



SGS18/07951

General Secretariat of the Council
Chair of the Code of Conduct Group (Business Taxation)

Mr Petr Ježek
Chair of the Special Committee
on Financial Crimes, Tax Evasion and Tax Avoidance
European Parliament
60 Rue Wiertz
B-1047 Brussels

Brussels, 8 October 2018

Subject: Your letter of 20 September 2018

Dear Mr Ježek,

Thank you for your letter of 20 September 2018, which included an updated version of your questionnaire.

As already confirmed, it will be my pleasure to participate in the exchange of views with the Special Committee on Financial Crimes, Tax Evasion and Tax Avoidance on 10 October 2018 to discuss the work of the Code of Conduct Group.

As regards the questionnaire, I have brought it to the attention of the Group, which, in the spirit of cooperation and transparency, has mandated me to provide you with the replies set out in the annex. These replies have been prepared on the basis of publicly available documents.

I would also like to take this opportunity to recall that, while the interactions with the European Parliament are of the highest importance in the spirit of sincere cooperation, the Group, its mandate and work are intergovernmental in nature and as such not subject to the scrutiny or supervision of the European Parliament.

I look forward to seeing you at the hearing.

Sincerely yours,

Fabrizia Lapecorella

Cc: Andreas Strub, GSC

Questions by the European Parliament's

TAX3 Committee¹

- Would you say that the work of the Code of Conduct Group is successful? If so, could you provide Members of the TAX3 Committee with statistics?

The work of the Group can be considered successful, having regard to the outcomes hereafter reported.

The Code of Conduct Group (hereafter "COCG" or "Group") that was created in 1998 with the objective to assess potentially harmful preferential tax regimes and curb harmful tax competition in the EU, has recently issued an overview of the preferential tax regimes examined by the Group since its creation in March 1998 (doc. 9639/18 REV 1)²

Based on this overview, the COCG has examined 638 preferential regimes (including 280 in 1998-1999), 254 of which were deemed harmful and have been (or are being) rolled back.

The Group has also agreed more than 27 guidance notes since its creation in March 1998 (see compilation in doc. 5814/18 REV 3) and is regularly reviewing their effective implementation (see priority list in doc. 6603/18).

The COCG has furthermore screened 92 third country jurisdictions in 2017, resulting in the approval of the EU list of non cooperative jurisdictions for tax purposes in December 2017. Since then 68 jurisdictions (3 in Annex I and 65 in Annex II of the 05/12/2017 Council conclusions) are being monitored for commitments taken at a high political level. These account notably for 107 harmful preferential regimes whose rollback is being monitored by the Group, half of which (52) have not been examined by the OECD Forum on Harmful Tax Practices (FHTP). Furthermore 13 jurisdictions without a corporate tax system or applying a corporate tax rate equal to zero or almost zero are committed to comply with our criterion 2.2³. More details on the state of play can be found in this regard in the publicly available six-monthly COCG progress report to the June 2018 ECOFIN Council (doc. 9637/18).

¹ Informal replies by the Chair of the Council's Code of Conduct Group (business taxation). Information provided can be found on the Council's website and Group's dedicated webpages.

² All references to documents are references to publicly available documents available at: <http://www.consilium.europa.eu/en/documents-publications/public-register/>

³ "The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction."

On the CoCG reform

- In March 2016, the Council adopted conclusions on the Code of Conduct Group on Business Taxation. In these conclusions, Member States:
 - o "Recalled the Group to develop guidance on the interpretation of the gateway criterion and its application." Could you please provide an update on the state of play of these guidelines?

As mentioned in the publicly available COCG six-monthly report to the December 2016 ECOFIN Council (doc. 14750/16), the Group discussed this issue at its meeting on 20 October 2016 and agreed that there is no need for guidance concerning the interpretation of the gateway criterion as it now stands.

- o "Decided that a subgroup will deal with the clarification of the third and the fourth criteria of the Code and that another subgroup will deal with dialogues with relevant third countries." Could you please provide an update on the state of play of this clarification?

