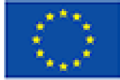

Parliamentary questions

16 April 2013 E-004280-13

Question for written answer
to the Commission
Rule 117
Marc Tarabella (S&D)

Subject: Gibraltar and its tax concessions for online gambling operators

Gibraltar's appeal to gambling operators has little to do with its tourist attractions. There would be nothing to distinguish the island from other tourist destinations were it not for the tax concessions it grants to investors.

Online poker and casino sites which base their operations in Gibraltar can provide services both to countries which are already moving towards more relaxed gambling laws and to those which still impose restrictive measures. They could of course choose other locations such as Antigua or the Kahnawake reserve, but they prefer to stay in Gibraltar, which has the advantage of being close to Europe and is at present the most lucrative site for their operations.

With a 15% tax rate on profits, it is not hard to see why companies decide to set up operations there.

1. In view of the fact that the Commission is currently working to combat tax evasion and tax havens, what action is it planning to take in respect of Gibraltar and the online gambling operators which have established themselves on the island in order to enjoy its tax breaks?

2. Are the Gibraltar-based online gambling companies not engaging in unfair competition against companies providing the same services in Member States which are not tax havens?

3. Has the Commission commissioned, or is it planning to commission, an impact analysis of gambling operations in Gibraltar, in terms of job creation or losses in Europe, for example?

Original language of question: **FR**

OJ C 33 E, 05/02/2014

Last updated: 29 April 2013

Legal notice

Parliamentary questions

3 June 2013 **E-004280/2013**

Answer given by Mr Šemeta on behalf of the Commission

1 and 3. The Commission is not currently taking any actions in the area of direct taxation specifically targeting online gambling operators established in Gibraltar, nor is the Commission planning to undertake an impact analysis of gambling operations in Gibraltar.

Member States are entitled to establish the tax regimes they see fit, so long as these comply with EC law.

2. The Code of Conduct Group, established by Member States to combat unfair tax competition, has recently reviewed Gibraltar's 2010 Income Tax Act. In its report to the Council dated 23 November 2012[1] the Group concluded that certain aspects of the Act, which do not relate to online gambling, were harmful. The United Kingdom has already informed the Group about work already begun to ensure compliance with the principles of the Code.

Other Member States are free to introduce such anti-abuse measures as they think are necessary to defend their tax bases, so long as they comply with EC law.

Regarding indirect tax, although Gibraltar is outside the territorial scope of VAT, online gambling falls within rules for tax on business to customers electronically supplied services. There is no blanket exemption from VAT for gambling and tax may be due depending on where customers are located and how Member States implement any exemption.

(1) Document 16488/12 FISC 173.

OJ C 33 E, 05/02/2014

Last updated: 7 June 2013 Legal notice

Vindplaats	H&I 2013/1.6
Auteur	Council of the European Union 23 November 2012, no. 16488/12

Report from the EU Code of Conduct Group (Business Taxation) to the ECOFIN Council of 4 December 2012. European Council (comments by Nouwen)

On 4 December 2012, the ECOFIN Council adopted conclusions with regard to the progress achieved by the EU Code Group under the Cyprus Presidency, as set out in the EU Code Group's Progress Report of 23 November 2012. Additional to the Code Group's habitual on-going work on the monitoring of standstill and on the implementation of rollback of harmful tax regimes (e.g. the Code Group labelled Gibraltar's Income Tax Act 2010 'harmful'), the Report elaborates on the results achieved on the Group's Work Package 2011. Regarding anti-abuse, the Code Group continued its work on mismatches, agreeing that further work in this area should concentrate as a first step on hybrid entities and (hybrid) permanent establishments. Following Member States' comments on draft guidance prepared by European Commission, it was agreed to have detailed technical discussions within the Code of Conduct Subgroup. The Report also sets out progress made in the area of administrative practice (e.g. monitoring agreed guidance on spontaneous exchange of information in relation to cross-border rulings) and links to third countries (e.g. trying to convince third countries to apply the principles and criteria of the Code).

Council of the European Union 23 November 2012, no. 16488/12

COUNCIL OF THE EUROPEAN UNION

Brussels, 23 November 2012

16488/12

LIMITE

FISC 173

REPORT

from: Code of Conduct Group (Business Taxation)

to: Council

Subject: Code of Conduct (Business Taxation)

- Report to the Council

INTRODUCTION

1.

