Council of the European Union

Brussels, 12 March 2019
(OR. en)

7219/19

FISC 152

OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Delegations
Subject:	The EU list of non-cooperative jurisdictions for tax purposes • Anguilla: final legislation and assessment under criterion 2.2

A/ FINAL LEGISLATION:

The Companies (Amendment) Act 2019, the International Business Companies (Amendment) Act 2019, the Limited Partnership (Amendment) Act 2019 and the Limited Liability Company (Amendment) Act 2019 were approved by the Governor on 11 January 2019 and published in the Gazette on 15 January 2019.

The Companies (Economic Substance) Regulations 2019, the International Business Companies (Economic Substance) Regulations 2019, the Limited Partnership (Economic Substance) Regulation 2019 and the Limited Liability Company (Economic Substance) Regulation 2019 were gazetted on 19 January 2019.

In its letter to the Chair of the Code of Conduct Group on 15 January 2019, Anguilla explained that the delay in passing this legislation was due to rules of procedure of the House of Assembly. In any case, the Acts and Regulations are deemed to have come into force on 1 January 2019.

The final legislation may be downloaded at the following link

http://anguillafinance.ai/economic-substance/

B/ FINAL ASSESSMENT:

Member States had concerns regarding both the ring-fencing element of the main companies incorporated in the jurisdiction (International Business Companies – IBC) and the lack of substance requirements.

The following assessment only highlights the remaining issues identified and still pending at the beginning of 2019 following previous feedback provided throughout 2018 on draft legislation submitted by Anguilla.

I – On ring fencing

The IBC (Amendment) Act, 2018 as gazetted on 20 September 2018 removes (Clause 4 – Amendment to Section 3) unequivocally the references to the restrictions for these companies "*to carry on business with persons resident in Anguilla*" and "*to own or hold an interest, whether legal or beneficial, in real property situated in Anguilla […]*" (Section 3 (1)(a) and (e)).

Conclusion:

Anguilla has eliminated the ring-fencing elements of its legislation.

II - On the introduction of substance requirements

1 – Identification of the relevant activities and included entities

1.1 – On relevant activities

It was reported to Anguilla that pure equity holdings should respect all law filing requirements and have the people and premises for holding and managing equity participations. It was also reported that holding companies with a variety of assets and income should have the CIGAs associated with the income earned.

In the final Regulations, Section 6 distinguishes between pure equity holding companies have to comply with all applicable statutory filing requirements and should have the people and premises in Anguilla for holding and managing equity participations.

Regarding other holdings, it is mentioned that where the company holds a variety of assets and earns different types of income, the CIGAs of the company are those activities associated with the income that holding company earns.

Conclusion:

This issue is settled.

1.2 – On included entities

After discussions, Anguilla decided to include, in the scope of substance requirements companies[1], international business companies, limited liability companies as well as limited partnerships.

From the Partnership Act provided by Anguilla, it appears that Anguilla only have general partnerships and limited partnerships. These will be covered by the substance requirements.

Conclusion:

This issue is clarified and the risk of BEPS should be limited. It however needs to be monitored whether, in the coming month, it is considered necessary to include all types of partnerships in the scope of substance requirements.

2 - Imposition of substance requirements

2.1 – Tax residence

The substance legislation of Anguilla excludes "exempt" entities. Exempt entities are defined in Regulation Section 3 as covering entities if:

- The entity is centrally managed and controlled or carries on the relevant activity in a jurisdiction where the rate at which the company may be charged tax is 10% or higher;
- The entity is resident for tax purposes in the jurisdiction; and
- The entity files with the Registrar evidence of its tax residence in that jurisdiction and an appropriate tax return has been submitted to the relevant tax authority of that jurisdiction in relation to the relevant activity.

[1] incorporated in Anguilla as well as foreign companies registered in Anguilla

On the other hand, Anguilla did not include an additional nexus based on management and control for the application of substance requirements.

Anguilla amended its Companies Act, Section 190 to provide that unless it is registered, a foreign company must not carry on business in Anguilla and must not be centrally managed and controlled in Anguilla. In such case, they will be caught in the scope of substance requirements.

This provision allows all foreign companies centrally managed and controlled or that carry on business in Anguilla to be caught by the substance requirements.

Claiming of tax residence in another jurisdiction will trigger the application of mandatory spontaneous exchange of information with the Member State in which a holding body of the company, an ultimate holding body of the company or a beneficial owner of the company is tax resident.

Conclusion:

This issue is settled.

2.2 – Appropriate CIGAs to be performed

There were concerns that Anguilla's draft regulation provided for the obligation to carry on "*one or more*" CIGAs, which could mean that there is no need to carry on all the appropriate CIGAs in relation to the particular relevant activity carried out by the entity.

The new Section 4(3) of the Regulations provides that one of the conditions for the substance test is that the entity "*carries on the appropriate core-income generating activities in Anguilla for the relevant activity*". This wording clarifies the issue.

Conclusion:

This issue is settled.

2.3 – Outsourcing safeguards

Anguilla's provision on outsourcing was lacking appropriate safeguards against the risk of double counting by the resources of a services provider.

