

Distr.: General
12 October 2009

Original: English

**Committee of Experts on International Cooperation
in Tax Matters**

Fifth Session

Geneva, 19-23 October 2009

Item 6 (f) of the provisional agenda

**The Proposed UN Code of Conduct on Cooperation in
Combating International Tax Evasion and Avoidance**

**Note by the Secretariat: Proposed Code of Conduct on
Cooperation in Combating International Tax Evasion.***

Summary

The present note has been prepared by the secretariat in consultation with the Coordinator of the subcommittee on Exchange of Information, in response to the recommendations made by the Committee of Experts on International Cooperation in Tax Matters at its third and fourth sessions in support of developing a Code of Conduct on Cooperation in Combating International Tax Evasion, and following further discussions within the subcommittee. The note annexes a Coordinator's draft for a possible Code of Conduct for discussion at this year's Annual Session. The draft was well supported within the subcommittee, but this note also acknowledges some contrary views expressed in that subcommittee.

*This note should not be taken as necessarily representing the views of the United Nations or its Secretariat.

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I. Introduction

1. At the Third Annual Session of the Committee of Experts on International Cooperation in Tax Matters in 2007, it was agreed to develop a Code of Conduct on cooperation in combating international tax evasion.
2. The objective of the Code of Conduct would be that Member States of the United Nations would adopt a political commitment to fight international tax evasion. The term “tax evasion” could be understood as a wide concept, comprehensive of tax evasion, tax avoidance and tax abusive practices (aggressive tax planning), but not including normal tax planning. It might be understood by “aggressive tax planning” tax planning that goes beyond the policy intent of the law and involves purposeful and deliberate approaches to avoid any type of tax.
3. As a political commitment, it would not affect the respective spheres of competence of Member States of the United Nations and their freedom to design their own tax systems, but the goal would be that, in doing so, they would abide by internationally accepted standards established in this Code of Conduct.
4. The background to this work has been an increasing recognition of the costs of international tax evasion and avoidance to all countries, but perhaps especially developing and emerging countries, as globalization has extended to all parts of the world. The tools of tax evasion, abusive tax avoidance and capital flight that have accompanied globalization are undermining the ability of developing and emerging countries to mobilize domestic resources for development and to create the “enabling domestic environment” called for in the Monterrey Consensus.
5. This work recognises, as does work in other fora, that the time has come for countries to act collectively to fight back against these abusive practices. The Committee of Experts, at its 2007 third session, expressed its willingness to play a major role in implementing the Monterrey Consensus by developing a practical and realistic Code of Conduct that would bring moral pressure to bear on Governments not to facilitate international tax evasion and aggressive tax avoidance.
6. At the Fourth Annual Session in 2008 there was a consensus in favour of the concept of such a Code of Conduct, although it was recognized that the suggestions presented to the Committee constituted an early draft and that further work should continue on the Code. Some of the points raised on the draft were:¹
 - (a) In the “goals” section of the draft Code, the suggestion that there should be publicly available data on all taxable entities would excessively burden many developing countries: the need to minimize the burdens cast on developing countries agreeing to the Code was noted;

¹ Report of the Fourth Annual Session, E/2008/45, E/C.18/2008/6, paragraph 57 ff.

(b) In the same section of the draft Code, there was no reason for confining the operation of paragraph (e) to new “ring-fencing” measures only, otherwise it would advantage countries having such measures already in place;

(c) It was important that the Code should not create a climate unfavourable to legitimate business transactions and that this should be borne in mind when redrafting it. In that context, there was a discussion about the extent of the Code’s coverage. While the general view was that it should not address only criminal matters (tax evasion), the manner in which it dealt with tax avoidance and the like would have to be evaluated on a case-by-case basis, bearing in mind the different ways in which such terminology might be used internationally. There was some discussion also of whether the title should refer only to tax evasion or to tax avoidance as well.

7. As noted in the Report of the Fourth Annual Session (at para. 59): “It was agreed that the subcommittee should continue its work on the Code, drawing on the discussions and the submissions that had been invited, which would include submissions on the title, structure, goals, objectives and commitments outlined in the document.”

