



Brussels, 30 April 2020
(OR. en)

7226/19
ADD 2

FISC 158

OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Code of Conduct Group (Business Taxation)
Subject:	The EU list of non-cooperative jurisdictions for tax purposes <ul style="list-style-type: none">– British Virgin Islands: final legislation and assessment under criterion 2.2 = British Virgin Islands: new guidance under criterion 2.2 (VG007)

The Code of Conduct Group (business taxation) (COCG) agreed in April 2019 to continue to monitor that no legislative changes that could undermine the standstill objective are made and sent a letter to all jurisdictions that have enacted sufficient legislation on criterion 2.2 requesting them to communicate to the Group any new legislation or guidance that they may adopt in the future related to substance requirements and related transparency aspects. As reported to the December 2019 ECOFIN Council (doc. 14114/19, page 16), the COCG furthermore agreed in October 2019 that jurisdictions should be encouraged to notify planned changes (to the legislative framework or related guidance) before their adoption and agreed on a procedural framework to that effect. As a result it was agreed that: *"if a jurisdiction does notify the COCG, it would be granted a maximum of 3 months to address any possible concern raised by the COCG after the adoption of the said changes before a listing recommendation is made to the ECOFIN Council"*.

The British Virgin Islands (BVI) published draft Economic Substance Code or "Guidance" (VG007) to clarify the implementation of the Economic Substance Act 2018, assessed positively under criterion 2.2 in March 2019. BVI did not notify the COCG of this draft. However, in July 2019 the Commission services contacted BVI raising questions and concerns on the Guidance. While the discussion was ongoing and pending COCG's feedback, on 9 October 2019, BVI adopted the Guidance.

In October 2019, Member States discussed the Guidance, raised concerns with the interpretation of economic substance legislation endorsed there and requested amendments to be made in order not to undermine the standstill. Following the new procedural framework agreed in November 2019 (see above), BVI therefore had to amend its Guidance to address these concerns within 3 months from adoption, i.e. by 9 January 2020, in order to avoid being listed. Nevertheless, the Group eventually decided to apply the same cut-off dates¹ as to the other jurisdictions affected by the February 2020 EU list revision, with a view to treating all jurisdictions equally.

A/ LEGISLATIVE CHANGES :

Revised Guidance adopted on 9 October 2019:

https://bvi.gov.vg/sites/default/files/ita_rules_final_10.09.2019_1.pdf

New revised Guidance adopted on 10 February 2020:

https://bvi.gov.vg/sites/default/files/resources/ita_rules_v2.pdf

B/ FINAL ASSESSMENT:

Following numerous exchanges and revised draft versions of the adopted Guidance, BVI adopted amendments to its Guidance on 10 February 2020, after receiving positive feedback from Member States. The following assessment only highlights the remaining issues identified and still pending after December 2019.

¹ Cut-off date for any new developments that required technical analysis: 3 February 2020. Cut-off date for issues that had already been examined by the COCG and where merely a formality was pending: 11 February 2020.

1/ Pure Equity Holdings (PEHs)

Member States had concerns that the Guidance provided limited safeguards for outsourcing, in the case of PEHs. Specifically, it provided no restrictions on outsourcing, except that the service provider must operate in BVI. However, to the extent there can be outsourcing for PEHs, all relevant safeguards should apply.

The new Guidance no longer includes this limitation.

2/ Distribution and service centre business

Member States had concerns that the Guidance undermined the application of substance requirements for distribution and service centre activity. Specifically, it exempted certain occasional transactions. However, substance requirements should apply to all relevant activity generating income.

The new Guidance clarifies that occasional transactions can be exempt, if ancillary in nature and recharged at cost or less.

3/ Intellectual Property Business

Member States had concerns that the Guidance limited relevant IP activity, by reference to income from IP rights that the entity did not develop itself or does not actively exploit. However, substance requirements should apply to all IP activity and enhanced requirements should apply to high-risk cases.

The new Guidance does not include this limitation.

Member States also discussed that, under the Guidance, non-identifiable IP income was exempted from substance requirements and there was no clarity for cases of IP assets not adjunct to the business. Member States considered this to be a borderline issue and agreed to discuss it further.

The new Guidance includes examples to clarify that substance requirements apply to transactions on IP assets, such as IT software, where a licence fee is paid for their use, even if the fee is not visible to the payer.

4/ Direction and management

Member States had concerns that the Guidance could undermine the substance requirements for the relevant activity to be directed and managed in BVI. Specifically, it did not clarify that, in order to meet the requirement, there should be evidence of strategic decisions for the relevant activity. The new Guidance clarifies that strategic decisions for the relevant activity are required.

5/ Foreign legal entities

Member States had concerns that the Guidance limited the scope of substance requirements as regards foreign companies, to companies (lawfully) carrying on relevant activities in BVI, but excluding those carrying on relevant activities from within BVI. However, foreign companies carrying on a relevant activity from within BVI should also be subject to substance requirements.

BVI revised the relevant provision of its Guidance so that substance requirements apply to any corporate body lawfully carrying on business in BVI, including any foreign company engaging in a relevant activity from within the Virgin Islands.

Conclusion

Since BVI submitted draft amendments to the COCG for feedback prior to the formal adoption of the new revised guidance, the final guidance as adopted on 10 February followed the feedback received and the final adoption occurred before the cut-off date of 11 February 2020, the COCG concluded that BVI addressed all concerns raised with its October 2019 Guidance and was not included in the EU list of non-cooperative jurisdictions for criterion 2.2 at the ECOFIN meeting on 18 February 2020.