

Economic substance: clarification of COVID-19 concession in Jersey

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Since the Taxation (Companies - Economic Substance) (Jersey) Law 2019 (the **Law**) came into force on 1 January 2019, Jersey tax resident companies carrying out certain 'relevant activities' have had to comply with the substance requirements set out within the Law. In particular, these include requirements that a company's activities be 'directed and managed' from Jersey, and that certain 'core income-generating activities' (**CIGAs**) be carried out in Jersey.

For many companies, the onset of the coronavirus (COVID-19) pandemic created difficulties in complying with the Law. For example, directors who might normally travel to Jersey to attend board meetings in person found that they could not do so because of travel restrictions, while social distancing and self-isolation requirements meant that many activities needed to be carried out remotely.

As a result, in March 2020 the Comptroller of Revenue in Jersey released a [concession](#) confirming that where companies had to alter their operating practices to compensate for the coronavirus outbreak, the Comptroller would not determine that such company had failed the economic substance test under Article 6 of the Law. This concession only applied to adjustments to normal operating practices to minimise the impact of the outbreak. Similarly, the Comptroller reassured companies which are deemed tax resident in Jersey as a result of being 'managed and controlled' in the Island that their corporate tax residency would not be disturbed by temporary adjustments to their operation.

Given that the pandemic remains on-going, the Comptroller has recently issued further [guidance](#) in relation to the concession. The new guidance arguably narrows the circumstances in which companies are able to rely on the concession. In particular, it confirms that:

- the concession applies only to the requirement that a company's activities be 'directed and managed' in Jersey, and not to other aspects of the economic substance test;
- there is no derogation from the requirement for a company to have adequate employees, expenditure and physical assets in Jersey;
- while flexibility for certain employees may be reasonable and even necessary, the Comptroller does not consider it credible 'that all, or even most of the employees of a company would fall into this exceptional category'; and
- any company seeking to rely on the concession must:
 - keep sufficient records to evidence the changes that have been made to its normal operating practices and evidence the underlying reasons for these changes; and
 - disclose that they are relying on the concession in their 2020 tax return.

While the new guidance does not refer specifically to CIGAs, given that the need for CIGAs to be carried out in Jersey is a requirement of its own under the Law (rather than a subset of the 'directed and managed' test) the Comptroller may reject an attempt to use the concession to justify a CIGA having been carried out from outside Jersey.

In addition, the Comptroller confirms that he intends to withdraw the concession as soon as

circumstances allow. While timing will depend on the public health position in Jersey and elsewhere, we would advise companies to monitor the position closely from late Spring onwards.

Self-managed funds and fund vehicles

Two important amendments to the Law were [lodged](#) by the Minister for External Relations on 29 December.

The first relates to 'self-managed funds': corporate funds that do not appoint an external manager, but which are managed internally by their board of directors. The amendment would bring self-managed funds within the scope of the Law in terms of their fund management activities, for accounting periods that commence on or after 1 January 2021. This amendment to the Law was anticipated. Indeed, in November 2019, the Crown Dependencies updated their joint guidance to reflect this point, and to confirm that legislation would be brought forward in each jurisdiction.

The draft legislation does not include a separate 'directed and managed' test in relation to self-managed funds. It is anticipated that additional guidance will confirm that self-managed funds in Jersey are required by applicable regulation to be directed and managed in Jersey, removing the requirement for a separate 'directed and managed' test in the Law.

Self-managed funds will be deemed to have received income by virtue of investing the funds' assets, so there will be no separate requirement for a self-managed fund to generate gross income for it to be within scope.

The second amendment introduces a specific statutory exemption for the business activities of other fund vehicles (i.e. those managed by other entities such as a general partner, trustee or fund manager), which is currently referred to only in guidance.

Partnerships

The Law as currently drafted does not apply to partnerships.

However, the European Union's Code of Conduct Group on business taxation gave a report to the Council of the European Union on 20 November 2020 in which it recommended that jurisdictions such as Jersey with economic substance requirements applicable to companies should extend those requirements to partnerships. The report suggests that new partnerships should be in scope from 1 July 2021, with a transition period of no more than six months (i.e. running to 1 January 2022) for existing partnerships.

We expect that funds that are limited partnerships will still benefit from the exemption given to non-self-managed funds which, as discussed above, will soon be enshrined in the Law.

Further draft legislation is anticipated in the coming weeks, which will set out how the tests are likely to be applied in relation to tax transparent vehicles.

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