Council of the
European Union

Brussels, 26 March 2019
(OR. en)

5443/19
DCL 1

FISC 42

DECLASSIFICATION

of document:	ST 5443/19 RESTREINT UE/EU RESTRICTED
dated:	17 January 2019
new status:	Public
Subject:	The EU list of non-cooperative jurisdictions for tax purposes – Progress Report - Mauritius

Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

Council of the
European Union

Brussels, 17 January 2019
(OR. en)

5443/19

RESTREINT UE/EU RESTRICTED

FISC 42

DECLASSIFIED

NOTE

From:	Commission Services
To:	Code of Conduct Group (Business Taxation)
Subject:	The EU list of non-cooperative jurisdictions for tax purposes – Progress Report - Mauritius

Delegations will find attached a document by the Commission services.

ANNEX

PROGRESS REPORT Mauritius

Subgroup Meeting – 18 January 2018

Background

In 2017, the EU found that the Mauritius tax system failed to meet listing criterion 2.1. This was explained to the Government of Mauritius in a letter sent by the Chair of the Code of Conduct on 23 October 2017. Mauritius was requested to reiterate to the EU, the commitment they already made to the OECD Forum for Harmful Tax Practices (FHTP), to amend five harmful tax regimes.

Mauritius confirmed this commitment to the EU on 31 October 2017, and was therefore included in Annex II of 5 December Council Conclusions.

Mauritius committed to amending or abolishing five preferential tax regimes: Global Business Company 1 (GBL 1), Global Business Company 2 (GBL 2), Freeport Zones, Captive Insurance regime, and Banks Holding a Banking Licence regime. In November 2018, the Code of Conduct Group took stock of the results of the assessment of those regimes made by the FHTP. The FHTP found the Captive Insurance regime to be abolished and this was endorsed by the Group. The Freeport regime was found to be amended and out of scope by the FHTP, however the Code of Conduct Group assessed it as harmful. The GBL 1, GBL 2, and Banks Holding a Banking licence regimes were assessed by the FHTP as abolished, and two new regimes, Partial Exemption regime and Banking regime, were assessed by the FHTP as not harmful. These results were not endorsed by the Group

The Code of Conduct Group asked the Commission Services to continue the dialogue with Mauritius on the abolishment of the GBL1, GBL2 and Banks Holding a Banking Licence regimes and on the two new regimes (Partial Exemption regime and Banking regime). This was based on the concerns expressed by the Commission Services and the Group as regards the substance requirements applicable to companies benefitting from the new regimes and, for the specific case of the Partial Exemption regime, on the lack of sufficient anti-abuse measures and a situation of possible de-facto ring-fencing. For this reason, the rollback of the GBL 1 and GBL 2 regimes has not been yet endorsed by the Code of Conduct Group.

DECLASSIFIED

Mauritius made a commitment to the EU to amend the Freeport regime by the end of 2019, and this commitment is assessed in a separate document before the Subgroup today (ST 5086/2019).

State of Play

The dialogue on the Partial Exemption regime continued with Mauritius in November and December focusing on the issues of substance and the lack of anti-abuse rules. The explanations provided by Mauritius did not convince us that the regime was not harmful. On this basis, we have now carried out an assessment of the Mauritius Partial Exemption regime. It should also be noted that in their communications with TAXUD, Mauritius expressed their willingness to introduce substance rules in line with the international best practice "*at the earliest opportunity*". Mauritius has not expressed a willingness to introduce anti-abuse rules.

On the Banking regime, Mauritius has provided clarifications on the scope of their substance rules, which are analysed below.

In summary, firstly the Subgroup should discuss whether to endorse the rollback of the three regimes: GBL1, GBL2, and Banks Holding a Banking Licence regimes. These three regimes have been abolished by Mauritius. Secondly, the Subgroup should discuss whether to endorse the FHTP *not harmful* assessment of the Banking regime. Finally, the Group should make a decision on the assessment of the new Partial Exemption regime.

The Group may decide to treat the rollback of the two GBL regimes as incomplete as a result of the introduction of the Partial Exemption regime, which maintains similar benefits under a different name.

Alternatively, the Group may decide that, by abolishing the two GBL regimes, Mauritius has fulfilled its commitment and that the Partial Exemption Regime should be treated as a new regime. In this case, the Group should request a commitment from Mauritius to amend the new regime by the end of 2019.

