Council of the European Union

Brussels, 23 November 2021
(OR. en)

13057/21

FISC 172

OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Code of Conduct Group (Business Taxation)
Subject:	Seychelles' Foreign source income exemption (SC011) and International Trade Zone Regime (SC002) - Final description and assessment

ROLLBACK REVIEW PROCESS

In December 2018 and in February 2019, Seychelles committed at high political level to address the deficiencies identified with respect to the Free Trade Zone (FTZ) and Foreign Sourced Income Exemption regimes (FSIE) by the end of 2019. As such, Seychelles was included in Annex II of the March 2019 Council Conclusions on the EU list of non-cooperative jurisdictions for tax purposes.

Seychelles introduced partial amendments to its FTZ and FSIE regimes through the Business Tax (Amendment) Act, 2020. However, since its commitment to amend or abolish the regimes was not fulfilled by the stated deadline, the Council included Seychelles in the EU list of non-cooperative jurisdictions for tax purposes on 18 February 2020.

On 15 September 2021 Seychelles' government issued a commencement order to enact the legislation to reform its preferential tax regimes and in particular, the FSIE regime. The law was published in the Gazette on 16 September and the provisions came into effect on that day. The reform of the FSIE regime also affected the FTZ regime, which was deemed harmful in 2020.

The Code of Conduct Group assessed the situation of the two regimes (the assessments are annexed to this note) at its meeting of 21 September 2021 and agreed to recommend to remove Seychelles from Annex I of the EU list for criterion 2.1. The COCG also considered that Seychelles should be removed from Annex I for criterion 1.2 after the Global Forum granted Seychelles a supplementary review to upgrade its rating on exchange of information on request. The COCG recommended the Council to place Seychelles on Annex II, pending the outcome of the supplementary review by the Global Forum to assess progress made in implementing the standard on transparency and exchange of information on request.

On 5 October 2021, the Council followed the Code of Conduct Group's recommendation.

Assessment of Seychelles' Foreign Source Income Exemption – Business Tax Act

	1a	1b	2a	2b	3	4	5
Seychelles – Foreign Source Income – Business Tax Act	X	?	X	?	X	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 general tax rate in Seychelles is 25%. It is brought up to 33% if the income exceeds 1.000.000 SCR. In specific circumstances, the Business Tax Act provides that no tax is levied, compared to the general tax rate of 25 or 33%. The provisions at issue operate by exempting foreign income from taxation.

As the Code of Conduct looks at the effects that tax legislation may have on the location of business activities in general terms, a full tax exemption may be regarded as one of the reasons for a business to establish in one jurisdiction over another. In this sense, the provisions are relevant for the Code.

The Code of Conduct uses a broad term ('tax measures') to describe what should be assessed under its criteria. This definition is not limited to specific pieces of legislation nor does it circumscribe the meaning of what should be intended as a 'tax measure'. In the specific case of the measures of the Ordinance on Profit Tax of 1940, it is relevant to take into account the tax in order to understand whether the legislation provides for a significantly lower level of taxation. This is the case as certain type of income with foreign source is excluded from tax.

The provisions are therefore potentially harmful and should be evaluated under the Code.

Criteria 1 and 2 – Targeting non-residents and ring-fencing:

"*whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents*"; "*whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base*"

Section 5 of the Business Tax Act sets forth that income which does not arise in Seychelles should not be considered assessable income and therefore subject to tax. This would lead to conclude that the provision should be considered as harmful under the Code. However, in light of the Code of Conduct Guidance on FSIE regime, the assessment should take into account the specific characteristics of this type of regime.

The guidance acknowledges that it is widely acceptable to exempt active income as a means of avoiding double taxation, provided that additional criteria are met. These criteria are the implementation of adequate substance requirements; the existence of robust anti-abuse rules; and the removal of administrative discretion in determining the income to be exempted from tax. If a regime is in line with these criteria, its remaining and inherent features such as ring-fencing should not lead to a conclusion that the regime is harmful.

In the case of Seychelles, the exemption applies to income of a foreign company that qualifies as a permanent establishment (PE) in Seychelles in line with definition of PE (See criterion 4) and depending on whether the company is subject to a preferential tax regime or a PE of a Seychelles' company in another jurisdiction, if the company qualifies as such in the other jurisdiction. Should this not be the case, the income is considered domestic and therefore subject to tax.

