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OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Code of Conduct Group (Business Taxation)
Subject:	Morocco's Export Enterprises regime (MA002) – Final description and assessment

ROLLBACK REVIEW PROCESS (JANUARY 2020)

On 14 December 2019 Morocco published the Finance Law 2020 No 70-19 (see doc. 7426/20 ADD 1-10). That law amends the Export Enterprises regime (MA002).

The Code of Conduct Group meeting (business taxation) (COCG) of 4 February 2020 assessed the amendments as follows:

	1a	1b	2a	2b	3	4	5
Morocco – Export Enterprises	X	?	X	?	X	X	X

V = harmful
X = not harmful

This conclusion was endorsed by the ECOFIN Council on 18 February 2020.

ADD 1-10: Finance Law 2020 No 70-19

Annex 1: Assessment of the MA002 regime in 2017 (standstill review)

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 Finance Law 2020 No 70-19, promulgated on 13 December 2019, introduces a system of progressive tax rates for the regime and for the generally applicable corporate tax system.

For companies with profits of 1 000 000 DH or more, a 20% rate (up from 17,5%) applies to profits resulting from export, whereas a rate of 28% (down from 31%) applies to profits from industrial/manufacturing activities from a domestic source. According to the Moroccan authorities, only 3% of the companies benefitting from the regime falls into this category.

This is the first step in a planned convergence of the different rates, with a view to applying a single company tax rate, applicable uniformly regardless of the destination of the product, gradually over five years from 1 January 2020.

The raised rate of 20% applies to all beneficiaries, existing as well as new, as there is no formal grandfathering. However, due to the general 5-year exemption from corporate tax, which is applied to all companies with industrial/manufacturing activities regardless of the source of their income:

- New beneficiaries will be exempt from tax during the whole period of convergence of the tax rates
- Existing beneficiaries that do not benefit from the 5 year exemption anymore will be subject to the raised tax rate (20% from 1 January 2020 as compared to 17,5% in 2019).

The effect of the amended legislation and the converging rates is tantamount to that of a grandfathering clause. This is because:

- A lower rate will only be applied for a limited time-period, and
- Due to the general 5 year exemption for new companies, only existing beneficiaries whose 5 year exemption has expired will benefit from a lower rate – so it is effectively closed to new entrants.

In addition, beneficiaries will not be subject to the former 17,5% rate, but the higher rate of 20% in 2020. This rate will be even higher again in the following years. As such, the mechanism will be less beneficial than other grandfathering clauses, which fully perpetuate the preferential treatment.

Based on these elements, the period of gradual convergence of rates of the Moroccan Finance Law 2020 is considered as a "de facto" grandfathering period (see below).

Criterion 1 – Targeting non-residents

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

The rate granted in respect of transactions carried out with non-residents on export income will be lower than the standard rate during the period of convergence. The regime would therefore be caught by criterion 1a and be considered as harmful, since the measure is not available for transactions with persons resident in Morocco.

However, in view of the approach suggested under the Gateway criterion, the convergence period should be seen as a "de facto grandfathering" period and the regime should be seen as not harmful.

There is no information available yet concerning the possible de facto ring-fencing of the amended legislation. Therefore a "?" is added for criterion 1b.

Criterion 2 – Ring-fencing

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

By analogy to the assessment against criterion 1a/b we propose that the regime should be considered as not harmful under criterion 2a and get a "?" under criterion 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 Moroccan authorities have confirmed that the draft legislation on the regime will include more detailed requirements for real economic activity and substantial economic presence than was previously the case. It will set out requirements on the number of employees and sufficient investments.

It should also be considered that the beneficiaries of the regime are companies carrying out industrial and manufacturing activities, which de facto have economic substance.

For this reason a cross ("X") is inserted 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. Therefore a cross ("X") is inserted 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. Therefore a cross ("X") is inserted 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 is considered overall not harmful from a Code of Conduct point of view.

"De facto" grandfathering

The grandfathering period will be no more than 5 years and may be shorter, depending on the economic and financial analysis of the initial year of convergence (2020), whereas a grandfathering period of more than 3 years is not in line with criterion 2.1.

Based on the information received from Morocco on 30 January 2020, the gradual implementation is dictated by a constitutional restriction linked to the need to take into account the loss of tax receipts associated with the reduction of the 31% rate: the constitution requires the State to preserve budgetary equilibrium; Article 77 stipulates that "the Parliament and the government shall ensure that the balance of State finances is preserved". Another, no less important, constraint concerns the gradual adaptation to the increasing of the 17.5% rate on the part of the economic base operating in the export sector, which is mainly made up of small and medium-sized enterprises.

The COCG accepted at its meeting of 4 February 2020 the justification provided by Morocco for this longer "de facto" grandfathering period. It was therefore decided that Morocco met its commitment under criterion 2.1 for the Exporters Regime.

Assessment of the MA002 regime in 2017 (standstill review)

Export Enterprises (MA002)

a. Description

Export enterprises benefit from a special tax regime. The regime is extended also to companies selling finished goods to other companies established in "export platform". The exemption or reduction is conditional upon the export of goods.

Sources: IBFD

b. Preferential features

Export enterprises are fully exempt from corporate tax during the first 5 years of operations. Thereafter, for an unlimited period, they will be subject to a corporate tax rate of 17.5%. The normal tax rate is progressive from 10% up to 31% for taxable profits over MAD 5,000,000.

The corporate tax exemption or reduction will apply only to income in foreign currency and services used outside Morocco.

c. Possible concerns

A regime limited to foreign tax payers and/or to operations outside the territory of the jurisdiction does not meet criteria 1 and 2 of the Code of Conduct which forbid this type of ring fencing. The tax exemption or reduction is conditional upon the export of goods.

d. Assessment

	1a	**1b**	**2a**	**2b**	**3**	**4**	**5**
Morocco – Export Enterprises	V	V	V	V	V	X	X

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 normal tax rate is progressive from 10% up to 31%.

Export enterprises are fully exempt from corporate tax during the first 5 years of operations. Thereafter, for an unlimited period, they will be subject to a corporate tax rate of 17.5%.

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 Export Enterprises regime seems targeted for activities with foreign entities/markets since tax advantages are granted only in respect of transactions carried out with non-residents (only on export income). Therefore, we consider that the measure is clearly caught by criterion 1a. We therefore propose a tick ("V" - harmful) for criterion 1a. Since the measure is not available for transactions with persons resident in Morocco, we would also propose a tick ("V" - harmful) for criterion 1b.

Criterion 2 – Ring-fencing:

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

The Export Enterprises regime seems targeted at activities with foreign entities/markets since tax advantages are granted only in respect of transactions carried out with non-residents (only on export income). Since the income of non-resident persons are not taxable in Morocco, the advantages are ring-fenced from the domestic market and thus, do 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") 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") 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") 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.