

# Economic substance requirements for Jersey companies

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## Introduction

Jersey has brought into force the Taxation (Companies – Economic Substance) (Jersey) Law 2019 (the **Substance Law**) in order to address concerns of the EU Code of Conduct Group that Jersey companies could be used to artificially attract profits that are not commensurate with economic activities and substantial economic presence in Jersey. EU Finance Ministers signalled their approval of the Substance Law by whitelisting Jersey on 12 March 2019.

The Substance Law imposes economic substance requirements on companies that are tax resident in Jersey that undertake relevant activities in respect of financial periods commencing on or after 1 January 2019. In essence, such companies will have to demonstrate that they have substance in Jersey by being directed and managed in Jersey, having adequate people, premises and expenditure in Jersey and conducting core income generating activities (**CIGA**) in Jersey.

A protected cell company will be required to satisfy the economic substance requirements at a whole entity level including the relevant activities and resources of its protected cells (as the protected cells are not separately incorporated). An incorporated cell company and each of its incorporated cells will have to separately satisfy the economic substance requirements by reference to their own resources in respect of the relevant activities they each undertake (as they are each separately incorporated).

Funds themselves are not caught if they are subject to regulation in Jersey (construed as also including where the service providers to such funds are subject to regulation in Jersey) and neither are other types of services which funds require such as administration, advisory or custodian services. Subsidiaries of a fund will have to ensure they meet the substance requirements in relation to any relevant activities undertaken.

The questions below should be considered to determine whether the substance test applies to a company and whether that test will be met. Guidance notes were issued on 26 April 2019 by the Jersey Comptroller of Taxes (the **Comptroller**) (jointly with the tax authorities in Guernsey and the Isle of Man) to clarify how the substance test can be met. Revised guidance notes were issued on 22 November 2019 to add guidance on, among other things, insurance, shipping and intellectual property holding business.

### 1 Is the company tax resident in Jersey?

A Jersey company is tax resident in Jersey unless its business is centrally managed and controlled outside Jersey in a country or territory where the highest rate at which any company may be charged to tax on any part of its income is ten per cent or higher and the company is resident for tax purposes in that country or territory. A non-Jersey company that is managed and controlled in Jersey will be tax resident in Jersey.

### 2 Does the company have any gross income?

If a company has no gross income in a financial period then it will not be subject to the substance test in the year of assessment in which that financial period ends. The guidance notes contain anti-avoidance rules for instances where companies seek to manipulate or suppress income to avoid being subject to the substance requirements. A company in liquidation that has gross income from a relevant activity is subject to the substance requirements albeit that it will be the liquidator who has to demonstrate that the substance requirements are met.

### 3 Is the company undertaking any relevant activity?

A resident company with gross income arising from a relevant activity is subject to the substance test. The relevant activities are:

- (a) **banking business:** deposit taking business registered under the Banking Business (Jersey) Law 1991 (and, in this regard, a company that does not take deposits but is part of a banking group will not be undertaking banking business although it may be undertaking another relevant activity);
- (b) **insurance business:** long-term business or general business under the Insurance Business (Jersey) Law 1996 which the resident company must be authorised to carry on by a category A permit or category B permit under that Law. This encompasses companies which are regulated in the conduct of insurance business in Jersey as an insurer in both the life and non-life sectors including reinsurance. Companies which undertake activities connected with insurance (eg insurance brokers or other intermediaries) or

provide services to insurers (eg insurance managers), but which are not themselves insurers, do not fall within this definition;

- (c) **fund management business:** includes companies registered under the Financial Services (Jersey) Law 1998 (FSJL) to carry on fund services business as a manager or investment manager as well as those companies that would be required to register if it were not for a specific exemption in the FSJL (eg where a company provides fund management services to a scheme that is not offered to the public). Where no manager is appointed by a fund, the company acting as trustee or a corporate partner in a partnership will be treated as the entity carrying on the fund management business for these purposes. All companies that provide fund management services are subject to the substance requirements. This is anticipated to include, in due course, where the fund manager and the fund are part of the same legal entity, although further legislative change will be required to bring this provision into force;
- (d) **finance and leasing business:** the business of providing credit facilities of any kind (including intra-group loans) for consideration (such as interest or a lending fee, but not the grant of security). Loans under which interest payments are not in fact made either because payment is deferred (eg where interest is compounded) or because loans are written off are caught. Companies which purchase debt securities as an investment are not caught. A provider of credit includes a company that becomes the transferee of a loan. The provision of credit may be by way of instalments for which a separate charge is made and disclosed to the customer in connection with:
- (i) the supply of goods by hire purchase;
  - (ii) leasing other than any lease granting an exclusive right to occupy land; or
  - (iii) conditional sale or credit sale.

