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OUTCOME OF PROCEEDINGS

From: General Secretariat of the Council
To: Code of Conduct Group (Business Taxation)
Subject: Cook Islands' Captive Insurance Companies regime (CK004)
– Final description and assessment

ROLLBACK REVIEW PROCESS (JANUARY 2020)

On 17 December 2020 Cook Islands adopted the Captive Insurance Amendment Act 2019 (see doc. 7420/20 ADD 1). This amendment repeals CK004 as of 1 January 2020.

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

ADD 1: Captive Insurance Amendment Act 2019

Annex 1: Assessment of the CK004 regime in 2017 (standstill)

Explanation

The Captive Insurance Amendment Act 2019 repealed Art. 48 of the Captive Insurance Act 2019, which provided a tax exemption for licensed captive insurers. Licensed captive insurers now fall under the International Companies regime, which is now compliant with criterion 2.1. Based on the amendments introduced, the regime can be considered abolished.

Assessment of the CK004 regime in 2017 (standstill)

International Captive Insurance Companies (CK004)

a. Description

According to Article 48 of the Captive Insurance Bill 2013, licensed captive insurers incorporated under the International Companies Act 1981-82, are exempt from taxation.

Source: International Companies Act 1981-82, Captive Insurance Bill 2013

b. Preferential features

Licensed captive insurers incorporated under the International Companies Act are exempt from tax. The normal tax rate is 20 %.

c. Possible concern:

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 Captive Insurance Companies regime seems targeted to foreign owned enterprises since tax advantages are granted only to foreign owned companies. Shares in international captive insurance companies may not be held beneficially by a natural person who is a citizen or a resident of or domiciled in the Cook Islands nor by any company incorporated or registered under the Companies Act 1970-71.

d. Assessment

	1a	1b	2a	2b	3	4	5
The Cook Islands – International Captive Insurance 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 Article 48 of the Captive Insurance Bill 2013, licensed captive insurers incorporated under the International Companies Act 1981-82 (as amended in 2005), 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 Captive Insurance Companies regime seems targeted to foreign owned enterprises since tax advantages are granted only to foreign owned companies. The tax exemption is only granted to a company incorporated under the International Companies Act. 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 to domestically owned companies, 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 Captive Insurance 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.**