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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.



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FISC 73

NOTE

From: Commission Services

To: Code of Conduct Group (Business Taxation)

Subject: The EU list of non-cooperative jurisdictions for tax purposes
– Progress Report - Anguilla

Delegations will find attached a document by the Commission services.

DECLASSIFIED

PROGRESS REPORT - ANGUILLA**Code of conduct subgroup – 25 January 2019****Background**

The Code of Conduct Group (the COCG) found that Anguilla's legal system failed to meet listing criterion 1.2 and 2.2.

On 1.2, although it was compliant with 2 out of 3 transparency standards (1.1 and 1.3), Anguilla received a "Partially Compliant" rating by the Global Forum and therefore could not benefit from the 2 out of 3 rule. In a letter dated 20 February 2018, Anguilla was asked to commit to take all necessary action with the aim of securing a rating of at least "Largely compliant" by the end of 2018.

For criterion 2.2, Member States had concerns regarding both the ring-fencing element of the main companies incorporated in the jurisdiction (International Business Companies – IBC) and the lack of substance requirements.

Following a commitment from Anguilla to remedy the deficiencies identified, it was put on Annex II in March 2018¹. This report assesses the overall implementation of the commitments undertaken by Anguilla.

Recent developments**Assessment of criterion 1.2**

According to available information, Anguilla was scheduled to be reviewed by the Global Forum in 2017 but was granted a 6-month deferral due to the consequences of the hurricane season. The new review was foreseen for the 2nd quarter of 2018. However, the peer review process lasts between 9 and 12 months from the launch of the review to the adoption by the Global Forum. Therefore, a rating will be only available mid-2019.

¹ The process was put on hold until February 2018 for jurisdictions that were affected by the hurricanes in 2017.

Suggested way forward

We suggest to keep Anguilla on Annex II pending the result of the new rating by the Global Forum.

Assessment of Anguilla implementation of its commitment under criterion 2.2

I – On ring fencing

The IBC (Amendment) Act, 2018 as gazetted on 20 September 2018 removes (Clause 4 – Amendment to Section 3) unequivocally the references to the restrictions for these companies "to carry on business with persons resident in Anguilla" and "to own or hold an interest, whether legal or beneficial, in real property situated in Anguilla [...]"(Section 3 (1)(a) and (e)).

Suggested way forward

We propose to consider that Anguilla has eliminated the ring-fencing elements of its legislation.

II - On the introduction of substance requirements

This assessment is based on the Terms of Reference (the "TOR") agreed by the Code of Conduct Group in July 2017 which is the basis for the decision taken by Member States on the compliance of jurisdictions under criterion 2.2, as further clarified in the Scoping Paper (the "2.2 SP") agreed in June 2018.

The Companies (Amendment) Act 2019, the International Business Companies (Amendment) Act 2019, the Limited Partnership (Amendment) Act 2019 and the Limited Liability Company (Amendment) Act 2019 were approved by the Governor on 11 January 2019 and published in the Gazette on 15 January 2019.

The Companies (Economic Substance) Regulations 2019, the International Business Companies (Economic Substance) Regulations 2019, the Limited Partnership (Economic Substance) Regulation 2019 and the Limited Liability Company (Economic Substance) Regulation 2019 were gazetted on 19 January 2019.

In its letter to the Chair of the Code of Conduct Group on 15 January 2019, Anguilla explained that the delay in passing this legislation was due to rules of procedure of the House of Assembly.

In any case, the Acts and Regulations are deemed to have come into force on 1 January 2019.

Suggested way forward

Considering the retroactive application of the Acts introducing substance requirements from 1 January 2019, we suggest to conclude that the legislation was applicable by the agreed deadline.

The following assessment only highlights the remaining issues identified and still pending following the last progress reports presented to the COCG (reference is made to the companies Act and Regulation with the understanding that the other Acts and Regulations implement the same obligations for other types of entities).

1 – Identification of the relevant activities and included entities

1.1 – On relevant activities

Following the December meeting, it was reported to Anguilla that pure equity holdings should respect all law filing requirements and have the people and premises for holding and managing equity participations. It was also reported that holding companies with a variety of assets and income should have the CIGAs associated with the income earned.

In the final Regulations, Section 6 distinguishes between pure equity holding companies have to comply with all applicable statutory filing requirements and should have the people and premises in Anguilla for holding and managing equity participations.

Regarding other holdings, it is mentioned that where the company holds a variety of assets and earns different types of income, the CIGAs of the company are those activities associated with the income that holding company earns.

Suggested way forward

We suggest concluding that this issue is settled.

1.2 – On included entities

After discussions, Anguilla decided to include, in the scope of substance requirements companies², international business companies, limited liability companies as well as limited partnerships.

From the Partnership Act provided by Anguilla, it appears that Anguilla only have general partnerships and limited partnerships. These will be covered by the substance requirements.

Suggested way forward

We suggest concluding that this issue is clarified and that the risk of BEPS should be limited. It however needs to be monitored whether, in the coming month, it is considered necessary to include all types of partnerships in the scope of substance requirements.

2 - Imposition of substance requirements

2.1 – Tax residence

The substance legislation of Anguilla excludes “exempt” entities. Exempt entities are defined in Regulation Section 3 as covering entities if:

- The entity is centrally managed and controlled or carries on the relevant activity in a jurisdiction where the rate at which the company may be charged tax is 10% or higher;
- The entity is resident for tax purposes in the jurisdiction; and
- The entity files with the Registrar evidence of its tax residence in that jurisdiction and an appropriate tax return has been submitted to the relevant tax authority of that jurisdiction in relation to the relevant activity.

On the other hand, Anguilla did not include an additional nexus based on management and control for the application of substance requirements.

