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OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Code of Conduct Group
Subject:	The EU list of non-cooperative jurisdictions for tax purposes - United Arab Emirates (UAE): final legislation and assessment under criterion 2.2

A/ FINAL LEGISLATION:

On 30 April 2019, the United Arab Emirates (hereafter "UAE") Cabinet adopted Resolution No 31 of 2019 concerning Economic Substance Regulations:

https://www.mof.gov.ae/en/lawsAndPolitics/CabinetResolutions/Pages/312019.aspx

The following amendment to paragraph 2 of Article 3 of Resolution No 31 of 2019 was subsequently adopted by the UAE Cabinet on 1st September 2019:

"The provisions of this Resolution shall not apply to any commercial company (as defined in Article 1 of the Commercial Companies Law) in which the Government of the State, or the Government of any Emirate of the State, or any governmental authority or body of any of them owns directly or indirectly at least fifty one percent (51%) of its share capital".

B/ FINAL ASSESSMENT:

The dialogue with the UAE was rather limited until end 2018 as no draft legislation had been shared for feedback by the Code of Conduct Group (COCG) and technical assistance by the Commission services. However, a concept paper was shared in December 2018, a first draft legislation in February 2019 and the dialogue has since then been constructive. The Commission Services reported regularly to Member States on the progress of the discussions with the UAE.

Although Resolution No 31 of 2019 reflected most of the feedback from the Commission services and COCG, there was an important change to the final legislation compared to the draft that had previously been discussed and provisionally agreed by the COCG.

The adopted Economic Substance Regulation indeed introduced a general exemption for all entities in which the government of the UAE, or of any Emirates of the UAE, had direct or indirect ownership in its share capital. The threshold of 51% government ownership (direct or indirect) of share capital, which had been in previous drafts of the Regulation, had been removed. As a result, even companies with a nominal government participation of 0.1% could be excluded from the economic substance requirements.

The COCG agreed that such a broad exemption created a significant risk of circumvention of the substance requirements. It also agreed that the information to be exchanged by the UAE would be insufficient to counterbalance this risk.

The subsequent amendment adopted by the UAE on 1st September 2019 resolved the issue by introducing the above-mentioned 51% threshold, which should limit the risk of circumvention of the substance requirements.

Conclusion

The UAE has implemented its commitment to introduce substance requirements under criterion 2.2.

ANNEX 1: assessment by COCG experts in 2017

ANNEX 1: ASSESSMENT BY COCG EXPERTS IN 2017

<table>
<tr><th></th><th>1a</th><th>1b</th><th>2a</th><th>2b</th><th>3</th><th>4</th><th>5</th></tr>
<tr><td>United Arab Emirates</td><td>X</td><td>X</td><td>X</td><td>X</td><td>V</td><td>?</td><td>X</td></tr>
<tr><td colspan="6">Criterion 2.2: "The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction"

In light of the assessment made under all Code criteria applied by analogy, the tax system of the United Arab Emirates should be considered overall harmful from a Code of Conduct point of view.

The main concerns on deviations from the Code of Conduct criteria as applied by analogy relate to the lack of legal substance requirements.</td><td colspan="2">Overall:

V</td></tr>
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Explanation:

Absence of a corporate tax system or applying a nominal corporate tax rate equal to zero or almost zero: In this respect, where criterion 2.1 is inapplicable solely due to the fact that the jurisdiction concerned does not meet the gateway criterion under Paragraph B of the Code of Conduct, because of the "absence of a corporate tax system or applying a nominal corporate tax rate equal to zero or almost zero", then the five factors identified in paragraph B of the Code of Conduct should be applied by analogy to assess whether the criterion 2.2 has been met.
Relevant questions (Q 1.2) *The United Arab Emirates (UAE) Constitution provides that the Federal Government has jurisdiction on finance and taxes, duties and fees (Art. 120). However, no federal CIT tax laws have been promulgated to date. The Emirates of Abu Dhabi, Dubai, Ras Al Khaimah and Sharjah established (corporate) income tax ("CIT") regimes by issuance of Decrees in the late 1960s (before the UAE Constitution was enacted). These Decrees very broadly deal with who are considered taxable persons, rates of taxes, administration, etc. (in these Decrees, rates typically vary from between 10% and 50% depending on the level of income). The Decrees provide for the levy of CIT on all companies (including branches of foreign companies) operating in the respective Emirates. However, with the exception of some provisions related to upstream oil and gas companies and branches of foreign banks, these Decrees are not implemented and consequently CIT is currently not levied on most companies in the UAE.* *In Abu Dhabi, Dubai, Ras Al Khaimah and Sharjah, branches of foreign banks are taxed at 20% of their taxable income which is earned or deemed to be earned in the particular Emirates.* *Companies dealing in oil or oil exploration rights in those Emirates pay royalties to the Emirate in which they are active. In Fujairah, royalties are payable by companies engaged in the extraction, production or selling of petroleum products.* *Only in some limited cases locally sourced income is taxed. No CIT applies to all other companies. We therefore suggest this jurisdiction to meet the gateway test of the criterion 2.2.*

Criterion 1: “whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents”
<u>Relevant questions (Q 2.1, Q 2.2, Q 2.3, Q 1.1, Q 1.2, Q 1.5, Q 1.8,)</u> *The absence in principle of CIT in the UAE is de lege applicable to both residents and non-residents and does not require that the beneficiaries carry out transactions only with non-residents.* *We would therefore propose a cross (“X” - not harmful) for criterion 1a).* *17,733 out of 408,280 registered active legal entities are owned by non-resident. More specifically in the financial sector (40) and the insurance sector (27) 67 companies out of 1,570 are foreign owned. The foreign owned companies in the financial and insurance sector employs 7,904 out of the total in that sector in the UAE of 126,114.* *It appears that foreign owned legal entities constitute a relatively small share of the total number of companies in the UAE which excludes a de facto ring fencing.* *As the situation seems not clear, we would propose a cross (“X” – not harmful) for criterion 1b).*
Criterion 2: “whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base”
<u>Relevant questions (Q 2.1, Q 2.2, Q 2.3, Q 1.1, Q 1.2, Q 1.5, Q 1.8,)</u> *By analogy to the assessment against criterion 1a/b. We would propose a cross ("X" – not harmful) for criterion 2a) and b).*

Criterion 3:

"whether advantages are granted even without any real economic activity and substantial economic presence within the jurisdiction offering such tax advantages"

Relevant questions (Q 1.1, Q 1.7, Q 1.9, Q 2.4, Q 2.5, Q 2.6, Q 2.7, Q 2.8)

All companies incorporated in the UAE are required to keep ownership and identity information. Ownership information is also available for foreign companies operating in the UAE.

UAE resident companies wishing to obtain a tax residence certificate for the application of the UAE's treaties for the avoidance of double taxation, must provide the following information to the Ministry of Finance:

1. A copy of the company's trade license;
2. Establishment contract certified by official authorities (if it is not a Sole Company);
3. A copy of the company's owners, partners and directors' passports;
4. A copy of the company's owners, partners and directors' IDs;
5. A copy of the company's owners, partners and directors' permits of residence;
6. A certified copy of the audited financial accounts;
7. A validated 6-month bank statement;
8. A certified copy of the lease agreement; and
9. Tax forms (if any) from the country in which the certificate will be submitted.

Under the UAE Federal Law No. (7) of 2017 on Tax Procedures, the Federal Tax Authority may perform a tax audit on any natural or legal person to verify the extent of that person's compliance with the provisions of said law and any federal law pursuant to which a federal tax is imposed. The Ministry of Economy and the Departments of Economic Development ("DEDs", Emirates local level) can impose administrative penalties in case the authorities would conclude that a company has no sufficient level of "economic substance" in that jurisdiction. There is however, no clear definition of the requirements for "economic substance" other than those referred to as a basis for obtaining a tax residency certificate or a trading license which in any case are relevant only for those companies willing to require a tax residence certificate for the application of the UAE's treaties for the avoidance of double taxation. The penalties can involve cancelation of trade license. In cases of tax evasion, the competent court in the UAE may impose a prison sentence and/or a monetary penalty not exceeding five times the amount of evaded tax.