Where credit is offered without expectation of consideration when the credit is provided it is not caught (such as where an interest free credit period is given on a sale of goods but late payment interest is charged thereafter). Banking, insurance and fund management business are excluded from being within the scope of financing and leasing;

- (e) **headquarters business:** the business of providing any of the following services to one or more non-Jersey resident connected persons (as defined below) of the resident company:
- (i) the provision of senior management;
  - (ii) the assumption or control of material risk for activities carried out by, or assets owned by, any of those connected persons;
  - (iii) the provision of substantive advice in connection with the assumption or control of risk referred to in paragraph (ii),

but does not include any such business undertaken as part of financing and leasing business, intellectual property holding business, insurance business or banking business to prevent duplicate reporting;

- (f) **shipping business:** is any of the following activities involving the operation of a ship anywhere in the world (other than solely between Jersey and Guernsey or within the territorial waters of Jersey):
- (i) the business of transporting, by sea, persons, animals, goods or mail;
  - (ii) the renting or chartering of ships for the purpose described in paragraph (i);
  - (iii) the sale of travel tickets or equivalent and ancillary services connected with the operation of a ship;
  - (iv) the use, maintenance or rental of containers (including trailers and other vehicles or equipment for the transport of containers) used for the transport of anything by sea; or
  - (v) the management of the crew of a ship.

A ship for these purposes does not include fishing vessels, harbour craft, vessels used for sport or recreation or vessels under 24 meters in length. A company that undertakes the activities in paragraphs (ii) to (v) above (eg a crew management business) which does not also operate ship(s) for the transport of passengers or cargo (or both) in international traffic does not fall in the definition. The chartering of ships on a bareboat basis does not constitute shipping business because the ship owner does not operate the ship that is chartered. A bareboat charter may, however, constitute financing and leasing business;

- (g) **holding company business:** the business of being a holding company. A holding company is a resident company which:

- (i) has as its sole function the acquisition and holding of equities which constitute controlling stakes in other companies (provided such equities are held beneficially and not for example as trustee); and
- (ii) does not carry on any commercial activity (and for these purposes, placing dividend monies on deposit or using them to acquire and passively hold other securities will not constitute a commercial activity),

and, if a company carries on any other relevant activity (whether or not for profit), then it would not fall in the definition of holding company. It would remain subject to the higher substance requirements of the other relevant activity;

- (h) **intellectual property holding business:** the business of holding intellectual property assets (**IP assets**) from which identifiable income (eg royalties, licence fees or franchise fees) accrues to the business from licences or other rights granted to use the IP assets. Such income must, however, be separately identifiable from any income generated from any tangible asset in which the right subsists (for example, a fizzy drinks manufacturer is not an intellectual property holding business because its income is generated by sales of fizzy drinks to third parties, not the exploitation of IP assets (ie the use of the trademark is incidental). If an IP asset is purchased or developed with the intention of reselling it at a profit, the proceeds of sale will constitute gross income. A company with more than one IP asset must consider the substance requirements in respect of each IP asset it has in a financial period;
- (i) **distribution and service centre business:** the business of:
  - (i) purchasing from non-Jersey resident connected persons component parts, raw materials or finished products and reselling them for profit; and/or
  - (ii) providing services (such as administrative, advisory, consulting, or employee services) to non-Jersey resident connected persons,

but does not include purchasing from, or providing services to, third parties or any such activity undertaken as part of any other relevant activity (except holding company business) to prevent duplicate reporting. The scope of distribution and service centre business does not extend to cases where the distribution and service centre activity is not the main activity of the company provided it is recharged at cost or less (eg staff sent on secondment for a limited time are recharged at cost). Services provided under sub-paragraph (ii) need have nothing to do with distribution undertaken under sub-paragraph (i) so companies that provide any services to non-Jersey connected persons will be subject to the Substance Law.