The new Section 4(5) of the Regulations provides that outsourcing is allowed if:

- The service provider has adequate employees, expenditure and assets in Anguilla;
- The service provider carries on the appropriate CIGAs in Anguilla; and
- The company can demonstrate that it adequately supervises that relevant activity.

The Regulation further specifies that the economic substance of third party providers shall not be counted multiple times by multiple companies when evidencing their own economic substance in Anguilla.

Conclusion:

This issue is settled.

2.4 – Cumulative substance test

In previous draft, Anguilla proposed an alternative substance test in which an entity was considered compliant either:

a) When having regard to the level of relevant activity carried on by the entity in Anguilla, it has an adequate number of qualified employees engaged in the relevant activity who are physically present in Anguilla, incurs in Anguilla an adequate level of expenditure in relation to the activity and has physical assets in Anguilla. And the entity carries on one or more CIGAs in Anguilla for the relevant activity; OR

b) When the mind and management for the relevant activity is in Anguilla (meaning board of directors as detailed in Section 7 of the regulation).

The final Regulations, Section 4, provide for a cumulative substance test in line with the Scoping paper.

Conclusion:

This issue is settled.

2.5 – IP low-risk and high-risk scenarios

Anguilla added to the definition of high-risk scenario the condition that (i) the entity holds the IP asset for the purpose of an IP business defined as earning income from IP assets, including royalties and income from the sale of an IP asset and (ii) the entity did not create the IP asset.

It was reported to Anguilla that those elements should not be considered to determine whether an entity is in a high-risk situation.

The new Section 205F(5) defines high-risk IP scenarios in line with the scoping paper.

Concerning low-risk scenarios, the Schedule to the Regulation created confusion between the main CIGAs (R&D for patents and marketing, branding and distribution for non-trade IP assets) and the other CIGAs that may, by exception, be taken into account when the main CIGAs are absent, as those are considered as examples within the marketing, branding and distribution CIGAs.

The new Schedule to the Regulation provides that only in exceptional cases when the main CIGAs are absent, can the other CIGAs be taken into account (except in high-risk IP scenarios).

Conclusion:

This issue is settled.

3 Enforcement and sanction mechanism

3.1 – Filing obligations

It was reported to Anguilla that the information to be filed was incomplete.

The new Section 2 provides for the appropriate filing of information by relevant entities.

Conclusion:

This issue is settled.

3.2 – Exchange of information

It was reported to Anguilla that its rules on spontaneous exchange of information lacked reference to high-risk IP scenarios.

Section 205F of the Act provides for spontaneous exchange of information in case of non-compliance, high-risk IP scenarios and when an entity claims to be exempt because tax resident in another jurisdiction.

Conclusion:

This issue is settled.

3.2 – Sanction framework

It was reported to Anguilla that its sanction framework was not dissuasive enough and that there was no direct reference to the possibility to strike-off an entity. Therefore, nothing would prevent an IBC without substance to continue to carry on business in Anguilla indefinitely.

Section 205E(8) of the Act clarifies that nothing in the sanctions section limits or restricts the power of the Registrar to strike-off a relevant company under section 243. In this respect, Section 243 was also amended so as to allow for strike-off in case of non-compliance with the substance requirements.

Conclusion:

This issue is settled. The efficient enforcement of the substance legislation will be subject to monitoring over the coming years.

Conclusion

Anguilla has removed the ring-fencing elements in its legislation on IBCs and implemented its commitment to introduce substance requirements.

ANNEX 1: assessment by COCG experts in 2017

ANNEX 1: ASSESSMENT BY COCG EXPERTS IN 2017

	1a	1b	2a	2b	3	4	5
ANGUILLA	V	V	V	V	V	?	X
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 ANGUILLA 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 and the de facto lack of substance. In addition there are legal or de facto mechanisms that enable the granting of advantages only to non-residents or in respect of transactions carried out with non-residents.						Overall: V	

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)

ANGUILLA does not apply any corporate tax system. 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"

Relevant questions (Q 2.1, Q 2.2, Q 2.3, Q 1.1, Q 1.2, Q 1.5, Q 1.8,)

The absence of CIT is de lege available to both residents and non-residents and does not require that the beneficiaries carry out transactions only with non-residents.

However, when assessing a jurisdiction without CIT for the purpose of the list of non-cooperative jurisdictions, it should be assessed whether aspects of the legal framework, including non-CIT aspects, provide for a ring-fenced scenario.

ANGUILLA has provided information that International Business Companies (IBC) are not allowed to do business in ANGUILLA. In this respect, subsection 3(1)(a) of Part II of International Business Companies Act defends such companies incorporated under that Act to carry out business with persons residents in Anguilla.

Anguilla however claims that these companies by law and by administrative practices are mainly treated in the same way as other types of (domestic) companies.

The fact that the legal framework of Anguilla provides for the incorporation of companies that can benefit from a zero-rate taxation but are not allowed to interfere with the domestic market justifies alone a conclusion on de lege ring-fencing.

We would therefore propose a tick ("V" - harmful) for criterion 1a).

The question whether the advantages of the absence of CIT de facto are accorded only or almost only to non-residents was not answered. ANGUILLA argued that information on the number of companies controlled by non-residents were not available.

