Council of the
European Union

Brussels, 9 March 2021
(OR. en)

6842/21

FISC 43

OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Code of Conduct Group (Business Taxation)
Subject:	Saint Lucia's "Foreign source income exemption" (LC005) – Final description and assessment

ROLLBACK REVIEW PROCESS

In 2020 Saint Lucia abolished provisions with harmful effects of its FSIE regime. The amendment to the legislation was published on 30 December 2020 (see ADD 1).

The Code of Conduct Group meeting on 1 February 2021 acknowledged the revision of the Saint Lucia's FSIE regime. This conclusion was endorsed by the Council on 22 February 2021.

Annex 1: Assessment of the old LC005 in 2019 (standstill review)

ANNEX 1

Assessment of the old Saint Lucia's exemption of foreign income regime (LC005) in 2019 (standstill)

Gateway criterion - Significantly lower level of taxation:

If a jurisdiction has introduced a general exemption / zero taxation in the general tax system, to replace the previous harmful regime, it needs to be considered whether the new measures pass the Gateway criterion of the Code. This Gateway criterion covers "*tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply*". That level "*may operate by virtue of the nominal tax rate, the tax base or any other relevant factor*".

In the case of the Income Tax Act, no tax is levied, compared to the general rate of 30%.

The provisions at issue operate by exempting foreign income from taxation. The beneficial tax treatment therefore seems only to apply to companies previously covered by the IBC regime, which are only foreign companies. The tax base of domestic companies will therefore in effect be untouched.

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 new 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 introduced by Saint Lucia, it is relevant to take into account the tax in order to understand whether the legislation provides for a significantly lower level of taxation.

A full exemption is lower than 30%. The measures cannot be viewed as generally applicable, as they result in only certain types of income being untaxed. Furthermore, the exemption is applied exclusively to transactions carried out with non-residents and almost exclusively concerns foreign entities. The intended result is a significantly lower level of taxation than the levels which generally apply.

	1a	1b	2a	2b	3	4	5
Saint Lucia – Exemption of foreign income	V	?	V	?	X	X	X

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*"

and Criterion 2 – Ring-fencing:

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

Criteria 1a and 2a: The measures excepting certain income from tax relate to foreign income and profit distributions related to that foreign income only. Domestic income and domestic profit distributions are taxed at a higher rate (30%). This is a clear case of ring-fencing under criterion 1 and 2 of the Code of Conduct, as it is limited to transactions carried out with non-residents.

Criteria 1b and 2b: There are no statistics on the actual use of the new provisions yet.

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*"

Saint Lucia has introduced a substance requirement under Section 5A(3) of the amended IBC regime by requiring that IBCs: *"(b) shall — (i) have an adequate number of employees with the necessary level of qualifications and experience, (ii) have an adequate amount of operating expenses, (iii) have an adequate amount of investment and capital that is commensurate with the type and level of activity undertaken by the company,*"

Any company which qualifies as an IBC would have to comply with the substance requirement. It appears that the new measures are intended to benefit mainly IBCs. Therefore, it can be assumed that the majority of companies benefitting from the exemptions will satisfy the substance requirement.

However, the Income Tax Act does not seem to contain a substance requirement. Therefore, companies that do not benefit from the status of IBCs would not seem to have to comply with any substance requirements.

As we assume that almost all companies benefitting from the exemption will be IBCs, it follows that there is a sufficient substance requirement.

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*"

Saint Lucia has sufficient provisions on transfer pricing based on the arm's length principle.

Criterion 5 - Transparency

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

The conditions for benefitting from the beneficial tax treatment are sufficiently set out in the legislation.

Overall assessment:

The regime is overall harmful as it is ring-fenced to transactions carried out with non-residents.