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Global Tax Alert

EU Code of Conduct Group publishes six-month Work Programme under EU's Croatian Presidency

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Executive summary

On 6 February 2020, the European Union (EU) Code of Conduct Group (Business Taxation) (COCG or the Group) published its six-month Work Programme[1] (the Work Programme), setting out anticipated activity during the course of the EU's Croatian Presidency.[2]

Among other things, the Work Programme confirms that the COCG will: (i) conclude the screening of the potentially harmful tax regimes (including the Foreign Source Income Exemption regimes) of a number of jurisdictions; (ii) continue the monitoring of commitments made by jurisdictions under the EU's listing of non-cooperative jurisdictions for tax purposes; (iii) continue its work screening the tax regimes of Argentina, Mexico and Russia; and (iv) also schedule a coordination meeting with the Chairs and secretariats of the Organisation for Economic Cooperation and Development's (OECD) Global Forum on Transparency and Exchange of Information for Tax Purposes, the Forum on Harmful Tax Practices (FHTP) and Inclusive Framework on Base Erosion and Profit Shifting (BEPS).

The Work Programme also notes that the EU list of non-cooperative jurisdictions for tax purposes[3] will be revised by the Economic and Financial Affairs Council (ECOFIN) on 18 February 2020.

Building a better working world

Detailed discussion

Background

On 1 December 1997, the Council and representatives of the governments of the EU Member States adopted a resolution on a Code of Conduct for business taxation, with the objective of curbing harmful tax competition. As foreseen by the resolution, a COCG was set up within the framework of the Council by the ECOFIN on 9 March 1998. Its role is to assess tax measures that may fall within the scope of the Code of Conduct. The COCG is composed of high-level representatives of both Member States and the European Commission.

The COCG provides a six-month report to the Council on the main elements assessed and on the monitoring of (non-) compliance with agreed guidance.[4] These reports are systematically made available to the public.

Work Programme

The six-month (i.e., the first semester of 2020) Work Programme is divided into four parts:

I. Monitoring of standstill and the implementation of the rollback

II. Monitoring and screening of third countries

III. Monitoring the implementation of agreed COCG guidance

IV. The organization of work

Additionally, the Work Programme opens with a summary of the conclusions of the ECOFIN Council meeting of 5 December 2019 as they pertain to the COCG.

Summary of the conclusions of the ECOFIN Council meeting of 5 December

The Work Programme notes that in the conclusions of the 5 December ECOFIN council meeting, the COCG was asked to focus on six key issues:

1. To continue its work under its multi-annual work package 2018 (doc. 10420/18)
2. To continue monitoring standstill and the implementation of the rollback
3. To continue monitoring the implementation of its past guidance notes
4. To start the assessment of the newly-identified foreign source income exemption regimes listed in its report of 25 November 2019[5]
5. To resume discussions and seek an agreement on future criterion 1.4 (exchange of beneficial ownership information)
6. To report back to the Council on its work during the Croatian Presidency

Section I: Monitoring of standstill and the implementation of the rollback

Section I effectively represents the continuing mandate of the COCG, setting out that the Group will review the tax measures notified by Member States under the last round of standstill and rollback notifications, and continue the monitoring of the actual effects of some regimes for which regular monitoring was decided.

That "last round" refers to a thorough investigation of potentially harmful tax regimes set out by the COCG in a November 2019 progress report,[6] including a list of new preferential regimes that the COCG had identified and planned to review.

Section II: Monitoring and screening of third countries

Section II contains several related activities that the COCG plans to carry out during the course of the coming six-month period. First, the Group will continue monitoring the implementation of commitments made by a number of jurisdictions during discussions that occurred in relation to the composition of the EU list of non-cooperative jurisdictions for tax purposes.

This includes compliance with the new criterion 3.2 (The implementation of the minimum standard on country-by-country reporting) and the monitoring of standstill (i.e., to refrain from introducing any new harmful tax measures) in respect of the newly identified regimes under criterion 2.1 (existence of harmful tax regimes) and measures under criterion 2.2, (existence of tax regimes that facilitate offshore structures which attract profits without real economic activity) in the jurisdictions covered by the geographical scope.

Section II also notes that the Group will resume discussions and work to find agreement on the EU's future criterion 1.4 on the exchange of beneficial ownership information, taking into account other related developments at international level.

Section II also notes that the Group will conclude the screening of the Foreign Source Income Exemption regimes identified in the 13 jurisdictions[7] falling within the scope of the EU listing process and review jurisdictions' responses regarding the treatment of partnerships (economic substance requirements) under criterion 2.2. Furthermore, Section II also sets out that the Group will conclude the ongoing screening of Argentina, Mexico and Russia, and seek commitments if and where appropriate.

