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OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Code of Conduct Group (Business Taxation)
Subject:	Tunisia's Offshore Financial Services regime (TN002) – Final description and assessment

ROLLBACK REVIEW PROCESS (JANUARY 2019)

The regime has been abolished through the Finance Law 2019 (Article 39). The regime will be closed to new entrants as of 1 January 2019. Grandfathering will be available for existing beneficiaries until 31 December 2021.

Unofficial French version of the final legislation: see Annex 2.

Official (Arabic) version of the Finance Law 2019:

http://www.finances.gov.tn/index.php?option=com_jdownloads&Itemid=721&view=finish&cid=1523&catid=9&lang=fr

The Code of Conduct Group meeting of 30 January 2019 approved the rollback of the regime. This conclusion was endorsed by the ECOFIN Council on 12 March 2019.

Annex 1: Assessment of the old TN002 regime in 2017 (standstill review)

Annex 2: Unofficial French version of the final legislation.

ANNEX 1

Assessment of the old TN002 regime in 2017 (standstill)

a. Description

The offshore financial services code (Law 2009-64 of 12 August 2009) allowed the creation of offshore collective investment vehicles, which are subject to simplified investment rules. The Law also provided for the creation of offshore banks, offshore financial institutions and offshore portfolio management companies. All these entities are exclusively dedicated to non-resident investors and they get several tax incentives. Accordingly, offshore banks, offshore financial institutions and offshore portfolio management companies are entitled, inter alia, to the following:

- a 10% corporate tax rate as of 1 January 2014 for profits derived from offshore transactions;
- tax exemption for interest received on deposits made in hard currency; and
- exemption from the obligation to withhold tax on interest payments on certain loans to non-residents lenders.

c. Possible concerns

The entities eligible for this preferential treatment are dedicated to non-resident investors. A regime limited to foreign taxpayers and/or to operations outside the territory of the jurisdiction does not meet criteria 1 and 2 of the Code of Conduct which forbids this type of ring fencing.

Sources of information

IBFD, http://www.uscib.org/docs/Tunisia_Tax_Incentives_Analysis.pdf

d. Assessment :

	1a	1b	2a	2b	3	4	5
Tunisia – Offshore financial services (TN002)	V	?	V	?	V	V	?

V = harmful

X = not harmful

Explanation

Significantly lower level of taxation:

The general corporate tax rate in Tunisia is 25%. The regime provides for a 10% corporate tax for profits derived from offshore transactions by offshore banks, offshore financial institutions and offshore portfolio management companies. Moreover, under the regime, companies are entitled to a tax exemption for interest received on deposits made in hard currency, as well as an exemption from the obligation to withhold tax on interest payments on certain loans to non -resident lenders. The measure provides for a significantly lower level of taxation. It is therefore potentially harmful within the meaning of paragraph A of the Code.

Criterion 1:

Criterion 1 contains two elements. The first element is whether the measure is exclusively available to non-residents or transactions with non-residents (criterion 1a). The second element is whether it is only or mainly used by non-residents or for transactions with non-residents (criterion 1b).

1a) Criterion 1a concerns the de jure application of the measure.

According to the Financial Service Code (Law number 64, 12 August 2009), Tunisia promotes the creation of offshore banks, offshore financial institutions and offshore portfolio management companies exclusively dedicated to non-resident investors. Therefore, the provision restricts the benefits to investments limited to foreign taxpayers.

1b) Criterion 1b is used to complement the assessment under criterion 1a which only looks at the literal interpretation of the measure. It takes account of the de facto effect of the measure. Where the majority of taxpayers (or counterparties to transactions) benefitting from the measure are in fact non-residents the measure will fall foul of criterion 1b.

Tunisia has not yet replied and the relevant data and information lack.

Criterion 2

As regards criterion 2 the division between criteria 2a and 2b is done in the same way as in the case of criterion 1 (i.e. de jure interpretation and de facto analysis). In general, a measure is caught by criterion 2 if the advantages are ring-fenced from the domestic market so that they do not affect the national tax base. In most cases, the evaluation against criterion 2 follows closely that of criterion 1.

2a) What has been written under criterion 1a often applies analogously to criterion 2a.

According to the Tunisian provisions, the entities eligible for this preferential regime are dedicated to non-resident investors. The provision excludes both domestic transactions and investments from the benefit.

2b) On the basis of the explanations provided above and the marking under criterion 1b, the evaluation of criterion 2b often follows the same reasoning.

Tunisia has not yet replied and the relevant data and information lack.

Criterion 3

According to the standard practice for the evaluation of a measure against criterion 3, a measure is found harmful under this criterion if there are no specific requirements with regard to real economic activities and notably any requirement with respect to employment obligations. There is no express requirement of employment in the Tunisian provisions. Furthermore, it is a condition for the flat tax rate that the business is carried on outside Tunisia, which indicates lack of real economic activities and employment therein. Furthermore, the other two incentives are granted only for mobile income (i.e. interest income) and the qualifying activities include 'highly mobile' activities, such as financial services activities, which do not require, due to their nature, a substantial economic presence in Tunisia.

Criterion 4

In 2010 Tunisia introduced a general transfer pricing rule for commercial and financial transactions between related parties. The rule provides for the use of uncontrolled price method. When applying this method, either internal or external comparables could be used.

On the basis of past practice of the Code Group a positive evaluation should be given to asymmetrical measures where gains are tax exempt but losses are tax deductible unless they are combined with appropriate anti-abuse provisions. The regime does not appear to include an anti-abuse provision as required under the Code (Paragraph L).

Criterion 5

All preconditions necessary for the granting of a tax benefit should be clearly laid down in publicly available laws, decrees, regulations etc. before a measure can be considered transparent.

It is unclear whether the measure is fully set out and published in the relevant legislation and the practice should not involve any administrative discretion.

Overall assessment

In light of the assessment made under all Code criteria, the regime is considered as overall harmful from a Code of Conduct point of view.

ANNEX 2

Unofficial French version of the final legislation

Loi n°2018-56 du 27 décembre 2018 portant loi de finances pour l'année 2019

Révision du régime fiscal de l'export et

des prestataires des services financiers aux non-résidents

Article 39 :

1) Est abrogé le premier paragraphe de l'article 143 du code de prestation des services financiers aux non résidents promulgué par la loi n°2009-64 du 12 août 2009.

2) Le début du deuxième paragraphe de l'article 143 du code de prestation des services financiers aux non-résidents promulgué par la loi n°2009-64 du 12 août 2009 est modifié comme suit :

Les prestataires des services financiers non-résidents bénéficient au titre de leurs opérations réalisées avec les non-résidents :

3) Sont abrogées les dispositions de l'article 142 du code de prestation des services financiers aux non-résidents promulgué par la loi n°2009-64 du 12 août 2009.