However, when it comes to passive income (e.g. dividends, interests, royalties, etc.), this type of income is exempted only if a company meets the criteria mentioned in the Business Tax (Amendment) Act, 2020, which came into operation on 15 September 2021 and Business Tax (Amendment of Eleventh Schedule) Regulations, 2021 – analysed under criterion 3. If this is not the case, the income is considered domestic and therefore subject to tax.

Based on the above, the regime can be considered non-harmful for criterion 1.a and 2.a and the analysis remains inconclusive for criterion 1.b and 2.b. as there is no available data at this stage on the effect of the measures.

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*"

Companies that benefit from the exemption under Section 5 of the Business Tax Act with regard to passive income have to meet adequate economic substance in the tax year. This requirement applies to companies ('qualifying companies') that are part of a multinational group. In particular, according to the 11th Schedule of the Business Tax Act, as amended, a qualifying company has to (a) comply with filing requirements applicable to it under the Companies Act 1972, Cap. 40 and the International Business Companies Act 2016; (b) maintain adequate human resources and premises in Seychelles for the purpose of holding and managing the investment assets; and (c) in the case of a company other than a purely equity or real estate holding company, in respect of any assets it acquires, holds, or disposes of — (i.) takes necessary strategic decisions; and (ii.) manages and bears principal risks in Seychelles; and (iii.) incurs adequate expenditure, relating to the acquisition, holding or disposal, as the case may be. Outsourcing activities can take place, provided that the company is able to demonstrate adequate supervision and that the relevant functions or activities are conducted in Seychelles.

With regard to income from royalties, Seychelles introduced in Section 5 of the Business Tax Act the modified nexus approach in line with the CoC and international guidance. With regard to income from capital gains, this type of income is subject to the reduced substance test for holding companies when the income arise from a core income generating activity of holding and managing shares or equitable interests.

Based on the above, the regime can be considered non-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*"

Section 2A of the BTA provides for a definition of permanent establishment which is in line with the international standards. Seychelles demonstrated to have sufficiently robust anti-abuse rules, as interpreted in the case law, to tackle cases of circumvention or aggressive tax planning.

The regime can be considered 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"

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.

As the measure under assessment complies with this criterion, the regime can be considered not harmful for criterion 5.

Grandfathering

No grandfathering has been foreseen for the regime in line with the request of the COCG for FSIE regimes.

Overall assessment:

In the light of the assessment made under all Code criteria, the regime is not harmful.

ANNEX 2

International Trade Zone Regime (ITZ)

	1a	1b	2a	2b	3	4	5
Seychelles – Free Trade Zone (SC010)	X	?	X	?	X	X	X

Gateway criterion – Significantly lower level of taxation:

The general corporate income tax (CIT) tax rate in Seychelles is 25%. It is brought up to 33% if the income exceeds SCR 1.000.000 (Approx. EUR 70000). On 26 December 2019, Seychelles amended Section 2 of the Schedule of the International Trade Zone, which provided for a tax exemption to companies benefitting from the regime. Following this amendment, companies in the Free Trade Zones are now subject to the general CIT system set out in the Business Tax Act of 1 January 2020 and as further amended in September 2021.

Criteria 1 and 2 – Ring-fencing

Section 3 of the International Trade Zone Act still prescribes that activities performed by licenced companies are considered as goods to be exported or services provided abroad. However, this is not longer a problem asthe tax exemption is completely removed, by making reference to the general CIT rate under the Business Tax Act.

Based on the above, we propose a cross ('X' – non-harmful) for criterion 1.a and 2.a and a question mark ("?" – Insufficient information under the criterion) for criterion 1.b and 2.b. as there are no data available at this stage on the effect of the measures.

Criterion 3 – Substance:

Section 3 of the International Trade Zone (Substantial Activity Requirements) Regulations, 2019 has introduced substance requirements, in line with the Code criteria in order for ITZ companies to be licenced. These requirements consist of maintaining a permanent, identifiable and appropriate physical office or premises in Seychelles, employing an adequate number of suitably qualified persons to carry out its activities and incurring an adequate amount of operating expenditures for such activities.

The regime can be considered not harmful for criterion 3.

Criterion 4 – Internationally accepted principles:

The measure does not contradict any internationally accepted principle. The regime can be considered not harmful for criterion 4.

Criterion 5 – Transparency:

The conditions for granting an ITZ licence are laid down by the law and no administrative discretion applies. The regime can be considered not harmful for criterion 5.

Grandfathering

Seychelles included a grandfathering provision for companies previously carrying out manufacturing activities under the regime. The grandfathering period is due to expire on 1 January 2023, in line with the Code requirements.

Overall Assessment

In the light of the assessment above, the regime should be considered abolished (not harmful).