DECLASSIFIED

Banking regime

Mauritius has introduced a new banking regime with the same name, and this new regime was assessed by the FHTP at the October meeting as not harmful. Banks with an income lower than Rs 1.5 billion will be taxed at 5%, while above that threshold income is taxed at the general rate of 15%. In addition, the threshold of Rs 1.5 billion is calculated on the basis of a complex mechanism that takes into account notions of chargeable income and base year, which refers to the taxable year 2017-2018 of an existing bank.

It has been clarified that the conditions to benefit from this exemption rely on the effective economic presence of a bank in Mauritius. This applies both to domestic banks and to branches of foreign banks. The limitation under subsection (4A) to the notion of substance for banks to management located within the country has also been explained, in the sense that the guidelines issued by the Bank of Mauritius and establishing stricter requirements apply.

Finally, it has also been clarified that a bank conducting exclusively private banking still needs to abide by all the licensing requirements, including all the provisions of the Banking Act and prudential requirements. Exemptions may only be granted with respect to significant shareholding (in excess of 10% stake) subject to it meeting all the other requirements. Currently there is only one such bank licensed by the Bank of Mauritius.

Given the explanations provided, it is proposed to endorse the "not harmful" assessments of the two banking regimes (MU006 and MU011) made by the FHTP.

Assessment of the Mauritius Partial Exemption regime

	1a	**1b**	**2a**	**2b**	**3**	**4**	**5**
Mauritius – Partial Exemption regime (MU10)	X	?	X	?	V	X	X

DECLASSIFIED

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 Mauritius is 15%. However, as a result of the reform enacted by the Finance Bill 2018, Mauritius introduced the Partial Exemption regime where 80% of specified income of global business companies will be exempted from corporate tax. The income categories exempt from tax are:

1. Partial Exemption for foreign source dividends,

2. Exemption for profits attributable to a foreign PE,

3. Exemption for dividends and interest income derived by a company whether from a local source or foreign source; and

4. Exemption for income from provision of specified financial services (investment management and investment advisory activities conducted in and from within Mauritius, ship and aircraft leasing, CIS/CEF).

This measure provides for a significant lower level of taxation and is therefore potentially harmful under the Code of Conduct.

Criterion 1 – Targeting non-residents:

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

The partial exemption regime is available 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.

DECLASSIFIED

There is no information on the de facto effect of the measure. However on the basis of publicly available information (from the Mauritius Financial Services Commission) collected by the Commission Services on the usage of the GBL 1, regime it appears that the Partial Exemption regime will mostly benefit companies not doing business in Mauritius. This information was presented to the Group at the meeting of 12 October 2018 (document ST12967/2018):

Licensees under domestic regime

- Financial service providers: 40
- Specialised financial services / institutions: 30
- Corporate trust service providers: 181
- Insurers: 274
- Pensions: 65
- Intermediaries: 238

Total of domestic licensees: 828

Licensees under Global Business Regime

- GBC 1: 10'756
- GBC 2: 10'688

Total of offshore licensees: 21'444

On the basis of the above figures, a preliminary assessment would suggest that the 80% exemption on income from financial services would mostly benefit companies not doing any business in Mauritius. Mauritius has challenged these statistics and disagrees with our conclusions. According to Mauritius, 1,153 (or less) GBL1 companies are likely to benefit from the new regime, and 1,700 non-GBL companies are expected to benefit.

Since we have based our conclusions on the statistics for the abolished GBL 1 regime and do not have any statistics for the use of the new regime, we would propose a question mark ("?" - insufficient information to assess under the criterion) for criterion 1b.

DECLASSIFIED

However the usage of this regime should be monitored by the Group in order to establish if a situation of de facto ring-fencing exists.

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.

What has been written above under criterion 1a and 1b also applies to criterion 2a and 2b. Therefore we would propose a cross ("X" – not harmful) for criterion 2a and a question mark ("?") for 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*"

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.

While the Partial Exemption regime does have substance requirements, they are not entirely in line with international best practice, in particular in terms of how they treat outsourcing. As agreed by the Code Group in the meeting of 21 September 2018, based on the progress report on the Crown Dependencies (ST 12196/2018), outsourcing should not be a practice used to circumvent the need for economic substance within a jurisdiction. Therefore, the outsourcing of core income generating activities is only permitted to occur within the jurisdiction concerned. In addition the primary entity should have the capacity to properly supervise and control the work of the entity to which the core functions have been outsourced; and the substance of the outsourcing provider (employees, expenditure and premises) should not be used multiple times by multiple primary entities that outsource to the same outsourcing provider. Jurisdictions should demonstrate that outsourcing is not used to circumvent compliance with the requirements. A similar approach to outsourcing is also

DECLASSIFIED

included in the OECD FHTP draft document *Approach to review of substantial activities requirements for no or only nominal tax jurisdictions*[1].