On 1 December 1997, the Council and the Representatives of the Governments of the Member States, meeting within the Council, adopted a Resolution on a Code of Conduct for business taxation. This Resolution provides for the establishment of a Group within the framework of the Council to assess tax measures that may fall within the Code. In its report to the Feira European Council on 19 and 20 June 2000, the ECOFIN Council agreed that work should be

pursued with a view to reaching agreement on the tax package as a whole, according to a parallel timetable for the key parts of the tax package (taxation of savings, Code of Conduct (business taxation) and interest and royalties).

2.

On 9 March 1998, the Council confirmed the establishment of the Code of Conduct Group. The Group reports regularly on the measures assessed and these reports are forwarded to the Council for deliberation.

3.

This report from the Code Group encompasses the work of the Code Group in 2012 under the Cyprus Presidency.

4.

In accordance with the Procedural Aspects of the Group (16410/08 FISC 174), the Group should maintain to aim at a (broad) consensus to reflect the positions of the Member States in the Group in its reports to ECOFIN, to avoid losing the effectiveness of the Group, while respecting the principle of unanimity as laid down in the Council conclusions of 9 March 1998 concerning the establishment of the Code Group. In the case broad consensus cannot be reached, the Group's reports can express the various views mentioned.

PROGRESS OF WORK

5.

The Code of Conduct Group met on 10 September, 17 October and 8 November 2012 under the Cyprus Presidency.

6.

At the meeting of 10 September 2012 the Group confirmed a programme of work under the Cyprus Presidency, agreeing to take forward work in the following areas:

(a) continue its work on rollback;
(b) continue existing work on standstill;
(c) continue work on the various aspects of the Group's Work Package 2011.

APPOINTMENT OF VICE CHAIRS

7.

Mr Georg Poufos (Director of Inland Revenue, Ministry of Finance of Cyprus) and Mr. Eamonn O'Dea (Director of the Corporate and International Tax Division in the Irish Revenue Commissioners) were confirmed as respectively the first and the second Vice-Chairs for the period up to the end of the Cyprus Presidency.

ROLLBACK

8.

UK: Guernsey – Zero-Ten Corporate Tax Regime

The Group discussed the rollback of the harmful aspects of the Guernsey's Zero-Ten Corporate Tax Regime on the basis of 'The Income Tax (Zero 10) (Deemed Distributions) (Repeal) (Guernsey) Ordinance, 2012' and agreed that the measures taken by Guernsey were adequate to achieve the rollback.

STANDSTILL

9.

Member States have made commitments not to introduce new tax measures that would be harmful within the meaning of the Code. The Group's work programme for the Cyprus Presidency identified the following measures where further discussion under standstill was required:

- UK: Gibraltar – Income Tax Act 2010.

10.

UK: Gibraltar –The Income Tax Act 2010 was discussed at the Group's meetings on 10 September, 17 October and 8 November 2012. On the basis of the agreed description of selected elements of the Income Tax Act 2010 covering those aspects seen as relevant for the application of the Code criteria approved by the Group at its meeting in February 2012, and of additional information supplied by UK subsequently, the Commission Services provided the Group with a draft assessment of the regime. The Group discussed this draft assessment and agreed that the Gibraltar regime is harmful under the criteria of the Code. The UK: Gibraltar has informed the Group about work already begun to ensure compliance with the principles of the Code.

WORK PACKAGE

11.

The Group continued its work on the Work Package 2011 under the Cyprus Presidency.

Anti-Abuse – Mismatches

12.

The Group continued its work on Mismatches, agreeing that further work on mismatches should concentrate as a first step on hybrid entities and hybrid PE's. Following Member States oral and written comments on draft guidance prepared by Commission Services, it was agreed to have detailed technical discussions in the Subgroup (Anti-abuse issues related to inbound and outbound profit transfers and mismatches between tax systems), starting under the Irish Presidency.

Monitoring the implementation of agreed guidance on Inbound Profit Transfers

13.