8. The document at Annex 1 was presented by the Coordinator of the subcommittee on Exchange of Information as an attempt to address issues raised in a way reflecting the balances of interests that must be present if such a Code is to be widely accepted and relevant. It represents a Coordinator’s draft only, as it was not possible to reach a consensus on a text within the subcommittee, for reasons noted below at Part III of the paper. Annex 2 to this note is a draft for comparison of the document which the Committee agreed could be released as a “technical working document – draft for discussion” at the Doha Follow-up Conference on Financing for Development at the end of 2008, as the latest draft that has received general Committee consideration..

II. Coordinator’s Discussion Draft

9. In previous meetings of the Committee, the question on the development of a Code of Conduct related to tax cooperation to address tax evasion has been widely supported. The differences relate in particular, the scope of the Code, and such differences have existed in the subcommittee, making it impossible to achieve a consensus document. The annexed document is therefore a Coordinator’s text reflecting what appears to be a preponderant, though not consensus, view among those expressed by subcommittee members.

10. It seems quite important to recall that such a Code will not be the only such document, as other international organisations (EU, OECD, FATF, IMF, IASB) have already adopted similar tools. In this context, the UN Code should add value to an important evolving process of cooperation to reduce the costs of tax evasion to development, particularly in view of the global scope of the Committee, and generally speaking of UN bodies and institutions.

11. The UN Committee of Experts on International Cooperation in Tax Matters had a mandate which has been broadened to include not only the tax treaties between developed and developing countries but also international cooperation in tax matters. The importance of the UN has been explicitly recognized, for instance, in the last G-20 summit, in which the need to adopt international standards for information exchange the same as the one reflected in the UN

Model Tax Convention was noted. The Committee should aim to encourage as many countries as possible to use current standards, where those standards are appropriate, especially in taking into account developing country priorities and concerns.

12. To this end, we all must be aware that the Code will be voluntary. For that reason, I understand that the tougher the Code might be, the less likely it is that countries will be willing to adopt it. Moreover, the goal of encouraging countries to eliminate ring fenced regimes or regimes that provide advantages to activities that lack substance is one that is likely to be problematic. In particular it might affect the design of a country's tax system which is a much more controversial topic and one on which it is difficult to reach consensus. It could take a lot of time, diverting attention from more important and more achievable goals. The last Annual Session showed that some experts raised this view.

13. To conclude, it might be worthwhile for the Committee and subcommittee to focus on what it can achieve in the short to medium term. As for the procedural aspects, the options for adoption of the Code will need further consideration, in the light of UN modalities. A secretariat or consultant's paper on that could be requested for consideration by the Committee.

III. A Differing View within the Subcommittee

14. The approach taken by the Coordinator in this note is not fully supported by all members of the subcommittee. One of them considers the Coordinator's draft a major step backwards as being limited to constituting a mere affirmation of the new Article 26 of the Model, which, in his opinion, is not very effective in combating international tax evasion or avoidance. That member believes that the Code should move beyond this Article 26 and be more ambitious. In particular, he considers that the proposed Code shows excessive dependency on the OECD's body of work.

15. These are issues that will need to be discussed at Committee level, to determine what approach should be followed in taking this work forward.

Annex 1:

Exchange of Information Subcommittee Coordinator's Discussion Draft

U.N. CODE OF CONDUCT ON COOPERATION IN COMBATING INTERNATIONAL TAX EVASION

Preface

ACKNOWLEDGING tax systems are a key issue to enhancing macroeconomic policies and mobilizing domestic public resources, and the need to step up efforts to enhance tax revenues through modernized tax systems, more efficient tax collection, broadening the tax base and effectively combating tax evasion,

ACKNOWLEDGING to the importance of supporting national efforts in these areas by strengthening technical assistance and enhancing international cooperation

ACKNOWLEDGING the positive effects of fair competition and the need to consolidate competitiveness at international level, whilst noting that tax competition may also lead to tax measures with harmful effects,