Regimes such as the partial exemption regime should also be properly contained by appropriate anti-abuse measures in order to tackle tax-planning opportunities.

Paragraph L of the Code of Conduct states that: "anti-abuse provisions or countermeasures contained in tax laws and in double taxation conventions play a fundamental role in counteracting tax avoidance and evasion". In past assessments, the Code Group has taken into account, in the overall assessment of various regimes, the existence of appropriate anti-abuse rules.

Such measures would include CFC rules or a switchover clause, in line with the agreed Code Guidance and previous assessments. In response to our queries Mauritius outlined certain provisions in its legislation such as the application of the arm's length test and a general anti-abuse rule. However, our understanding is that the Mauritius general anti-avoidance rule only covers transactions aimed at avoiding tax that should have been due in Mauritius. Therefore any schemes involving Mauritius but aimed at eroding other countries' tax bases would not be covered. Mauritius did not agree to introduce CFC rules or a switchover clause.

As a result of the absence of appropriate anti-abuse rules in this regime, and the deficiencies in the substance requirements, we 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*"

The measures do not contain such elements that would be relevant from the point of view of internationally accepted principles as referred to in criterion 4 of paragraph B of the Code, and we have therefore proposed a cross ("X").

DECLASSIFIED

[1] CTPA/CFA/FHP/NOE2(2018)15 approved by the FHTP but still to be approved by CFA.

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.

Since this is the case with respect to this measure, we have proposed a cross ("X") for criterion 5.

Overall assessment:

With respect to the overall evaluation of the Mauritius Partial Exemption regime, based on the tick under criterion 3, we have suggested a tick ("V"). Therefore, the overall assessment of this regime is harmful.

Conclusions – Two Possible Approaches

While the provisions in the Partial Exemption regime may appear to be new to the EU listing exercise, it must be emphasised that Mauritius committed to remove the harmful elements of in its tax regimes and to come into line with the listing criteria. Many of the entities that benefitted from the GBL 1 and GBL 2 regime may in the future benefit from the Partial Exemption regime. The result would therefore be similar to the status quo.

The Partial Exemption regime may have the effect of perpetuating harmful elements of the old regimes. The absence of action from the Code of Conduct will risk undermining the credibility of the listing process as a whole. It would allow Mauritius to make changes to their legislation to avoid being listed, while maintaining many effects of the harmful tax measures, contrary to the principles of fair taxation.

Options to consider

On the basis of the assessment above, Member States could consider two alternative approaches.

DECLASSIFIED

1. No Rollback

The first option would be to consider that an effective rollback of the harmful effects of the identified Mauritius regimes has not been achieved through the abolition of the two GBL regimes, because the harmful effects remain. In this case, Mauritius' commitment to roll back the regimes in order to remove the harmful effects would not be fulfilled and a decision could be made to place Mauritius in Annex I.

2. Assessment of new regime

The second option could be to consider that Mauritius has fulfilled its rollback commitment by abolishing the two regimes. In this case, the provisions of the Partial Exemption regime can be considered as a new regime to be assessed by the Code Group on a standalone basis. If the subgroup agrees with this approach, they can endorse the assessment of the Partial Exemption regime in this report and ask Mauritius for a commitment to amend or abolish it by the end of 2019.

Conclusion and way forward

Member States could either decide that:

- Option 1: The provisions introduced in the Partial Exemption regime to exempt certain categories of income should be considered to have the similar effects as the GBL 1 and GBL 2 regimes that Mauritius committed to roll back.

- Mauritius has therefore maintained some harmful effects identified by the Group and is not compliant with the commitment it made. In this case, Mauritius should be added to Annex I.

  Or

- Option 2: The FHTP assessments of the effective rollback of the GBL1 (MU001) and GBL 2 (MU002) regimes should be endorsed.

DECLASSIFIED

- The assessment of the new Partial Exemption regime as harmful should be agreed. In this case, Mauritius should remain listed in Annex II and a commitment request should be sent to Mauritius asking for a commitment to amend or abolish by 31 December 2019. The commitment letter should reach the Chair of the Code of Conduct Group before *[pre-ECOFIN date to be decided]*. If no commitment letter is received within the given deadline, Mauritius should be listed in Annex I by ECOFIN.

- In either case, the FHTP assessment of the two Banking regimes, new and old ((MU006 and MU011), should be endorsed.

Question: Which of the two alternatives for the assessment of Mauritius do delegations support?

DECLASSIFIED