Additional work will also be carried out by the Group to review of the approach used for selecting jurisdictions in the geographical scope of the EU listing exercise. The Group will focus on the most relevant jurisdictions, considering the agreed work on the extended geographical scope as identified in 2018, and will also initiate a review of the economic data used to select jurisdictions for inclusion on the list.

Section II further notes that the Group's Chair will not only continue procedural and political dialogue with some jurisdictions as necessary but will also schedule a coordination meeting with the Chairs and Secretariats of the OECD Global Forum, the Forum on Harmful Tax Practices (FHTP) and the Inclusive Framework on BEPS.

The Group will furthermore launch a review of the classified documents that have been issued in respect of the EU listing process since 2016, assessing whether some could be declassified.

Finally, Section II notes that the EU list of non-cooperative jurisdictions for tax purposes will be revised by the ECOFIN Council in February 2020, following the expiration of the end-of-2019 deadline by which jurisdictions were required to have responded in writing to the inquiries of the Group.

Section III: Monitoring the implementation of agreed guidance

Section III of the Work Programme notes that, during the coming six months, the Group will assess Member States' compliance with the 2016 guidance around the issuance of tax rulings,[8] on the basis of Member States' responses to a questionnaire.

Section IV: Organization of work

Section IV of the Work Programme proposes that the Group should meet for four one-day meetings during the semester, on 4 February, 2 March, 1 April and 3 June 2020, enabling it to provide a report before the end of the Croatian Presidency. The Croatian Presidency furthermore plans to organize six meetings of the two subgroups (on anti-abuse and on third countries) to progress work on items falling within its remit.

Implications

Despite the fact that it started outside the EU legal infrastructure as a political peer pressure group among the Member States, and has no legally binding consequences, the group continues to play an increasingly important role in the EU and wider tax community. The group has played a key role in ensuring the compliance of jurisdictions worldwide with the global standards on BEPS and Exchange of Information by requiring membership of the Inclusive Framework on BEPS and participation in the Global Forum on Transparency and Exchange of Information and the relevant multilateral instruments in relation to Exchange of Information, in order to prevent being included in the EU list of non-cooperative jurisdictions The increased importance of the Group is also a result of a desire by the European Parliament to be more transparent and accountable of its work.

Future reports, findings, guidance, recommendations and standard-setting work of the Group should be closely monitored on the Group's public website. In particular, businesses with operations in any of the jurisdictions remaining on the EU list of non-cooperative jurisdictions for tax purposes should consider what implications, if any, the application of defensive measures by EU Member States may have on their operations, both now and in the future.

Endnotes

1. https://data.consilium.europa.eu/doc/document/ST-5815-2020-INIT/en/pdf.
2. Croatia holds the Presidency of the EU between 1 January 2020 and 30 June 2020, at which time it is passed to Germany.
3. https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/. See also EY Global Tax alert, *Council of the European Union publishes list of uncooperative jurisdictions for tax purposes*, dated 6 December 2017.
4. See for example EY Global Tax alert, *EU Code of Conduct Group issues update report, including new guidance*, dated 12 December 2019.
5. https://data.consilium.europa.eu/doc/document/ST-14114-2019-INIT/en/pdf.
6. Ibid.
7. See https://data.consilium.europa.eu/doc/document/ST-14114-2019-INIT/en/pdf for full information on each of the 13 regimes.
8. *The Guidelines on the conditions and rules for the issuance of tax rulings - standard requirements for good practice by Member States* – http://data.consilium.europa.eu/doc/document/ST-5814-2018-REV-2/en/pdf.

For additional information with respect to this Alert, please contact the following:

Ernst & Young GmbH Wirtschaftsprüfungsgesellschaft, Munich
- Klaus von Brocke klaus.von.brocke@de.ey.com

Ernst & Young LLP (United Kingdom), London
- Chris Sanger csanger@uk.ey.com

Ernst & Young Belastingadviseurs LLP, Rotterdam
- Marlies de Ruiter marlies.de.ruiter@nl.ey.com

Ernst & Young Belastingadviseurs LLP, Amsterdam
- David Corredor-Velásquez david.corredor.velasquez@nl.ey.com

Ernst & Young Société d'Avocats, Paris
- Jean-Pierre Lieb jean.pierre.lieb@ey-avocats.com

Ernst & Young LLP (United States), Global Tax Desk Network, New York
- Jose A. (Jano) Bustos joseantonio.bustos@ey.com

Ernst & Young LLP (United States), Washington, DC
- Rob Thomas rob.l.thomas1@ey.com

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