The Group continued its monitoring exercise regarding the implementation of the previously agreed guidance on inbound profit transfers (doc. 16766/10 FISC 139, par. 16). Further discussion on this topic under the Irish presidency is required. The Group also agreed to start monitoring asymmetric provisions for capital gains and losses in Member States' tax provisions under the Irish Presidency.

Preparation of guidance or application notes

14.

The Group continued its work on the preparation of guidance notes for regimes offering beneficial treatment to interest, royalties, intermediate companies and special economic zones. Whilst noticing that past assessments should not be affected, the Commission provided the Group with a proposal for general guidance or application notes for future use, based on characteristics and elements which indicate that a tax measure may be harmful when fully considered against the criteria in the Code. The Group will continue its work under the Irish Presidency.

Administrative Practices

15.

The Group was informed on progress made by CACT in developing a Model Instruction to improve the spontaneous exchange of information on advance interpretations of legal provisions in cross border situations (‘rulings’) (doc. 16766/10 FISC 139). With regard to the exchange of information in the area of transfer pricing the Group was informed that Commission has sought technical advice from members of the Joint Transfer Pricing Forum in relation to the exchange of information concerning unilateral advance pricing agreements and the Group will continue to follow developments.

Links to third countries

16.

As asked by the Council (ECOFIN) on 22 June 2012 (10905/12 FISC 78), the Commission intensified discussions with Switzerland with the aim of reaching agreement to apply the principles and all the criteria of the Code. At the meetings held on 10 September, 17 October and 8 November 2012, the Group was informed of the continuing dialogue with Switzerland. . Some progress has been made on reaching a common understanding in relation to some Swiss regimes. However, the Group considers it important that all its concerns are taken into account. The Group expects to see further concrete progress by the end of the Irish Presidency and calls on the Commission to report at every Code of Conduct meeting until then, bearing in mind that the Group still retains the possibility to follow alternative approaches including unilateral assessment of the regimes.

Comment

Introduction

On 4 December 2012, the ECOFIN Council adopted conclusions on the EU Code of Conduct Group (Business Taxation) (the ‘*Code Group* ’) (Press Release of the 3205th ECOFIN Council Meeting of 4 December 2012, doc. 17131/12 PRESSE 501 PR CO 68). Although the ECOFIN Council Conclusions do not provide many details on the state of play on the dossiers that are currently on the Code Group’s table, the Code Group’s November 2012 Progress Report (the ‘*Report* ’) does (EU Code Group Report of 23 November 2012, doc. 16488/12 FISC 173). This halfyearly Report encompasses the Code Group’s work under the Cyprus Presidency.

In the first part of the Report, the Code Group’s work on the monitoring of standstill and the implementation of rollback is discussed. It is revealed that Gibraltar’s Income Tax Act 2010 was labelled ‘harmful’ under standstill and that it was decided that the measures taken by Guernsey were adequate to achieve the rollback of the ‘harmful’ aspects of the Zero-Ten Corporate Tax Regime. In the second part of the Report, the results achieved on, amongst others, the following items of the Work Package 2011 are set out:

- anti-abuse (i.e. mismatches leading to double non-taxation in the area of hybrid entities and (hybrid) permanent establishments);
- administrative practices (e.g. stimulating spontaneous exchange of information in relation to specific *cross-border rulings*); and
- links to third countries (i.e. dialogue between the EU and third countries on the application of the principles and the criteria of the Code).

The lack of concrete results mentioned in the present Report seems to indicate that the Code Group finds it increasingly difficult to achieve tangible results, particularly in the area of antiabuse and administrative practices.

Below, I briefly highlight the most interesting results and trends on the above-mentioned topics.

Guernsey’s Zero-Ten Corporate Tax Regime & Gibraltar’s Income Tax Act 2010

In order to counter harmful tax practices, paragraph C and D of the Code of Conduct (on Business Taxation) (the ‘*Code* ’) provide an on-going commitment to Member States to refrain from introducing any new harmful tax measures

('standstill') and amend any laws or practices that are deemed to be harmful in respect of the principles of the Code ('rollback'). The Group monitors these commitments via the annual standstill and rollback notifications.

