COLLAS CRILL

Let's talk about Jersey economic substance: Distribution and service centre business

JULY 2021

Jersey is a popular place to establish an asset holding company because its corporate law is modern, flexible and modelled on English companies legislation.

Jersey introduced the **Substance Law** to require Jersey companies which carry on particular activities (called **relevant activities**) to have economic substance in Jersey.

This guide looks at the key things you need to know about the Jersey economic substance requirements that apply to companies which carry on **distribution and service centre business**.

For a high-level overview of the economic substance requirements in each of our offshore jurisdictions (BVI, Cayman, Guernsey and Jersey), please view our fact sheet which is accessible from this page.

Words in bold text are defined at the end of this guide.

Why was the Substance Law introduced?

As a part of its base erosion and profit sharing (or BEPS) initiative, the European Union required **OFCs**, like Jersey, to introduce legislation which seeks to ensure that the **OFC** does not facilitate structures that generate profits which do not reflect real economic activity in the **OFC**.

To avoid being placed on the European Union blacklist of non-compliant jurisdictions, Jersey introduced the **Substance Law** which came into force on 1 January 2019.

The **Substance Law** is supported by the **Guidance** published by the **Comptroller** which is periodically revised.

Distribution and service centre business

The essential feature of a company which carries on **distribution and service centre business** is that it:

- buys raw materials or finished products from **foreign connected persons** and sells them for a profit; or
- provides services, consulting or other administrative services to **foreign connected persons**.

A company which carries on **distribution and service centre business** in a **financial period** must comply with the **substance requirements** if it:

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- is a **tax resident company**; and
- earns gross income from carrying on that **relevant activity** in that **financial period**.

The **Substance Law** looks at gross income earned from carrying on a **relevant activity**, not accounting or taxable income or profit.

The **Substance Law**states that if a company:

- carries on another **relevant activity** other than holding company business; and
- in the course carrying on that other **relevant activity** performs *a* distribution and service centre service activity,

the company is taken not to be carrying on **distribution and service centre business**.

A company will not carry on **distribution and service centre business** in a **financial period** if:

- it does not earn any gross income from carrying on **distribution and service centre business**;
- it buys raw materials or finished products from, or provides services, to a:
  - third party which is not a **foreign connected person**; or
  - connected person which is resident or regarded as resident in Jersey;
- any distribution and service centre activity performed by it for a **foreign connected person** is:
  - not its main business activity; and
  - charged to that **foreign connected person** at cost or less; or
- it is not a **tax resident company**.

Substance requirements

If a company earns gross income from carrying on **distribution and service centre business** in a **financial period**, it must satisfy the following **substance requirements**:

- be directed and managed from Jersey;
- (having regard to the level activity carried on by it):
  - have an adequate number of employees physically present in Jersey (whether employed by it or by another person);
  - incur adequate expenditure in Jersey; and
  - have adequate physical assets in Jersey;
- carry on all of its **CIGA**s in Jersey; and
- (to the extent any of its **CIGA**s is carried out for it in Jersey by another person (like a corporate services provider)) be able to monitor and control in Jersey the carrying out of those **CIGA**s.

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Direction and management

To satisfy the requirement to be directed and managed in Jersey, the **Substance Law** requires a company to ensure that:

- its board of directors meets in Jersey at an adequate frequency having regard to the amount of decision making required at board level;
- at each board meeting there is a quorum of directors physically present in Jersey;
- the minutes of each board meeting record the strategic decisions made by the board at that meeting;
- its directors have the necessary knowledge and expertise to discharge the duties of the board; and
- the minutes of all board meetings and the records of the company are kept in Jersey.

The **Guidance** states that:

- the requirement to be directed and managed in Jersey is designed to ensure that an adequate number of board meetings is held in Jersey;
- what constitutes an adequate number will depend on the activities of the company;
- the quorum for a board meeting will be determined in accordance with the company's articles of association;
- it is expected that even a company with minimal activity will hold at least one board meeting in Jersey each year; and
- where a company has a corporate director, it is necessary to look through the corporate director to the individuals who actually perform duties on behalf of the corporate director.

It is important to note that **not all**:

- board meetings need to be held in Jersey (only a majority of meetings); and
- directors need to be physically present in Jersey at each board meeting (only a quorum of directors).

If a company has a sole director, the sole director will need to record decisions regarding the management of the company's business in writing. The **Guidance** states that a sole director must be physically present in Jersey when the sole director makes decisions and records them in writing.