The subgroup on the clarification of the third and fourth criteria was created in 2016 and has been active since then. Information can be found in the regular publicly available six-monthly COCG reports to ECOFIN, but the Group has notably agreed on a guidance on special economic zones (1st semester 2017), a guidance on the interpretation of the third criterion (2nd semester 2017) and a guidance on the interpretation of the 4th criterion (1st semester 2018). All these guidance notes can be found in the above-mentioned compilation, as well as on the Council's dedicated webpage.

As for the subgroup on third countries, that was created especially to assist the COCG with respect to the EU list of non-cooperative jurisdictions for tax purposes, it is in particular responsible for technical aspects of the monitoring of commitments taken by jurisdictions in the context of the EU list of non cooperative jurisdictions for tax purposes, in line with the procedural guidelines agreed in February 2018 (doc. 6213/18).

- o "Invited the Group to explore initiatives to further inform the public on the results of its meetings and to report back to ECOFIN on this issue by June 2017." Could you please explain which initiatives have been adopted to increase information to the public on the outcomes of COCG meetings (beyond the 6-monthly reports to ECOFIN)?

The Group has substantially increased the information that is available to the public.

Not only the regular six-monthly report of Group to the Council provide a detailed account of the work of the Group, but also the web resources of the Group and EU list of non-cooperative jurisdictions have recently been updated and contain substantial information about the work of the Group:

<http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/code-conduct-group/>

<http://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/>

The webpages also contain links to publicly available documents, such as a compilation of agreed guidance, more information on the preferential tax measures examined by the Group, guidelines and many letters related to the EU listing process, the agreed descriptions and assessments of Member States' preferential regimes after endorsement by the Council, etc.

- The COCG has recently discussed on the revision of the mandate of the COCG.
 - What are the conclusions or ongoing progress of the HLWP on the revision of the Code of Conduct Group's mandate? Could you detail the state of play of the COCG discussions and plans for the reform of the COCG?
 - According to your view, what areas or elements of the Code of Conduct Group and its work need a reform/improvement and why this has not been done so far?

The HLWP was formally mandated by the ECOFIN Council to examine a possible revision of the mandate of the COCG by the Council conclusions of 8 December 2015 and 8 March 2016.

As committed in its tax policy roadmap (doc. 5668/18), the Bulgarian Presidency, which chaired the HLWP in the first semester of 2018, resumed discussions on possible ways forward.

The state of play is set out in the last six-monthly progress report by the Group to the ECOFIN Council (doc. 9637/18, paragraphs 91 to 93). A revision of the gateway criterion and integration of criterion 2.2 of the EU listing exercise are notably among the elements being examined.

The Austrian Presidency will continue discussions on this.

- How is the Code of Conduct assessing whether the harmful measures have truly be rolled-back (i.e. not just by law but in practice as well, and that no substitute measures with an equally harmful effect are being introduced)?

Member States have to notify their rollback measures to the Group, as required by the December 1997 mandate. These rollback measures are then assessed by the Commission services and agreed by the Group.

If new or substitute preferential measures are introduced, they have to be notified under the standstill procedure.

- Based on the work of the CoC Group, do any EU Member States have in place any harmful practices of which you are aware, but about which the CoC Group has not taken its position or has not found a common solution (e.g. VAT advantages, investment related tax relieve, patent boxes, etc.)?

VAT is a common tax system harmonized by EU Directives and as such, it does not fall within the mandate of the COCG, which is focused on coordinating Member States business taxation to the extent that the EU has not exercised its legislative competence in the field.

For the rest, the TAX3 Committee is referred to the comprehensive overview of the preferential tax regimes examined by the Group set out in doc. 9639/18 REV 1.

On the listing process

- The European Parliament has been calling for more transparency in the screening process by the Code of Conduct Group, especially in the commitments third countries take to be removed from the so-called "blacklist".
 - What steps have you taken or are you planning to take in this regard?