ACKNOWLEDGING that international tax evasion has become increasingly costly to developing countries as globalization has extended to all parts of the world,

ACKNOWLEDGING that the tools of tax evasion have accompanied globalization and they are undermining the ability of developing countries to mobilize domestic resources for development

ACKNOWLEDGING, therefore, the need for a Code of Conduct in combating international tax evasion,

EMPHASIZING that the Code of Conduct is a political commitment and does not affect the States' rights and obligations or the respective spheres of competence,

WE HEREBY ADOPT THE FOLLOWING CODE OF CONDUCT:

I. Scope

The Code of Conduct would apply to Governments and their agencies, and therefore would extend to the tax measures covered by their laws, regulations and administrative practices.

II. Goals

The Code of Conduct has the following goals:

- A. All countries, in an effort to combat international tax evasion, shall ensure that high standards of transparency and exchange of information in tax matters are adhered to by endorsing and undertaking to implement the principles and standards included in article 26 and the accompanying Commentary of the United Nations Model Tax Convention.
- B. To assist in the development of international norms and practical steps that Governments should follow to prevent, and cooperate to fight and avoid, facilitating international tax evasion.
- C. To encourage Governments to approve norms on transparency and effective exchange of information, in particular norms that allow them to supply bank information and information about the beneficial owner.

III. Content

The Code of Conduct sets minimum standards that countries should meet with respect to cooperation on measures to combat international tax evasion.

The content of the Code of Conduct includes the following commitments:

1. Endorsing the following principles of transparency and effective exchange of information:
 - the existence of mechanisms for exchange of information upon request;
 - the ability to exchange of information for purposes of domestic tax law in both criminal and civil matters;
 - no restrictions on information exchange caused by application of the dual criminality principle or a domestic tax interest requirement;
 - the existence of strict confidentiality rules for information exchanged and respect for safeguards and limitations that apply to taxpayer information;
 - the availability of reliable information, in particular bank account, ownership, identity and accounting information, and powers to obtain and provide such information in response to a specific request.

2. These commitments would be implemented by the following actions:
- (a) Unilateral actions: the implementation of these standards may require that countries amend their domestic legislation and practices;
 - (b) Bilateral actions: the principles of transparency and effective exchange of information will generally be implemented through bilateral agreements relating to tax matters; in this field the principles of transparency and exchange of information will be included in international agreements relating to tax matters by insisting on the Article 26 of the UN Model Convention or any equivalent provision;
 - (c) Multilateral actions: the standards and other kinds of administrative cooperation can be implemented through multilateral conventions. Additionally, whereas possible, countries are invited to participate actively in relevant international organizations, defending and supporting these standards and principles of transparency and effective exchange of information.

Annex 2:

Version of the Code of Conduct released for Doha Conference as a Technical Working Document

PROPOSED U.N. CODE OF CONDUCT ON COOPERATION IN COMBATING INTERNATIONAL TAX EVASION

1. At the third session of the Committee of Experts on International Cooperation in Tax Matters (29 October-2 November 2007), it was agreed to develop a Code of Conduct on Cooperation in Combating International Tax Evasion.
2. The objective of the Code of Conduct would be that Member States of the United Nations would adopt a political commitment to fight international tax evasion. The term “tax evasion” could be understood as a wide concept, comprehensive of tax evasion, tax avoidance and abusive practices (aggressive tax planning), but not including normal tax planning². It might be understood by “aggressive tax planning” tax planning that goes beyond the policy intent of the law and involves purposeful and deliberate approaches to avoid any type of tax.
3. As a political commitment, it would not affect the respective spheres of competence of Member States of the United Nations and their freedom to design their own tax systems, but the goal would be that, in doing so, they would abide by internationally accepted standards established in this Code of Conduct.
4. International tax evasion and avoidance have become increasingly important to developing and emerging countries, as globalization has extended to all parts of the world. The tools of tax evasion (as broadly understood) that have accompanied globalization are undermining the ability of developing and emerging countries to mobilize domestic resources for development and to create the “enabling domestic environment” called for in the Monterrey Consensus. The time has come for countries to act collectively to fight back against these abusive practices. The Committee of Experts, at its 2007 (third) and 2008 (fourth) sessions, expressed its willingness to play a major role in