In this guide, a company is connected with another person if that person has control of it or if that person and persons connected with that person together have control of it and a company is connected with another company if they are in the same group or under common control. References to connected persons include connected companies.

#### 4 Is the company directed and managed in Jersey in relation to a relevant activity?

This first limb of the substance test is satisfied if:

- (a) the company's board of directors meets in Jersey at an adequate frequency given the level of decision-making required at that level (and, for these purposes, it is not necessary that all board meetings are held in Jersey provided that a majority are and even companies with a minimal level of activity should hold at least one board meeting each year);
- (b) at board meetings there is a quorum of directors physically present in Jersey (quorum being determined in accordance with company law and a company's articles of association) and where a company has a sole director, written resolutions are considered and signed while the director is physically present in Jersey;
- (c) strategic decisions of the company are set at board meetings and the minutes reflect those decisions (and such minutes should refer to all decisions taken, even where a course of action has been considered and rejected);
- (d) the directors of the company as a whole have the necessary knowledge, expertise and experience to discharge their duties as a board (and they are not giving effect to decisions taken outside Jersey whether by them or others); and
- (e) the minutes of all board meetings and the records (including statutory records) of the company are kept in Jersey (eg constitutional documents, financial statements, operating licences, copies or originals

of major funding documents and mortgages and other documents required by a board to make decisions; and in the case of a non-Jersey company that is Jersey tax resident, additional requirements apply).

In the case of corporate directors, the requirements will apply to the individual officers of the corporate director who actually perform the duties.

## 5 Does the company meet the adequacy test?

This second limb of the substance test is satisfied if the company is able to demonstrate that having regard to the level of relevant activity carried on in Jersey:

- (a) there are an adequate number of employees in relation to that activity who are physically present in Jersey (whether or not employed by the resident company or by another entity);
- (b) there is adequate expenditure incurred in Jersey proportionate to the level of activity carried on in Jersey; and
- (c) there are adequate premises in Jersey .

For the purposes of assessing adequacy:

- (a) what is adequate will be assessed by reference to its ordinary dictionary meaning being "enough or satisfactory for a particular purpose" which will be dependent on the particular facts of the company and its business activity;
- (b) owner-managers and directors will be treated as employees;
- (c) employees must collectively demonstrate appropriate qualifications, experience, competency and a broad, complementary skill set relevant to the relevant activities undertaken;
- (d) when considering what an adequate number of qualified employees is, this must relate to the employees needed to conduct the relevant activity as a whole and not just the CIGA (and employing qualified staff, and adopting digitisation and automation of processes, may mean that fewer staff are needed);
- (e) the employee count is based on the number of full time equivalents (**FTE**) working a 35 hour week (so if two people worked part time for 17.5 hours a week for or on behalf of a company during a financial period this would equal one FTE and, for these purposes, directors should be counted as a fraction of a FTE reflecting the time committed to the role);
- (f) where a company outsources its CIGA to a service provider in Jersey (and provided that the company adequately supervises the outsourced activities):
  - (i) the time spent by the staff of that service provider providing services to the company will count towards assessing whether the company has an adequate number of employees;
  - (ii) where the service provider makes available meeting rooms for board meetings to be held in Jersey, that this will count towards assessing whether the company has adequate premises; and
  - (iii) the cost of outsourcing to a service provider in Jersey will count towards assessing whether the company has an adequate level of expenditure.

A company will be responsible for ensuring accurate information is reported on its tax return including precise details of the resources employed by its service providers (eg based on the use of timesheets or another allocation methodology). A company will therefore have to ensure it maintains and retains appropriate records to demonstrate the adequacy of the resources utilised and expenditure incurred.

## 6 Does the company carry out core income generating activities in Jersey?

The third limb of the substance test is a requirement that all of a company's CIGA are carried out in Jersey. It is not necessary for a company to perform all of the CIGA listed in the Substance Law for the relevant activity, but it should perform in Jersey the CIGA that generates the income that it has.