The objective has always been to establish a cooperative and transparent process in the dialogue with third jurisdictions and draw up an EU list of non-cooperative jurisdictions for tax purposes to promote compliance by the third country jurisdictions concerned (Annex I to the Council conclusions of 5 December 2017, doc. 15429/17).

The COCG in its nature is intergovernmental and as such is not subject to the scrutiny or supervision of the European Parliament.

The Group at the request of Member States has decided to take the following measures to increase transparency:

- 1) creation of a new webpage on the Council's website with links to all publicly available documents;*
- 2) publication of the various guidelines used during the screening (doc. 14166/16) and monitoring process (see annexes to the 5 December 2017 Council conclusions, the February 2018 Procedural guidelines on the monitoring process, or the June 2018 scoping paper on criterion 2.2);*
- 3) publication of all the letters seeking commitment sent to jurisdictions, and publication of the commitment letters received in return when consent was received from the concerned jurisdictions (46 have been published already);*
- 4) publication of the overview of all the preferential tax regimes screened by the COCG in the 92 jurisdictions covered by the scope (doc. 9639/18 REV 1 part III);*
- 5) more detailed progress report to the ECOFIN Council in June 2018.*

The COCG reports to the Council suggesting the de-listing of certain jurisdictions are also publicly available on the Council's website.

- Brazil is not in the list of non-cooperative jurisdictions for tax purposes, nor in the "grey list", while Brazil has an "Export Processing Zone", a preferential tax regime which does not seem to comply with criteria 2 of the EU list. Has this been addressed during the assessment phase of third countries? For which reasons was it decided to not put Brazil on any list?

This is the case because Brazil provided additional information on this regime after the letter seeking commitment was sent to them. See document 9639/18 REV 1.

- For which reasons did the Code of Conduct Group suggest to withdraw the mention of "no or close-to-zero corporate tax rate" as a sub-criteria for the assessment of third countries in preparation of the EU list?

No or close-to-zero corporate tax rate is not a sub criterion: it is the trigger of an analysis of a jurisdiction's tax system under criterion 2.2. In fact, criterion 2.2 and the relevant scope of application provide that those tax rates shall not be considered as "harmful" per se, but that the jurisdiction applying that regime needs to be screened to assess whether it facilitates offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in its territory.

For more details see Annex VII ("Scope of criterion 2.2") to the Council conclusions of 5 December 2017: doc. 15429/17.

On transparency issues

- Can you please provide more information regarding the CoC policy to declassify/publish documents? Which documents does the CoC Group decide not to publish?

The general policy is publicly available in doc. 5643/16.

The General Secretariat of the Council examines individual access requests under Regulation 1049/2001 (including concerning classified documents) on the basis of these guidelines. The Council's Working Party on Information (not the COCG) is the preparatory body taking the final decision on the release of documents.

In some cases, the COCG also declassified/published some documents at its own initiative. This was the case for instance regarding letters seeking commitment sent to jurisdictions, or commitment letters received in return when consent was received from the concerned jurisdiction.

- Following the former Special or Inquiry Committees TAXE, TAX2 and PANA, the EP made notably the following recommendations:
 - Regular report and exchange with the ECON committee by the Chair of the Group and the Council to regularly report on the activities of the Group;
 - Regular provision, updates and publication of a list every two years of harmful tax practices;
 - Regular production, provision and publication of its minutes, notably with an indication of representatives of MS' positions;

- o Production of an annual report identifying and describing the most harmful tax measure used in the MS, and stating what counter-measures were taken;
- o annual CoC report on most harmful tax practices used by Member States during the year
- Which responses and concrete follow-up actions have you already carried out and how do you intend to follow up on the points on which you have not yet done so?

Despite all the abovementioned initiatives recently undertaken by the COCG to ensure that its work becomes more transparent (following also some of the recommendations made by the EP), it is however to be borne in mind that the Code of Conduct Group is a preparatory body reporting only to the Council. It is furthermore intergovernmental in its nature and as such is not subject to the scrutiny or supervision of the EP.