² [Original] Coordinator’s note: Here and in other parts of this text, perhaps including the title of the document, there is a need for further consideration of how to deal with matters that do not constitute “tax evasion” as commonly understood, but are classed as “tax avoidance” or are referred to in some similar fashion, such as the term “aggressive tax planning” used here. The application of the draft code in such instances will have to be evaluated on a case by case basis, bearing in mind the different ways in which such terminology may be used internationally, and yet seeking consistency of approach within the draft code itself. This discussion may also impact on whether the title should refer only to tax evasion or to tax avoidance as well, for example.

implementing the Monterrey Consensus by developing a sensible code of conduct that would bring moral pressure to bear on Governments not to facilitate international tax evasion and aggressive tax avoidance.

A. Scope

5. The Code of Conduct would apply to Governments and their agencies, being the tax measures covered by their laws, regulations and administrative practices.

B. Goals

6. The code of conduct might have the following goals:

(a) To assist in the development of international norms and practical steps that Governments should follow to prevent, and cooperate to fight and avoid, facilitating international tax evasion;

(b) To encourage Governments to approve norms on transparency and effective exchange of information, in particular norms that allow them to supply bank information and information about the beneficial owner;

(c) To encourage Governments to approve accounting norms regarding transparency and public availability, in particular the obligation of recording publicly the structure and the accounts of taxable entities, while recognising the practical constraints upon many developing countries in this area;

(d) To encourage Governments to avoid the establishment or continuance of legal instruments that are intended to confound tax enforcement, such as trusts with undisclosed terms;

(e) To encourage Governments to avoid the establishment or continuance of tax measures that accord advantages without any real and substantial economic activity;

(f) To give guidance to members of the private sector, such as banks and accounting firms, that wish to conform to an emerging international standard of conduct;

(g) To give moral support to civil society organizations seeking to prevent international tax avoidance and evasion.

C. Content

7. The Code of Conduct would set minimum standards that countries should meet with respect to cooperation on measures to combat capital flight and international tax evasion and avoidance.

8. The content of the Code of Conduct would include the following commitments:

(a) Endorsing the following principles of transparency and effective exchange of information:

(i) the availability of reliable information, in particular bank, ownership, identity and accounting information, and powers to obtain and provide such information in response to a specific request;

(ii) no restrictions on information exchange caused by application of the dual criminality principle, domestic tax interest requirements or bank secrecy;

(iii) the existence of mechanisms for exchange of information upon request;

(iv) the existence of confidentiality rules for information exchanged and respect for safeguards and limitations that apply to taxpayer information;

(b) Avoiding the establishment or continuance of legal instruments that are intended to confound tax enforcement or tax measures that imply advantages without any real and substantial economic activity;

(c) Adopting and enforcing reporting rules, such as rules on large cash transfers.

9. These commitments would be implemented by the following actions:

(a) Unilateral (purely domestic) actions: the implementation of these standards may require that countries amend their domestic legislation and practices;

(b) Bilateral actions: the principles of transparency and effective exchange of information will generally be implemented through bilateral agreements relating to tax matters;

(c) Multilateral actions: the standards and other kinds of administrative cooperation can be implemented through multilateral conventions. Additionally, whereas possible, countries are invited to participate actively in relevant international organizations, defending and supporting these standards and principles of transparency and effective exchange of information.

D. Approval

10. It is understood that this Code of Conduct will be approved by a procedure followed in the case of other kinds of codes of

conduct within the United Nations and other international organizations.

E. Monitoring and reviewing

11. The possibility of a monitoring and review process regarding the implementation of the code could be considered. In that regard, States willing to comply with the code could voluntarily submit themselves to annual appraisal of their conduct and in turn be reviewed by the Committee of Experts on International Cooperation in Tax Matters.