With respect to rollback, the Code Group discussed the harmful aspects of the Guernsey's Zero-Ten Corporate Tax Regime. In its June 2012 Report, the Code Group considered Guernsey's Zero-Ten, and more specifically the deemed distribution provisions, 'harmful'. The deemed distribution provisions of Zero-Ten ensure that resident shareholders are subject to a 20% tax rate on the undistributed profits of Guernsey companies. To the extent that a Guernsey company has non-resident shareholders, an effective tax rate of 0% applies on Guernsey's business profits. Based on the deemed distribution provisions, investment income (earned by a Guernsey company) is taxed on an annual current basis. Other (trading) income is deferred subject to the occurrence of a specific 'trigger' event, such as emigration of the shareholder. These 'triggers' ensure a latent Guernsey tax claim.

In the light of this, the Code Group discussed the rollback of the harmful aspects of the Guernsey's Zero-Ten Corporate Tax Regime on the basis of 'The Income Tax (Zero 10) (Deemed Distributions) (Repeal) (Guernsey) Ordinance, 2012' and agreed that the measures taken by Guernsey were adequate to achieve the rollback. This legislative amendment removes the deemed distribution provisions and ensures that Zero-Ten is Code-proof. For more detailed comments on this subject see my comments on the June 2012 Code Group Report in *H&I* 2012/ 8.3.

With respect to standstill, the Report indicates that the Code Group assessed Gibraltar's Income Tax Act 2010. Although no details of the assessment have been revealed, it seems that the Code Group particularly criticized the taxation of inbound and outbound interest and royalty payments. In order to perform a *formal assessment* of this tax measure, last year the Code Group requested the European Commission (the '*Commission* ') to prepare a so-called *agreed description* of selected elements of the Income Tax Act 2010 covering those aspects seen as relevant for the application of the Code criteria. On the basis of this *agreed description* , and of additional information supplied by the UK, the Commission subsequently provided the Code Group with a *draft assessment* (i.e. *grid assessment*) of the regime. The Code Group has now discussed this draft assessment and concluded that the Gibraltar regime is harmful under the principles and criteria of the Code. According to the *Gibraltar Chronicle* , minor changes would be required to ensure that the 2010 Tax Act is Code-proof. An official of the Gibraltar Government source stated that '(…) [t]he Gibraltar Government has already identified a solution to this and has requested a meeting with the Code officials to propose a solution to them which the Gibraltar Government is confident will meet their concerns' (Gibraltar Chronicle, Spain blows hot and cold as gib addressed ecofin concern on minor aspect of the tax act, 5 December 2012).

Anti-abuse: Countering Mismatches Caused by Hybrid Instruments, Hybrid Entities and (Hybrid) Permanent Establishments

The debate on anti-abuse in the Code Group is closely connected to the very recent work of the Commission. On 6 December 2012, the Commission presented a Communication entitled *An Action Plan to strengthen the fight against tax fraud and tax evasion* (European Commission, An Action Plan to strengthen the fight against tax fraud and tax evasion, COM(2012) 722 final, 6 December 2012), to provide for a more effective EU response to tax evasion and avoidance. In the Action Plan, the Commission announced its intention to propose a legislative amendment to the Parent-Subsidiary Directive to address double non-taxation in the area of hybrid loan structures. The Commission also announced it was to review the anti-abuse provisions of the Interest and Royalties, Mergers, and Parent-Subsidiary Directives.

Concurrently, the Commission sent to the Member States a Recommendation entitled *aggressive tax planning* (European Commission, Recommendation on aggressive tax planning, C (2012) 8806 final, 6 December 2012). The Commission recommends that Member States coordinate common actions to resolve aggressive tax planning. In order to resolve certain risks of aggressive tax planning:

- Member States are encouraged to ensure, in the context of their Double Tax Conventions, that income may only remain untaxed in a Contracting State if it is subject to tax in the other Contracting State (which may be either another Member State or a third country). The Recommendation includes a provision that Member States are asked to include in their treaties to this effect;
- similarly, Member States that avoid double taxation by exempting foreign income through unilateral measures are called upon to adopt provisions preventing double non-taxation; and
- Member States are asked to adopt a General Anti-Abuse Rule (GAAR) and, in that respect, a suggested provision is included in the Recommendation.

