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OUTCOME OF PROCEEDINGS

From: General Secretariat of the Council
To: Code of Conduct Group (Business Taxation)
Subject: Cook Islands' International Companies regime (CK001)
– Final description and assessment

ROLLBACK REVIEW PROCESS (JANUARY 2020)

On 17 December 2020 Cook Islands adopted the International Companies (Removal of Tax Exemption) Amendment Act 2019 (see doc. 7418/20 ADD 1). This act repeals CK001 as of 1 January 2020.

The Code of Conduct Group (business taxation) (COCG) meeting of 4 February 2020 approved the rollback of the regime. This conclusion was endorsed by the ECOFIN Council on 18 February 2020.

Annex 1: Assessment of the CK001 regime in 2017 (standstill)

ADD 1: International Companies (Removal of Tax Exemption) Amendment Act 2019

Explanation

The International Companies Amendment Act 2019 has repealed Art. 249 of the International Company Act, which provided a tax exemption for licensed international companies. Section 7 of the Bill stipulates that a company licensed before 1 January 2019 will continue to benefit from the former tax exemption until 31 December 2021. This is in line with the COCG's requirements for grandfathering and the COCG's decision in September 2019 to align the FHTP's timeframe for grandfathering, provided that this is not disproportionately longer.

As the tax exemption has been repealed and international companies are now subject to the standard CIT rate of Cook Islands, the regime no longer provides for a significantly lower level of taxation and should be considered as abolished.

Assessment of the CK001 regime in 2017 (standstill)

International Companies (CK001)

a. Description

An “international company” means a company incorporated pursuant to the International Companies Act 1981-82 (as amended in 2005) and includes a company registered on incorporation as an international shipping company. Under Section 6 of the International Companies Act, no natural person who is a citizen or a resident of or domiciled in the Cook Islands and no company incorporated or registered under the Companies Act 1970-71, except a trustee company, may hold shares beneficially, either individually or with another person or persons, in an international company under the Act or a foreign company that has the centre of its administrative management in the Cook Islands unless that foreign company is registered under the Companies Act 1970-71.

According to Section 7(1) of the International Companies Act, an international company may be incorporated for any lawful purpose or purposes except for the purpose of carrying on the business of banking insurance or acting as a trustee company, or any of such businesses, otherwise than in accordance with Section 7. Under Section 7(2) an international company unless restricted by its articles or memorandum may carry on any business which may lawfully be carried on by an individual but shall not carry on the business of

- a) banking, unless it is licensed pursuant to the provisions of the Off-Shore Banking Act 1981,
- b) insurance, unless it is licensed pursuant to the provisions of the Off-Shore Insurance Act 1981-82 , or
- c) acting as a trustee company unless it is permitted to do so pursuant to the Trustee Companies Act 1981-82.

According to Section 249 of the International Companies Act, international companies are exempt from taxation.

Source: International Companies Act 1981-82

b. Preferential features

International companies are exempt from tax. The normal tax rate is 20 %.

c. Possible concerns

A regime limited to foreign tax payers and/or to operations outside the territory of the jurisdiction (ring fenced regime) does not meet criteria 1 and 2 of the Code of Conduct which forbid this type of ring fencing. The International Companies regime seems targeted to foreign owned enterprises since tax advantages are granted only to foreign owned companies. Shares in international companies may not be held beneficially by a natural person who is a citizen or a resident of or domiciled in the Cook Islands; or by any company incorporated or registered under the Companies Act 1970-71. With regard to insurance companies incorporated under the International Companies Act, see regime 2) and regime 4) below.

d. Assessment

	1a	1b	2a	2b	3	4	5
The Cook Islands – International Companies	V	V	V	V	V	X	X

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 tax rate for companies in the Cook Islands is 20%. Under Section 249 of the International Companies Act 1981-82 (as amended in 2005), companies incorporated under the Act (international companies) are exempt from taxation. The measure therefore provides for a significantly lower level of taxation and is potentially harmful under the Code.

Criterion 1 – Targeting non-residents:

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

The International Companies regime seems targeted to foreign owned enterprises since tax advantages are granted only to foreign owned companies. Shares in international companies may not be held beneficially by a natural person who is a citizen or a resident of or domiciled in the Cook Islands; or by any company incorporated or registered under the Companies Act 1970-71. We therefore propose a tick (“V” - harmful) for criterion 1a." [*de lege*]. Since the measure is not available companies with shares held beneficially by a natural person who is a citizen or a resident of or domiciled in the Cook Islands; or by any company incorporated or registered under the Companies Act 1970-71, we would also propose a tick (“V” - harmful) for criterion 1 b.

Criterion 2 – Ring-fencing:

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

The International Companies regime seems targeted to foreign owned enterprises since tax advantages are granted only to foreign owned companies. Since the income of non-domiciled or non-resident persons are not taxable in the Cook Islands, the advantages are ring-fenced from the domestic market and thus, does not, affect the national tax base. By analogy to the assessment against criterion 1a/b we would propose a tick ("V" - harmful) for criterion 2a/2b."

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 measure does not include any express requirement for real economic activity or substantial economic presence. We would therefore propose a tick ("V" - harmful) for criterion 3.

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”

A tax exemption does not contradict any internationally embraced principle. We would therefore propose a cross (“X” – not harmful) for criterion 4.

Criterion 5 - Transparency:

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

The measure is fully set out and published in the relevant legislation and the practice should not involve any administrative discretion. We would therefore propose a cross (“X” – not harmful) for criterion 5.

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”

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

The main concerns which deviate from the Code of Conduct criteria relate to:

- The international business company regime seems **targeted at activities with foreign entities/markets** since tax advantages are granted only to foreign owned companies.
 - The measure **does not include any express requirement for real economic activity or substantial economic presence.**
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