The CIGA for:

- (a) **banking business** are raising funds, managing risk (including credit, currency and interest risk), taking hedging positions, providing loans, credit or other financial services to customers, managing capital and preparing regulatory reports and returns;

- (b) **insurance business** are predicting and calculating risk (which includes oversight of the determination of the quantification and likelihood of an insured event occurring and the likely costs and ensuring oversight of systems and processes put in place for the provision of support services), insuring or re-insuring against risk and providing insurance business services to clients (which includes taking strategic decisions regarding the commissioning of client services relevant to insurance and ensuring oversight of systems and processes put in place for the provision of support services);
- (c) **fund management business** are taking decisions on the holding and selling of investments (and the majority of those making the decisions should be physically present in Jersey), calculating risk across a fund and the reserves required on a strategic basis, taking decisions on currency or interest fluctuations and hedging positions in relation to a fund's position as a whole and ensuring that systems and processes are in place to ensure timely and accurate preparation of regulatory reports and returns;
- (d) **finance and leasing business** are agreeing funding terms, identifying and acquiring assets to be leased (in the case of leasing), setting the terms and duration of any financing or leasing, monitoring and revising any agreements and managing any risks;
- (e) **headquarters business** are taking relevant management decisions (and the majority of those making the decisions should be physically present in Jersey), incurring expenditures on behalf of group entities and co-ordinating group activities to produce the best outcome for the group;
- (f) **shipping business** are managing crew (including hiring, paying and overseeing crew members), overhauling and maintaining ships, overseeing and tracking deliveries of cargo, determining what goods to order and when to deliver them (being activities which determine how a ship is to be utilised as regards types of cargo and scheduling of voyages) and organising and overseeing voyages (including the logistical aspects of operating ships such as which routes to use and when);
- (g) **holding company business** are all activities related to that business;
- (h) **intellectual property holding business** are:
  - (i) taking strategic decisions and managing (as well as bearing) the principal risks related to development and subsequent exploitation of the IP asset generating income;
  - (ii) taking the strategic decisions and managing (as well as bearing) the principal risks relating to acquisition by third parties and subsequent exploitation and protection of the IP asset;
  - (iii) carrying on the underlying trading activities through which the IP assets are exploited leading to the generation of revenue from third parties;
  - (iv) research and development; and
  - (v) marketing (a term used only in the guidance notes), branding or distribution; and
- (i) **distribution and service centre business** are transporting and storing goods, components and materials, managing stocks, taking orders and providing consulting or other administrative services.

The following should also be noted:

- (a) it is not necessary for a company to perform all of the CIGA listed for a relevant activity in order to demonstrate substance but all the CIGA that is undertaken should be undertaken in Jersey;
- (b) a company may undertake or outsource all or part of an activity outside of Jersey only if it does not generate income for the company (eg support functions such as HR or IT);
- (c) the taking of decisions outside Jersey will generally indicate performance of CIGA outside Jersey. However, isolated decisions may be taken outside Jersey provided that it can be evidenced that the decisions taken and the CIGA undertaken in Jersey are of a quality and quantity that clearly outweigh decisions taken and CIGA undertaken outside Jersey;
- (d) the CIGA requirements do not preclude companies seeking expert professional advice or engaging the services of specialists in other jurisdictions;
- (e) so far as providing non-life insurance business services to clients is concerned, the appointment of service providers outside Jersey (such as claims handlers and loss adjusters) will not affect the ability of a company undertaking insurance business from meeting the requirement for CIGA to be conducted in Jersey provided that the taking of strategic decisions regarding the commissioning of such client services and the oversight of systems and processes put in place for the provision of support services both take place in Jersey;
- (f) a fund manager can appoint one or more brokers outside Jersey to buy and sell investments and may even give those brokers some discretion to execute trades without breaching the requirement for CIGA

to be conducted in Jersey provided that the brokers act within investment parameters set by the fund manager which are carefully monitored and controlled by the fund manager;

