

Guernsey substance rules – the company perspective

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The Guernsey government has approved new regulations which impose an economic substance test for Guernsey tax-resident companies to meet the requirements of the EU Code of Conduct Group. These regulations were approved by the EU's ECOFIN council on 12 March 2019 and as a result, Guernsey was re-affirmed as a co-operative jurisdiction in terms of tax transparency and for action 5 of BEPS.

The regulations came into force on 1 January, establishing tests for tax resident companies carrying on "relevant activities". The tests require companies that are in scope to demonstrate that they have economic substance in Guernsey, including that they are "directed and managed" in Guernsey, that certain of their "core income generating activities" are undertaken here, and that the companies have "adequate" premises, employees and expenditure in Guernsey proportionate to the level of relevant activity carried on in Guernsey.

"Relevant activities" for the purposes of this briefing includes:

- Pure equity holding companies
- Companies headquartered in Guernsey
- Companies carrying on business as distribution and service centres

Please see [here](#) for Ogier's briefing applicable to fund managers and [here](#) for Ogier's briefing in respect of banks, insurance businesses and finance and leasing vehicles.

Our view, set out below, is that specific consideration should be given to outsourcing arrangements of company within a relevant structure, and to updating Policies and Procedures. Further consideration also needs to be given in respect of the detailed guidance on the definition of "adequacy" that we anticipate soon, and in respect of companies generating income from intellectual property, which are subject to more stringent tests.

The "Directed and Managed" Test

The regulations provide that the test as to whether a company was "directed and managed" in Guernsey would be met if the following are adhered to:

- There must be meetings of the Board of Directors in Guernsey at adequate frequencies given the level of decision making required;
- During these meetings, there must be a quorum of the Board of Directors physically present in Guernsey (note that the Directors do not have to be Guernsey resident);
- Strategic decisions of the company must be set at meetings of the Board of Directors and the minutes must reflect those decisions;
- All company records and minutes must be kept in Guernsey; and
- The Board of Directors, as a whole, must have the necessary knowledge and expertise to discharge their duties as a board.

Core Income Generating Activities

Guernsey tax resident entities which carry on relevant activities will need to demonstrate that they carry out core income generating activities (CIGAs) in Guernsey. The nature of the CIGAs varies by industry sector and are summarised below.

Requirements for Pure Equity Holding Companies

The law requires pure equity holding companies (ie those Holding Companies which have as their primary function the acquisition and holding of shares or equitable interests in other companies and derive income from those activities but otherwise do not carry on commercial activity) to have adequate persons and physical presence in Guernsey to hold and manage the shares and equitable interests. This will require each holding company to carry out an analysis as to what functions need to be carried out in Guernsey, which is likely to vary depending on the function and purpose of the pure equity holding company.

CIGAs for Companies Headquartered in Guernsey

Companies headquartered in Guernsey will need to demonstrate that the following "core income generating activities" take place in Guernsey:

- taking relevant management decisions;
- incurring expenses on behalf of group entities; and
- co-ordinating group activities.

CIGAs for Companies carrying on distribution and services centres

Companies providing distributions of products and services centres must have the following taking place in Guernsey:

- transporting and storing goods, products and materials;
- managing stocks;
- taking orders; or
- providing consulting or other administrative services.

What is the impact of carrying on a "relevant activity"?

This is a very broad area. Each company carrying on such operations or providing such services will need to analyse what functions need to be carried out in Guernsey to demonstrate adequate substance in Guernsey.

Companies carrying on the "relevant activities" of headquartering and distribution and service centres must be able to demonstrate:

- An adequate number of employees in Guernsey, or adequate level of expenditure on outsourcing to service companies in Guernsey, proportionate to the activities of the company carried on in Guernsey.
- An adequate level of annual expenditure incurred in Guernsey proportionate to the activities of the company carried on in Guernsey.
- Adequate physical offices and/or premises in Guernsey, or adequate level of expenditure on outsourcing to service companies in Guernsey, proportionate to the activities of the company carried on in Guernsey.

The new law proposes sanctions for non-compliance to include financial penalties, strike-off from the register of Guernsey companies, and reporting to any relevant tax or regulatory authorities.

The Ogier view

- Affected companies should review outsourcing arrangements (where relevant) in respect of Guernsey tax-resident companies that fall within the scope of the new law and whether the third-party service provider agreements in place meet the tests set out therein.
- It is anticipated that many structures will be compliant with the new requirements already – consideration should still be given to whether amendments and updates are required to any Policies and Procedures as a result of the new law.
- IP income generating companies (ie tax resident companies with income from intellectual property) will be subject to enhanced requirements, which will be the subject of a separate briefing in due course.
- We anticipate further detailed guidance on the precise definition of activities to fall within the scope of the proposed regulations, and the definition of adequacy in respect of employees, expenditure and premises under the "Core Income Generating Activities" test.

If you require further information or would like to discuss how the proposals may impact your business, please get in touch with your usual Ogier contact.

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