Out of the active companies (28,608 as of 2016), the vast majority of 25,915 = 90.6 % are IBCs. According to the given criteria that de facto ring-fencing is given by a percentage of more than 90 %, the situation in Anguilla constitutes de facto ring-fencing.

ANGUILLA stated that some companies are exempt from the general obligation to file annual financial statements but did not explain the reasoning behind these exemptions nor did they provide data on the activities performed by companies which are exempt. It is possible that only non-residents are exempt.

We would therefore propose a tick ("V"- harmful) for criterion 1b).

Criterion 2:

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

Relevant questions (Q 2.1, Q 2.2, Q 2.3, Q 1.1, Q 1.2, Q 1.5, Q 1.8,)

By analogy to the assessment against criterion 1a/b. We would propose a cross ("X" – not harmful) for criterion 2a) and a tick ("V"- harmful) for criterion 2b).

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)

Facts: According to the answer of Anguilla to question 2.4 of the questionnaire, „there is no legislation that provides for any economic substance requirements applicable to companies."

Number of companies in Anguilla:

Companies Ordinance Companies:

Active: 2058

Total: 7914

International Business Companies:

Active: 25915

Total: 43958

Limited Liability Companies

Active: 579

Total: 1046

Limited Partnerships:

Active: 40

Total: 70

TRUST

Active: 16

Total: 17

Number of employees in 2002 (other data is not available): 5644

Anguilla does not undertake investigations on the carrying out of real economic activities.

- *Assessment*

The majority of the members of the Panel would propose a tick ("V" – harmful) for criterion 3. From there view the conditions attached to the advantages at stake (e.g. requirements for incorporation or operations) do not include any express requirement for real economic activity or substantial economic presence. This alone justifies a conclusion on the lack of substance.

In addition the data concerning employees and number of companies submitted by Anguilla strongly support the lack of substance in practice. From the information provided it follows that it is highly questionable whether there is an adequate de facto link between profits and underlying substance.

In addition there are no investigations on the carrying out of real economic activities in Anguilla. That fact also supports the view that there is no adequate link between profits and underlying substance.

Addendum by one expert only:

If you divide the number of employees, which is 5,644 (as of 2001, no more recent data available), by the number of active companies, which is 28,608 (as of 2016), there are on average only 0,20 employees per company. If you divide the number of companies in total, the ratio is even lower, namely 0,11 (5,644/53,005). From our perspective, these disproportionate figures strongly highlight the questions arising in respect of substance.

One other expert of the Panel provided the following assessment:

- The agreed terms of reference for the assessment of jurisdictions under Criterion 2.2 states the following:

A jurisdiction can only be deemed to have failed the assessment under this criterion when 'offshore structures and arrangements attracting profits which do not reflect real economic activity in the jurisdiction' are due to rules or practices, including outside the taxation area, which a jurisdiction can reasonably be asked to amend, or are due to a lack of those rules and requirements needed to be compliant with this test that a jurisdiction can reasonably be asked to introduce.

The introduction of a CIT system or a positive CIT rate is not amongst the actions that a third country jurisdiction can be asked to take in order to be in line with the requirements under this test, since the absence of a corporate tax base or a zero or almost zero level tax rate cannot by itself be deemed as criterion for evaluating a jurisdiction as non-compliant.

- *This states that a jurisdiction can only be deemed to have failed the assessment under Criterion 2.2 where reasonable/proportionate actions have been identified that a jurisdiction could take to avoid being listed.*

- *It remains unclear what exactly we would be asking jurisdictions to amend/introduce in response to their deemed failure under Criterion 3. It might be suggested that a jurisdiction should have a de jure requirement for substance as part of their company law, but it's not clear what that would entail i.e. what the test of substance would be, when that test of substance would be applied, what the implication would be of a company failing that test.*

- *Those are important questions in being able to test the reasonableness of such a requirement.*

- *If we can't demonstrate that such requirements are reasonable, and we can't demonstrate that they are commonly replicated by other countries/Member States, then the failing of a jurisdiction due to the lack of such a requirement would amount to a failing of a jurisdiction on the basis of it not having a CIT regime which is incompatible with the terms of reference. This part of Panel III would therefore propose a question mark ("?") for Criterion 3 until this has been discussed further.*

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"

Relevant questions (Q 2.9, Q 2.10, Q 2.11, Q 2.12)

ANGUILLA does not apply 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. However, the panel is not sure, whether it is adequate to ask countries without a CIT-system to set rules for profit determination in respect of activities within a MNE in place or if the commitment to CbCR, which gives relevant information to the other states, should be enough to fulfil criterion 4.

Anguilla has not committed to BEPS minimum standard including CbCR by no. *In light of the above we would propose a "?" 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"
Relevant questions (Q 2.13, Q 2.14, Q 2.15, Q 2.16) *All the elements of the legal system which are relevant for benefitting from the advantages at stake (including rules for the granting of tax residence or the setting up of companies) are clearly set by the law and the practice does not involve any administrative discretion. We would therefore propose a cross ("X" – not harmful) for criterion 5.*