



**Brussels, 30 April 2020
(OR. en)**

7423/20

FISC 89

OUTCOME OF PROCEEDINGS

From: General Secretariat of the Council
To: Code of Conduct Group (Business Taxation)
Subject: Curaçao's manufacturing activities under the eZone regime (CW005)
– Final description and assessment

ROLLBACK REVIEW PROCESS (JANUARY 2020)

On 30 December 2020, Curaçao adopted the Ordinance 92/2019 with effect as from 1 January 2020 (see doc. 7423/20 ADD1). 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.

ADD 1: Ordinance 92/2019 (translated version)

Annex 1: Assessment of the CW005 regime in 2018 (standstill)

Explanation

On 30 December 2019 the Parliament of Curaçao adopted the Ordinance 92/2019, with effect as of 1 January 2020. Art. 2 of the Ordinance repeals Section 11 of the Economic Zones Act 2000, which provided preferential tax treatment to activities performed in the Zones. Companies operating in the Zones are now subject to the general headline CIT (22%). The Ordinance foresees grandfathering until 31 December 2022 for companies benefitting from the E-Zones regime before 31 December 2019, in line with the COCG's requirements. Based on the amendments introduced, it can be concluded that the regime is abolished.

Assessment of the CW005 regime in 2018 (standstill review)

Manufacturing activities under the eZone regime

The eZone regime has been assessed as amended and “out of scope” by the OECD FHTP in October 2019. It has been amended by removing highly mobile activities from its scope.

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 in Curaçao is 22% in 2018. The eZone regime allows a reduced rate of 2% on income derived from qualifying activities. The measure provides for a significantly lower level of taxation and is therefore potentially harmful under the Code.

	1a	1b	2a	2b	3	4	5
Curaçao – Manufacturing activities under the eZone regime (CW005)	V	V	V	V	X	X	V

V = harmful

X = not harmful

Explanation:

Criterion 1 – Targeting non-residents:

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

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.

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.

Annually at least 75% of total sales have to be exported under this regime, while a maximum of 25% of total sales may be sold on the domestic market after obtaining a permit from the Government. E-zone companies are not allowed to supply goods or services to residents of Curaçao without this special permit to do so. As part of their engagement with the FHTP, Curaçao have amended the regime to apply the reduced tax rate of 2% to all profits of the company, regardless of whether the goods are delivered to local or international customers. However the fact that domestic sales are capped at 25% and a special permit is required means the measure remains ring-fenced.

Criterion 2 – Ring-fencing:

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

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).

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.

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”

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.

As part of their engagement with the FHTP process, Curaçao introduced substance requirements for this regime.

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”

The measure does not contradict any internationally embraced principle.

Criterion 5 – Transparency:

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

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.

Curaçao informed the FHTP in their self review template prepared for the October FHTP that they were in the process of drafting a National Decree to deal with the transparency issues as regards the conditions to be allowed into the E-Zone and to be treated as an E-Zone Company.

Grandfathering

Curaçao has grandfathering provisions for companies previously benefiting from the regime until 31 December 2018.

Overall Assessment

In the light of the assessment made under all Code criteria, the eZone regime would be considered as overall harmful.