Following the December meeting, Anguilla amended its Companies Act, Section 190 to provide that unless it is registered, a foreign company must not carry on business in Anguilla and must not be centrally managed and controlled in Anguilla. In such case, they will be caught in the scope of substance requirements.

² incorporated in Anguilla as well as foreign companies registered in Anguilla

In our view, this provision allows all foreign companies centrally managed and controlled or that carry on business in Anguilla to be caught by the substance requirements.

Claiming of tax residence in another jurisdiction will trigger the application of mandatory spontaneous exchange of information with the Member State in which a holding body of the company, an ultimate holding body of the company or a beneficial owner of the company is tax resident.

Suggested way forward

We suggest concluding that this issue is settled.

2.2 – Appropriate CIGAs to be performed

Following the December meeting, the Commission services reported concerns to Anguilla that its draft regulation provided for the obligation to carry on “one or more” CIGAs, which could mean that there is no need to carry on all the appropriate CIGAs in relation to the particular relevant activity carried out by the entity.

The new Section 4(3) of the Regulations provides that one of the conditions for the substance test is that the entity “*carries on the appropriate core-income generating activities in Anguilla for the relevant activity*”.

This wording clarifies the issue.

Suggested way forward

We suggest concluding that this issue is settled.

2.3 – Outsourcing safeguards

Following the December meeting, the Commission services informed Anguilla that its provision on outsourcing was lacking appropriate safeguards against the risk of double counting by the resources of a services provider.

The new Section 4(5) of the Regulations provides that outsourcing is allowed if:

- The service provider has adequate employees, expenditure and assets in Anguilla;
- The service provider carries on the appropriate CIGAs in Anguilla; and
- The company can demonstrate that it adequately supervises that relevant activity.

The Regulation further specifies that the economic substance of third party providers shall not be counted multiple times by multiple companies when evidencing their own economic substance in Anguilla.

Suggested way forward

We suggest concluding that this issue is settled.

2.4 – Cumulative substance test

In previous draft, Anguilla proposed an alternative substance test in which an entity was considered compliant either:

- a) When having regard to the level of relevant activity carried on by the entity in Anguilla, it has an adequate number of qualified employees engaged in the relevant activity who are physically present in Anguilla, incurs in Anguilla an adequate level of expenditure in relation to the activity and has physical assets in Anguilla. And the entity carries on one or more CIGAs in Anguilla for the relevant activity;

OR

- b) When the mind and management for the relevant activity is in Anguilla (meaning board of directors as detailed in Section 7 of the regulation).

The final Regulations, Section 4, provide for a cumulative substance test in line with the Scoping paper.

Suggested way forward

We suggest concluding that this issue is settled.

2.5 – IP low-risk and high-risk scenarios

Anguilla added to the definition of high-risk scenario the condition that (i) the entity holds the IP asset for the purpose of an IP business defined as earning income from IP assets, including royalties and income from the sale of an IP asset and (ii) the entity did not create the IP asset.

Following the December meeting, the Commission services reported to Anguilla that those elements should not be considered to determine whether an entity is in a high-risk situation.

The new Section 205F(5) defines high-risk IP scenarios in line with the scoping paper.

Concerning low-risk scenarios, the Schedule to the Regulation created confusion between the main CIGAs (R&D for patents and marketing, branding and distribution for non-trade IP assets) and the other CIGAs that may, by exception, be taken into account when the main CIGAs are absent, as those are considered as examples within the marketing, branding and distribution CIGAs.

The new Schedule to the Regulation provides that only in exceptional cases when the main CIGAs are absent, can the other CIGAs be taken into account (except in high-risk IP scenarios).

Suggested way forward

We suggest concluding that this issue is settled.

3 – Enforcement and sanction mechanism

3.1 – Filing obligations

Following the December meeting, the Commission services reported that the information to be filed was incomplete.

The new Section 2 provides for the appropriate filing of information by relevant entities.

Suggested way forward

We suggest concluding that this issue is settled.

3.2 – Exchange of information

Following the December meeting, it was reported to Anguilla that its rules on spontaneous exchange of information lacked reference to high-risk IP scenarios.

Section 205F of the Act provides for spontaneous exchange of information in case of non-compliance, high-risk IP scenarios and when an entity claims to be exempt because tax resident in another jurisdiction.

Suggested way forward

We suggest concluding that this issue is settled.

3.2 – Sanction framework

Following the December meeting, it was reported to Anguilla that its sanction framework was not dissuasive enough and that there was no direct reference to the possibility to strike-off an entity. Therefore, nothing would prevent an IBC without substance to continue to carry on business in Anguilla indefinitely.

Section 205E(8) of the Act clarifies that nothing in the sanctions section limits or restricts the power of the Registrar to strike-off a relevant company under section 243. In this respect, Section 243 was also amended so as to allow for strike-off in case of non-compliance with the substance requirements.

Suggested way forward

We suggest concluding that this issue is settled. The efficient enforcement of the substance legislation should be subject to monitoring over the coming years.

Conclusion

Anguilla's review by the Global Forum is due mid-2019. Therefore, for criterion 1.2, we propose to maintain Anguilla in Annex II, pending the outcome of this review.

Anguilla has removed the ring-fencing elements in its legislation on IBCs.

Anguilla has settled all pending remaining issues on substance requirements:

- Requirements for pure equity holdings and other types of holdings;
- Included entities (with monitoring);
- Tax Residence;
- Appropriate core-income generating activities to be performed;
- Outsourcing safeguards;
- The cumulative substance test;
- IP specific scenarios;
- Filing obligations;
- Spontaneous exchange of information; and
- Sanctions framework (with monitoring).

Therefore, we propose to conclude that Anguilla has implemented its commitment to introduce substance requirements and Anguilla should be removed from Annex II on criterion 2.2.