Due to the coronavirus pandemic, the **Comptroller** has published a concession which temporarily relaxes the requirement to be directed and managed in Jersey. The concession:

- allows a company to adjust its normal operating practices regarding board meetings to mitigate the threats posed by the coronavirus pandemic; and
- means that a company will not be considered to fail to satisfy the requirement to be directed and managed in Jersey if, for example, it has non-resident directors who are unable to travel to Jersey to attend board meetings.

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The concession warns that a company seeking to rely on it:

- must keep sufficient records which show the changes made to its normal operating practices and the reasons for making those changes; and
- will be required to disclose to the **Comptroller** those records to enable the **Comptroller** to determine whether the concession applies.

Adequate employees, expenditure and assets

What is adequate?

Although the **Substance Law** does not define what is meant by *adequate*, the **Guidance** states that it should be given its ordinary meaning of *enough or satisfactory for a particular purpose*.

The **Guidance** adds that:

- what is adequate for a company is dependent on the particular facts of the company and its level of business activity; and
- a company should keep appropriate records to demonstrate adequacy.

Employees

The **Guidance** states that for the purposes of the requirement to have adequate number of employees physically present in Jersey:

- *employees* includes directors and employees of any person to whom any activity (including any **CIGA**) has been outsourced;
- the requirement looks at the number of employees necessary to carry out a **relevant activity** as a whole and not just the **CIGA**s for that **relevant activity**;
- the better qualified the employees, the fewer of them may be needed; and
- the number of employees is calculated on a full time equivalent basis of a 35 hour working week.

Expenditure and assets

Neither the **Substance Law** nor the **Guidance** currently gives any direct guidance on satisfying the requirements to incur adequate expenditure, and to have adequate physical assets, in Jersey.

Despite this, based on the general tenor of the **Guidance**, it is reasonable to expect that:

- what constitutes adequate expenditure, and adequate physical assets, in Jersey will depend on the level of activity of the company;

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- the **Substance Law** does not require a company to incur more expenditure than is reasonably necessary to efficiently carry on a **relevant activity**;
- expenditure will only be taken into account if it is incurred to carry on a **relevant activity**; and
- where a company outsources any activity in accordance with the **Substance Law** and the **Guidance**, the expenditure incurred on the outsourcing will be taken into account.

CIGAs

The essence of a **CIGA** is that it is a key essential and valuable activity that generates a company's income. In the case of a company carrying on **distribution and service centre business**, the **Substance Law** states that its **CIGA**s include:

- transporting and storing goods, components and materials (including managing risks associated with these activities);
- managing stocks (including considering minimum stock levels, effective use of storage space and security);
- taking orders; or
- providing consulting or other administrative services.

The **Substance Law** allows a company to outsource (whether to a related party or a third party) some or all of its **CIGA**s, however, if it does so, it must be able to show that it exercises in Jersey adequate supervision of those **CIGA**s.

The **Guidance** states that:

- it is not necessary for a company to carry on each **CIGA** listed in the **Substance Law**, but each **CIGA** it carries on must be performed in Jersey;
- taking decisions regarding **CIGA** outside Jersey will generally indicate that **CIGA** is carried on outside Jersey, however, a company may take isolated decisions regarding **CIGA** outside Jersey if it can show that the quality and quantity of decisions taken, and **CIGA**s carried on, in Jersey clearly outweigh any decisions regarding **CIGA** taken outside Jersey; and
- the **substance requirements** do not prevent a company from seeking expert professional advice or engaging the services of a specialist in a jurisdiction outside Jersey.

Practical steps

The practical steps a company which carries on **distribution and service centre business** can take to show that it satisfies the **substance requirements** include the following.

Direction and management

In the case of the directed and managed requirement, the steps include to:

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- ensure that at each of the company's board meetings there is a quorum of directors physically present in Jersey unless there are exceptional circumstances which prevent it;
- consider appointing one or two Jersey based directors;
- ensure that all strategic decisions concerning the company's business are made at board level; and
- ensure that the minutes of each board meeting:
  - record the location of each director at the time of the meeting;
  - accurately record the strategic decisions taken at the meeting; and
  - are kept at the company's registered office in Jersey.

