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OUTCOME OF PROCEEDINGS

From: General Secretariat of the Council
To: Code of Conduct Group
Subject: Aruba's Transparency regime (AW013)
– Final description and assessment

ROLLBACK REVIEW PROCESS (MAY 2019)

The transparency regime (AW013) was assessed in 2017 as in breach of two criteria, *Substance* (criterion 3) and *Internationally accepted principles* (criterion 4).

Concerning the use of the regime, Aruba communicated the following data to the COCG in 2018: there are currently 845 transparent companies registered with the tax department of which

- 23% have a local shareholder,
- 77% have no local shareholder,
- 23% are performing local activities,
- 60% do not perform local activities and
- 17% Aruba can currently not determine whether they perform activities or where they perform the activities.

Concerning the *Internationally accepted principles* the questions were related to the existing rules on permanent establishment (PE) in Aruba; the Code experts were of the opinion that the Aruban rules for determination of PE seemed to depart from Article 5 of OECD Model Tax Treaty and its Commentary. After a number of exchanges with Aruba (see related information provided by Aruba), it appears that the Aruban legislation refers to the definition of a PE under the OECD Model Convention and its commentary for guidance on the requirements of a PE.

On *Substance requirements*, Aruba adopted on 4 April 2019 a National Ordinance, whilst the respective National Decree containing the detailed substance requirements was officially published on 10 April 2019 and came into force the day following its publication, according to art. 6 para. 1 thereof. Grandfathering was furthermore introduced until the end of 2021.

National Ordinance:

<https://www.overheid.aw/document.php?m=5&fileid=54586&f=7caa4cda65705df01358e75a755f1fcc&attachment=0&c=42013>

National Decree:

<https://www.overheid.aw/document.php?m=5&fileid=54076&f=3e1bc95e363aa6f1aa8f61c38d0b51fc&attachment=0&c=41617>

The COCG subgroup on third countries examined the above legislative amendments at its meeting of 6 May 2019 and the Code of Conduct Group subsequently approved the rollback of the regime by silence procedure on 7 May 2019. This conclusion was endorsed by the ECOFIN Council on 17 May 2019.

Annex 1: Assessment of the old AW013 regime in 2017 (standstill review)

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a. Description

As from January 1, 2006, taxable corporations in Aruba, including A.V.V.'s, may opt for treatment as a transparent entity for Aruban tax purposes by filing a request to that effect with the Aruba Tax Authorities. This option is available for all newly incorporated companies in Aruba.

If an entity has opted for transparency, it is not possible to undo this decision at a later stage without the severe penalty of being subject to an effective profit tax rate 52.5% in Aruba.

The treatment as a transparent entity for Aruban tax purposes implies that the company will be exempt from Aruba profit tax, dividend withholding tax and income tax and is in fact treated as a transparent partnership. In case the AVV, NV, and VBA has foreign shareholders, the shareholders will only be subject to Aruba taxes if the shareholders have a taxable presence in Aruba via either a permanent establishment or a permanent representative.

Source: [Guide Business Aruba, Tax and Legal Services Website](#)

b. Preferential:

Yes, exempt from profit tax.

c. Possible concern:

The regime may involve a risk of ring-fencing as foreign-owned companies may benefit from a lower level of taxation.

d. Assessment

	1a	1b	2a	2b	3	4	5
Aruba – Fiscal transparent company/ Transparency regime (AW013)	X	see 1a	X	see 2a	V	V	X

V = harmful

X = not harmful

Explanation:

Gateway criterion - Significantly lower level of taxation:

“Within the scope specified in paragraph A, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code”

The general CIT rate in Aruba is 25%. If shareholder of a company that opted for fiscal transparency resides outside the Aruba and this shareholder does not perform business through a permanent establishment in Aruba or does not derive income from immovable property situated in Aruba, profits derived by that company are completely tax exempted in Aruba. The measure therefore provides for a significantly lower level of taxation and is potentially harmful under the Code of Conduct.

Criterion 1 – Targeting non-residents:

“whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents”

The regime is available for both resident and non-resident companies and does not require beneficiaries to carry out transactions only with non-residents. Given tax benefit is same for both non-resident and resident companies.

Criterion 2 – Ring-fencing:

“whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base”

This regime is not reserved exclusively to non-residents and therefore it is not completely isolated from the Aruban market so that it would not have any impact on the national tax base.

Criterion 3 - Substance:

“whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages”

The regime does not include any clear requirements for real economic activity or substantial economic presence. It seems that this regime is of an administrative nature, but in combination with general characteristic of Aruban tax system it provides strong tax incentive by exempting income of certain non-resident shareholders without clear and effective safeguards.

Criterion 4 – Internationally accepted principles:

“whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD”

Tax exemption provided to non-resident for income derived from sources outside the state providing exemption is clearly in line with internationally accepted principles¹. On the other hand, we are of the opinion that Aruban rules for determination of PE seems to depart from Article 5 of OECD Model Tax Treaty and its Commentary as it provides wider definition of activities of preparatory and auxiliary character, i.e. these that do not constitute a PE. These activities are pursuant publicly available information: keeping and safeguarding the books by a trust office in Aruba; holding of shares in a company established in Aruba; ownership of intangible assets not physically present in Aruba, even if assets are registered in Aruba, etc. If these activities are undertaken by non-resident companies, there would be no taxable presence in Aruba and these companies would be treated in a more preferential way than resident companies. Such a design of the regime, which combines transparency with unusual PE determination rules does pose a risk of BEPS (regime could be exploited as a tax minimisation vehicle). Moreover, combination of mentioned factors leads to ring-fencing concerns as well.

Criterion 5 - Transparency:

“whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way”

Pursuant to publicly available information, regime is fully set out and published in the relevant legislation and the practice should not involve any administrative discretion. In order to be eligible for regime, company must register its shares and it must apply for transparency status within one month after the company has been incorporated.

¹ Art 7 para. 1 MTC: *“Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein”*

Overall assessment

“Without prejudice to the respective spheres of competence of the Member States and the Community, this code of conduct, which covers business taxation, concerns those measures which affect, or may affect, in a significant way the location of business activity in the Community”

With respect to available information and 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.

Note: this assessment was based only on publicly available information, as the Group did not dispose of translated legislation or more detailed information provided by Aruban officials.

Sources:

http://www.arubafinancialcenter.aw/taxes/Fiscal_Transparency_Regime.pdf

<http://taxsummaries.pwc.com/uk/taxsummaries/wwts.nsf/frnTerritoryPrintPreview?openForm&countryName=Aruba&Type=Corporate>

<http://www.wtsaruba.com/wp-content/uploads/Transparency-regime-2016.compressed.pdf>

<http://arina-aruba.com/ebooklet/guide/files/assets/common/downloads/Arina%20Brochure.pdf>

http://www.arubaeconomicaffairs.aw/index.php?option=com_content&task=view&id=37

<https://www.imctrust.com/tax/tax-transparency/>