- (g) a company undertaking financing and leasing business will need to evidence decision making by its board in relation to decisions to lend, setting the terms of loans and monitoring and managing the risk of loans;
- (h) whether a company will be undertaking headquarters business will depend on the extent to which management and responsibility for subsidiaries by the company is in fact taking place;
- (i) the maintenance of ships by independent shipyards close to where ships are operated is industry standard and, if such maintenance takes place outside Jersey, it will not affect the ability of a company undertaking shipping business from meeting the requirement for CIGA to be conducted in Jersey;
- (j) the CIGA required to be undertaken for an IP asset will depend on the nature of the asset and how it is used to generate income. For IP assets such as patents, it is expected that the CIGA will include research and development. For non-trade intangible assets such as brand, trademark and customer data it is expected that the CIGA will include marketing, branding and distribution activities. In exceptional circumstances an intellectual property holding business will be able to demonstrate that it is undertaking the other types of CIGA (which are listed at paragraphs 6(h)(i) to (iii) above) in order to meet the economic substance requirements. A company is not required to undertake all of the CIGA for intellectual property holding business provided it undertakes in Jersey the CIGA relevant to the type(s) of IP asset(s) it holds in an accounting period. Credit will be given to research, development, marketing, branding and distribution undertaken in Jersey in earlier accounting periods the value of which is being realised by the exploitation of the IP asset in the current period. Periodic decisions by non-resident directors or local staff of a company passively holding intangible assets will not be capable of demonstrating CIGA for intellectual property;
- (k) where CIGA is undertaken for the company by another entity in Jersey (eg by an administrator or another group company), the company must be able to demonstrate that it supervises the carrying on of that activity by the other entity and, to meet the substance test, that it undertakes such supervision in Jersey;
- (l) where a CIGA is outsourced, the resources of the service provider in Jersey will be taken into consideration when determining whether the people and premises test is met (but there must be no double counting if the services are provided to more than one company); and
- (m) the income subject to tax in Jersey must be commensurate to the CIGA undertaken in Jersey.

## 7 Is the company a high risk IP company?

A high risk IP company is a company which carries on an intellectual property holding business and:

- (a) the company:
  - (i) did not create the intellectual property which it holds;
  - (ii) acquired the intellectual property from either a connected person or in consideration for funding research and development by another person situated outside Jersey; and
  - (iii) licences the intellectual property to one or more connected persons or otherwise generates income from the asset in consequence of activities (such as facilitating sale agreements) performed by foreign connected persons; or
- (b) the company does not carry out research and development, branding or distribution as part of its Jersey CIGA.

As the risks of artificial profit shifting are considered to be greater, there is a rebuttable presumption that a high risk IP company has failed the substance test during a financial period unless the company provides sufficient information to satisfy the Comptroller that the test is met. To rebut the presumption, a high risk IP company will have to produce materials which will explain how the development, enhancement, maintenance, protection and exploitation functions have been under its control, and that this has involved people who are highly skilled and perform their core activities in Jersey.

This high evidential threshold requires:

- (a) detailed business plans which clearly lay out the commercial rationale for holding the IP assets in Jersey;
- (b) concrete evidence that the decision making is taking place in Jersey and not elsewhere; and

- (c) information on employees in Jersey, their experience, their contractual terms, qualifications and length of service.

Periodic decisions by non-resident directors or board members, or local staff passively holding intangible assets, will not rebut the presumption.

### **Self-assessment and reporting**

A company will be required to provide any information reasonably required by the Comptroller to assist him in determining whether the substance test has been met. The following information will be required to be provided by a company in its tax return each year for these purposes:

- (a) a statement of each relevant activity undertaken (or a statement that none is undertaken);
- (b) gross income for each relevant activity (generally the turnover figure from the financial statements);
- (c) the number of board meetings where a quorum of directors was physically present in Jersey;
- (d) all types of CIGA which form part of a company's relevant activities (except in the case of holding company business);
- (e) accounting profits attributable to each relevant activity in the financial period;
- (f) the net book value of a company's tangible assets;
- (g) number of employees (or FTEs based on a 35 hour week) in Jersey;
- (h) the number of employees with reportable qualifications (being equivalent to or higher than Level 5 UK NVQ or Level 5 European Qualification Framework);
- (i) premises address in Jersey (which can be those of another entity such as a service provider);
- (j) total expenditure incurred in Jersey on a relevant activity less sums expended by or attributed to any overseas permanent establishment of the Jersey resident company (this will generally be the company's operating expenditure from the financial statements excluding capital);
- (k) total expenditure on outsourcing providers in Jersey, whether the activities outsourced are CIGA and, if so, the name, address and TIN of the providers, the total expenditure and confirmation if the figures in the return for employees and premises include the outsourcing providers' employees or premises;
- (l) a declaration by the company based on its own analysis whether the substance test in respect of each relevant activity is met;
- (m) for high risk IP companies, details of the company's parent, ultimate parent and ultimate beneficial owner along with evidence to rebut the presumption that the economic substance test is failed; and
- (n) a copy of the company's financial statements.