Employees, expenditure and CIGA

In the case of the employee, expenditure and **CIGA** requirements, the steps include to:

- appoint a Jersey corporate services provider which provides the company with a range of services which could include:
  - a Jersey registered office address (including facilities to hold board meetings);
  - a Jersey company secretary;
  - Jersey based directors; and
  - corporate services like accounting and/or cash management services;
- hold a bank account in Jersey;
- hold the majority of the company's board meetings with a quorum of directors physically present in Jersey;
- appoint a Jersey based auditor if the company is required, or wishes, to have its financial statements audited;
- keep records that allow the company to show (with reasonably accuracy) the number of its employees, the amount of expenditure incurred by the company and the **CIGA**s carried on by it, in Jersey; and
- include in any contract with a corporate services provider an obligation for the corporate services provider to provide the company (in reasonable detail) with any information the company may reasonably require to show that it complies with the **substance requirements**.

Reporting

The **Comptroller** must determine whether a company has satisfied the applicable economic substance requirements for any **relevant activity** carried on by it in a **financial period**.

To allow the **Comptroller** to do so, a company must file an annual tax return online which provides information that addresses the applicable economic substance requirements for each **relevant activity**.

The information which a company must provided in its tax return, includes:

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- each **relevant activity** carried on by it;
- its gross income from each **relevant activity**;
- the operating expenditure incurred by it on each **relevant activity**;
- its **CIGA**s for each **relevant activity**;
- details of its premises in Jersey;
- the number of board meetings held at which a quorum was present in Jersey; and
- the number of its qualified employees in Jersey.

A tax return must be accompanied by a copy of the company's financial statements for the relevant **financial period**.

A company must provide the **Comptroller** with any information reasonably required by the **Comptroller** to assess whether it has complied with the applicable economic substance requirements.

Sanctions

The **Substance Law** imposes a number of penalties for failure to comply with its requirements. For more information on this topic, see our guide *Enforcement and sanctions regime*.

Terms used

CIGA means a core income generating activity.

Comptroller means the Jersey Comptroller of Revenue.

distribution and service centre business means the business of:

- purchasing from **foreign connected persons**:
  - component parts or materials for goods; or
  - goods ready for sale,

and reselling those component parts, materials or goods; or

- providing services to **foreign connected persons** in connection with the business,

but does not include any activity included in any other **relevant activity** except holding company business.

financial period means a period of up to 18 months for which a company's financial statements are prepared.

foreign connected person means a person who is:

- not resident or regarded as resident in Jersey; and

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- connected with a **tax resident company**.

For this purpose a company is *connected* with:

- another company if:
  - the same person has control of both companies;
  - a person has control of one company and persons connected with that person or that person and persons connected with that person have control of the other; or
  - each company is controlled by a group of two or more persons and each group consists of the same persons or could be regarded as consisting of the same persons by treating any member of either group as replaced by a person with whom the member is connected; and
- another person if that other person has control of it or if that other person and persons connected with that person together have control of it.

Guidance means the documents entitled:

- *Key aspects in relation to the economic substance requirements, as issued by Guernsey, Isle of Man and Jersey,* version 2 dated 21 December 2018; and
- *Guidance on aspects in relation to the economic substance requirements issued by Guernsey, Isle of Man and Jersey*, version 2 dated 22 November 2019.

OFC means an offshore financial centre.

relevant activity means banking business, **distribution and service centre business**, fund management business, finance and leasing business, headquarters business, holding company business, intellectual property holding business, insurance business or shipping business.

Substance Law means the Taxation (Companies – Economic Substance) (Jersey) Law 2019.

substance requirements means the requirements of the ***Substance Law*** that apply to **distribution and service centre business** which are set out under the paragraph headed *Substance requirements* above.

Tax Law means the Income Tax (Jersey) Law 1961.

tax resident company means a Jersey company that is regarded as tax resident in Jersey under the **Tax Law**. A Jersey company is regarded as tax resident in Jersey under the **Tax Law** unless:

- its business is centrally managed and controlled outside Jersey in a jurisdiction where the highest rate at which any company may be charged to tax on any part of its income is 10% or higher; and
- the company is resident for tax purposes in that jurisdiction.

About this guide

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About this series

This guide is part of our series *Let's talk about Jersey economic substance* which looks at aspects of Jersey's economic substance regime. The other guides in this series can be found in the Latest thinking section of our website.

About Collas Crill

We are a leading offshore law firm. We are easy to do business with and give practical advice to overcome tough challenges. Through our network of offices, we practise British Virgin Islands, Cayman Islands, Guernsey and Jersey law.

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