For more detailed comments on the Commission's Action Plan and Recommendation see my comments elsewhere in this *H&I* issue.

The results achieved to date by the Code Group on the issue of anti-abuse are limited to mismatches between national law characterizations of payments made under hybrid loan arrangements. The Code Group's December 2011 Report revealed that a 'solution' had been found (EU Code Group Report of 13 December 2011, 17081/1/11 REV 1 FISC 144, para. 18). Unfortunately, the paragraph that should contain this solution has not (yet) been made public (EU Code Group Report of 22 November 2010, 16766/10 FISC 139, para. 17). However, recently, a Commission official indicated that the following approach has been chosen: denial of exemption of the interest payment received if the source State considers it a deductible interest payment. The Code Group is still debating the implementation of the chosen policy: no consensus seems to exist yet on the form of implementation (hard law or soft law).

The Code Group recently turned to other mismatches. The Report shows that hybrid entities and hybrid permanent establishments are priority areas within the Work Package 2011. This makes sense, as through hybrid entities a similar effect can be achieved as via hybrid loan arrangements. Both types of arrangements can cause a mismatch in the tax treatment of crossborder payments (i.e. deduction in Member State 1, no taxation in Member State 2, or vice versa). Another effect caused by these arrangements regards the deduction of the same expense in two Member States, the use of the same loss in two Member States, or the simultaneous exemption of the same income in two Member States (i.e. double deduction or double non-taxation). The Report reveals that, following Member States' comments on draft guidance prepared by the Commission, which unfortunately has not been made public, it was agreed to have more detailed technical discussions on these issues under the (forthcoming) Irish Presidency.

See further on this subject my comments on the December 2011 Code Group Report in *H&I* 2012/2.1 and on the June 2012 Code Group Report in *H&I* 2012/8.3 .

Administrative Practices: Cross-Border Rulings Subject to Spontaneous Exchange of Information

The Code Group's results in the area of administrative practices can be summarized as follows:

- agreement on an annual review process on administrative practices (i.e. individual rulings) simultaneously with the annual standstill and rollback notifications);
- agreed guidance on the transparency of procedures for providing advance certainty and the publication of individual rulings suitable for horizontal application; and
- agreed guidance on the exchange of information when granting a *cross-border ruling* .

It seems that the Code Group has found it increasingly difficult to achieve tangible results in this area. With respect to the review process on advance tax rulings, the Report does not provide any details on whether the recently initiated review process has led to any satisfactory results. I would like to recall that even though all Member States were called upon to notify potential harmful advance tax rulings, the December 2011 Report showed that none of the Member States had made any such notification. It was therefore suggested to carry out an external study, which could be used as a starting point for further discussion (EU Code Group Report of 27 May 2011, doc. 10867/11 FISC 75, para. 26), Finally, with respect to the spontaneous exchange of information on *cross border rulings* , the Report notes that the Commission is still working on a 'Model Instruction'. No further details have been made public.

See further on this issue my comments on the December 2011 Code Group Report in *H&I* 2012/2.1 and on the June 2012 Code Group Report in *H&I* 2012/8.3 .

Dialogue with Third Countries: the Commission is Still Trying to Convince Switzerland to Apply the Code

Another on-going element of the Code Group's work regards the dialogue between the EU and third countries (particularly Switzerland and Liechtenstein) on the application of the principles and the criteria of the Code. The present Report particularly describes the current status of the on-going negotiations with Switzerland regarding certain cantonal tax regimes:

‘(…) Some progress has been made on reaching a common understanding in relation to some Swiss regimes. However, the Group considers it important that all its concerns are taken into account.’
The Code Group has threatened Switzerland (for the third time), in guarded terms, that it will retaliate if the *dialogue* fails to produce satisfactory results by the end of the first half of 2013:

‘(…) The Group expects to see further concrete progress by the end of the Irish Presidency and calls on the Commission to report at every Code of Conduct meeting until then, bearing in mind that the Group still retains the possibility to follow alternative approaches including unilateral assessment of the regimes.’
For more detailed comments on this issue see my comments on the December 2011 Code Group Report in *H&I* 2012/2.1 and on the June 2012 Code Group Report in *H&I* 2012/8.3 .