Reduced filing requirements will apply for the 2018 year of assessment which are designed to establish whether or not a company pays income tax in Jersey and what relevant activities it is undertaking.

### **Exchange of information**

If the Comptroller determines that a company has not met the substance test for a financial period, he must provide the information provided to him relating to the company for that period to:

- (a) the competent authority of the country or territory in which resides a holding body, the ultimate holding body of the resident company and an ultimate beneficial owner;
- (b) if the company is incorporated outside Jersey, the competent authority of the country or territory in which the company is incorporated.

In the case of a high risk IP company, whether or not it meets the substance test for a financial period, the Comptroller must provide the information provided to him relating to the company for that period to the same competent authority referred to in the previous paragraph.

The Comptroller is not obliged to provide information to a competent authority of a country or territory unless the provision of the information is permitted under either a bilateral agreement made between Jersey and that country or territory or the OECD and Council of Europe (2011), Multilateral Convention on Mutual Administrative Assistance in Tax Matters: Amended by the 2010 Protocol.

## Penalties

If the Comptroller determines that a company has failed to meet the substance test for a financial period, he must issue a notice to the company notifying it of that determination, his reasons for it, the penalty imposed (up to £10,000) and of what action he considers should be taken to meet the substance test.

If the Comptroller determines that a company has failed the substance test two years in a row, he may, in addition, levy a further penalty (up to £100,000) and take measures which may ultimately lead to the company being struck off.

## Conclusion

Companies which are subject to the substance test should start making preparations now or early in their next financial period commencing on or after 1 January 2019 to ensure that the test can be met during that and subsequent financial periods. Mourant can assist Jersey companies carrying on relevant activities which need advice on complying with the Substance Law.

## Things to think about

It is recommended that consideration is given to the following matters if the substance test applies to a company:

- (a) assessing where board meetings are held and whether quorum requirements in articles of association or other corporate documentation (eg shareholders' agreements) might prevent meetings being held in Jersey;
- (b) assessing whether directors of the company have the necessary qualifications and expertise to discharge the duties of the board (the rubber stamping of decisions taken elsewhere is unlikely to pass the substance test);
- (c) improving the way board meetings are minuted so that the detail of a board's deliberations are captured and that decisions not to take action are minuted as well as decisions to take action;
- (d) assessing what CIGA is undertaken in Jersey and what is undertaken outside Jersey;
- (e) evidencing where CIGA are discharged in board minutes or otherwise documenting at board level where decisions in relation to CIGA are to be made;
- (f) assessing where the company's statutory and non-statutory records are located to ensure that they are located in Jersey or accessible from Jersey;
- (g) assessing the company's staff, premises and expenditure in Jersey and outside Jersey and assessing whether this is proportionate and adequate;
- (h) reviewing outsourcing arrangements to see whether CIGA is or can be undertaken in Jersey;
- (i) considering how to complete the company's 2018 tax return (because this return is more complex than previously owing to the substance changes);
- (j) ensuring that administration agreements are amended to:
  - (i) require the administrator to ensure adequate service provision by employees of the administrator both in terms of time and qualifications/experience;
  - (ii) require the administrator to make adequate premises available when needed;
  - (iii) require the administrator to report to the company the necessary information as regards time allocation, qualifications and experience of staff, premises and expenditure;
  - (iv) require the administrator to maintain procedures that enable levels of input to be measured/ascertained including, for example, the use of timesheets; and
  - (v) agree the fees for assessing whether a company is in or out of scope and, if it is in scope, the fees for any additional service required to meet the tests;
- (k) assessing the adequacy of the supervision and monitoring by the company of any outsourced CIGA;
- (l) assessing the way the company makes decisions, how decisions are implemented and how execution of decisions and outsourcing is monitored as well as making an assessment of the adequacy of the same;
- (m) implementing procedures now to ensure that information required to be provided to the Comptroller will be available to be included in future returns; and
- (n) documenting policies and procedures to improve decision making, implementation and oversight.

## Contacts

To find out more, please get in touch with your usual Mourant contact, or alternatively, contact one of the specific contacts named below.



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