blacklist") were adopted by the ECOFIN and several amendments to the list were further approved, on the basis of the work performed by the Group.

Activity under the Bulgarian Presidency

On June 22, 2018 the ECOFIN adopted conclusions¹ on the Code of Conduct Group (Business Taxation), in which it endorsed the Group's report on the work performed during the Bulgarian EU Presidency². The report details in particular the review process applied on the Member States' patent boxes and notional interest deduction regimes, recalls the work performed by the Group on the EU Blacklist and provides some clarifications on the third criteria (substance) of the Code of Conduct.

With respect to standstill and rollback review processes, the Group reports that several notional interest deduction regimes are currently being reviewed (Belgium, Portugal, Italy, Malta, Cyprus), while Italy, Portugal, Spain and France notified the Group that a reform of their respective patent box regimes is ongoing, with the objective of making them compliant with the modified nexus approach by the end of 2018.

As regards the interpretation of the EU substance criterion, the ECOFIN adopted additional guidance³, including a "real economic activity" test and an additional "substantial economic presence" test for regimes that may be considered to attract highly mobile activities such as certain financial services. In addition to these tests, a "nexus requirement" will be applied and increased scrutiny (tax audits) is recommended. The guidance further specifies that the Group will monitor regimes based on information collected from the jurisdictions on how the core income generating activities are undertaken by the taxpayer.

A significant part of the activities performed by the Group was also dedicated to the EU Blacklist, in particular with respect to following-up on the listing and delisting procedures, investigating possible coordinated defensive measures, monitoring the commitments taken by the relevant jurisdictions, and discussing a potential update of the EU listing criteria and a revision of the geographical scope of the list. The report therefore contains a consolidation of listing and de-listing updates, as well as a summary table of the commitments taken by the 92 jurisdictions initially screened. As a consequence, the Group has been monitoring - in accordance with the guidelines agreed upon in February 2018⁴ - a total of 142 commitments taken by 67 jurisdictions, and made available in June 2018 a revised consolidated version of the 'State of play of the cooperation with the EU with respect to commitments taken to implement tax good governance principles'⁵. Agreement was also reached on technical guidance⁶ concerning criterion 2.2 (substance requirement), according to which jurisdictions will have to impose additional substance requirements, where appropriate. Enhanced transparency requirements from these jurisdictions (e.g. spontaneous exchange of information, reporting of information on the Ultimate Beneficial Ownership of entities, or mandatory disclosure rules for intermediaries) are also considered. However, no clear consensus emerged on the possibility to apply coordinated defensive measures, and the Bulgarian

¹ Code of Conduct (Business Taxation) Council conclusions of June 22, 2018 ([doc. 10373/18](#))

² Code of Conduct Group (Business Taxation) Report to the Council Endorsement ([doc. 9637/18](#))

³ Code of Conduct (Business Taxation) Guidance on the interpretation of the third criterion ([doc. 10419/18](#))

⁴ Code of Conduct Group (Business Taxation) Procedural guidelines for carrying out the process of monitoring commitments concerning the EU list of non-cooperative jurisdictions for tax purposes ([doc. 6213/18](#))

⁵ The EU list of non-cooperative jurisdictions for tax purposes State of play of the cooperation with the EU with respect to commitments taken to implement tax good governance principles ([doc.6236/18](#))

⁶ Code of Conduct (Business Taxation) Scoping paper on criterion 2.2 of the EU listing exercise ([doc. 10421/18](#))

Presidency suggested that work be started on specific guidelines in respect of the type of measures that could be applied by Member States.

As part of its commitment to increase transparency on its work, the Group also recently published an updated compilation of the guidance agreed by the Group⁷ and an overview of the preferential tax regimes it has examined since its creation in March 1998⁸.

Future Work

The Code of Conduct Group also published, on June 22, 2018, a new multiannual work program⁹, providing further insights into the Group's areas of focus:

- Dialogue with third countries will continue within the framework of the EU blacklisting process and the implementation of the commitments taken by the various jurisdictions will be closely monitored. In parallel, the Group will investigate possible legislative defensive measures and the introduction of new screening criteria on tax transparency (criterion 1.4 on beneficial ownership and anti-BEPS measures (criterion 3.2).
- In line with the Group's current focus, particular attention will be given to the review of the Member States' notional interest deduction regimes and patent boxes, including the implementation of the modified nexus approach for Intellectual Property regimes.
- The need to update EU guidelines on transfer pricing issues, such as documentation requirements, low value adding intra-group services or cost contribution arrangements will be assessed in light of the recent BEPS developments at the OECD level.
- Review of the implementation by the Member States of previously agreed guidance on finance branches, holding companies and headquarters, as well as on intermediate finance or licensing companies, will further be given priority¹⁰.
- The future work of the Group will also cover anti-abuse measures in particular with respect to outbound payments, building upon the previous guidance on inbound payments and existing anti-abuse provision in the EU legislation.

Finally, the Group reiterates its intention to consider further ways to increase transparency in respect of its work, in particular concerning the EU Blacklist and, for example, the publication of the European Commission's initial assessment notes on certain Member States' national measures.

EU Tax Centre comment

In an attempt to address the concerns of the European institutions and of the wider civil society regarding the opacity of the work performed by the Code of Conduct Group, the latter has undertaken various initiatives to increase the visibility and transparency of its work with the public, and recently published a number of documents compiling the results of its work over the years, including review processes and guidance notes. Although the details of the discussions performed within the Group are still confidential, these publications provide a valuable insight

⁷ Agreed guidance by the Code of Conduct Group (business taxation): 1998-2018 ([doc. 5814/2018](#))

⁸ Code of Conduct Group (Business Taxation) Overview of the preferential tax regimes examined by the Code of Conduct Group (Business Taxation) since its creation in March 1998 ([doc. 9639/18](#))

⁹ Code of Conduct (Business Taxation) New multiannual work package ([doc. 10420/18](#))

¹⁰ Code of Conduct Group (business taxation) - Priority list for monitoring agreed guidance ([doc. 6603/18](#))

into the group's most recent work, in particular as to the national regimes reviewed and the EU blacklisting process.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



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