The conditions attached to conducting business in the UAE do not include an express requirement for a minimum number of adequately qualified employees, physical presence requirements and (for non-resident companies) that management and control should be in Bahrein. There are minimum capital requirements and requirements on the minimum number of founders and members of the Board. Some companies are obliged to file and to keep annual financial statements. However, there is no express obligation to have a real economic presence in the sense of the Code of Conduct.
We would therefore propose a tick ("V") for criterion 3.

Criterion 4: "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"
<u>Relevant questions (Q 2.9, Q 2.10, Q 2.11, Q 2.12)</u> *The UAE does not apply any specific transfer pricing ("TP") legislation, neither OECD transfer pricing rules nor alternative transfer pricing rules for profit determination in line with internationally accepted principles. This situation seems to negatively affect a proper allocation of profits.* *The Commercial Companies Law (CCL) requires companies to comply with the International Accounting Practices and Standards. Foreign companies or their branches shall have an independent balance sheet and an independent profits and losses account and shall have an auditor registered in UAE. They shall provide to the competent local authority and the Ministry of Economy, on annual basis, copy of these balance sheets and final accounts, together with a report by the auditor. There are no exemptions from these obligations. Additionally, all legal persons conducting a business in the UAE must keep Accounting Records and Commercial Books of the business as well as any tax related information determined by any federal law pursuant to which a federal tax (such as VAT) is imposed.* *It should be noted that the UAE has informed that once it (i) implements its Country by Country Reporting ("CbCR") legislation, (ii) ratifies the Convention on Mutual Administrative Assistance in Tax Matters, (iii) signs and ratifies the Multilateral Competent Authority Agreement on the exchange of CbC Reports("MCAA"), and (iv) implements an appropriate IT operational framework to facilitate compliance with its obligations in respect of CbCR, the Convention and the MCAA, it believes that this should provide an appropriate framework pursuant to which tax authorities in states with CIT can access the information they require for the purpose of determining whether companies active in the UAE are complying with the relevant state's transfer pricing rules.* *However, it is unclear whether a country without CIT should be asked to set rules for profit determination in respect of activities within a MNI in place or if the commitment to implement CbCR which gives relevant information to the other states should be considered as sufficient to comply with criterion 4* *We would therefore propose a question mark ("?" – harmful) for criterion 4.*

Criterion 5: “whether the features of the tax system lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way”
<u>Relevant questions (Q 2.13, Q 2.14, Q 2.15, Q 2.16)</u> *The English version of the Commercial Companies Law (CCL) No. 2 of 2015 including conditions to register a commercial business is available on the Ministry's website.* *There are no elements in the legal system, including the granting of tax residence or the setting up of companies, which can be regulated on the basis of an advance ruling with the relevant authorities.* *Companies resident in the UAE can only obtain a tax residency certificate from the Ministry of Finance if they submit the required documentation.* *The authorities in the UAE are not entitled to provide taxpayers with any discretional decision regarding the application of a regime or general rules in relation to setting up of a company.* *Because the UAE does currently not levy CIT, there is no public information available in that specific regard. Existing UAE tax laws and regulations such as those regarding Excise Duties and VAT are publicly available as well as those regarding conditions to register a company are publicly available in an English language version.* *The UAE authorities do not grant any rulings which should be exchanged under the transparency framework laid down in the final G20/OECD BEPS Action 5 Report.* *All the elements of the legal system which are relevant for benefiting from the advantages at stake are set by the law and the administrative practices do not appear to involve any administrative discretion. We would therefore propose a cross (“X”- not harmful) for criterion 5.*