

STATES OF JERSEY



DRAFT TAXATION (COMPANIES – ECONOMIC SUBSTANCE) (JERSEY) LAW 201-

**Lodged au Greffe on 23rd October 2018
by the Minister for External Relations**

STATES GREFFE



Jersey

DRAFT TAXATION (COMPANIES – ECONOMIC SUBSTANCE) (JERSEY) LAW 201-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Minister for External Relations has made the following statement –

In the view of the Minister for External Relations, the provisions of the Draft Taxation (Companies – Economic Substance (Jersey) Law 201- are compatible with the Convention Rights.

Signed: **Senator I.J. Gorst**

Minister for External Relations

Dated: 19th October 2018

REPORT

The Draft Taxation (Companies – Economic Substance) (Jersey) Law 201- provides the means by which the commitments of the Government of Jersey to address the concerns of the EU Code of Conduct Group (Business Taxation) (“COCG”) regarding economic substance are met.

On 1 December 1997, the Council of the European Union adopted a resolution on a Code of Conduct for business taxation with the objective to curb harmful tax competition^[1]. In 1998 the COCG was set up to assess tax measures and regimes that may fall within the scope of the Code of Conduct for business taxation.

In 2017 the COCG investigated the tax policies of countries, in and out of, the European Union (EU) to reinforce global standards on tax matters. As part of the associated screening process jurisdictions were assessed against the following tax good governance criteria^[2] –

- tax transparency,
- fair taxation, and
- implementation of anti-BEPS measures^[3].

No concerns were raised by the COCG regarding Jersey’s standards of tax transparency and implementation of anti-BEPS measures.

Jersey was also regarded by the EU as fully compliant with the general principles of “fair taxation” as its business tax regime had been assessed against the Code of Conduct for business taxation and determined non-harmful in 2011.

As part of the screening process, jurisdictions with low or zero rates of corporate income tax were also assessed against “criterion 2.2” (under the “fair taxation” heading) which states:

“The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction.”

Following this screening process the COCG expressed concerns about Jersey’s possible compliance with the criteria regarding a “legal substance requirement for entities doing business in or through the jurisdiction”. The COCG recognised substance requirements in respect of regulated entities but were concerned the absence of a clear general statutory requirement “increases the risk that profits registered in a jurisdiction are not commensurate with economic activities and substantial economic presence”.

In response, Jersey made a political commitment to address these concerns by the end of December 2018. The Chief Minister made a statement to the States Assembly in

^[1] Further information on the Code of Conduct for business taxation can be found here:

https://ec.europa.eu/taxation_customs/business/company-tax/harmful-tax-competition_en

^[2] Full detail of the tax good governance criteria can be found here:

<http://data.consilium.europa.eu/doc/document/ST-14166-2016-INIT/en/pdf>

^[3] Anti-BEPS (Base Erosion Profit Shifting) measures are measures aimed at addressing tax planning strategies of multinational companies that rely on mismatches and gaps between the tax rules of different jurisdictions.

December 2017 updating States Members and providing a copy of the letter sent to the Chair of the COCG containing the commitment made by the Government of Jersey^[4].

Jersey was placed in “Annex II” of the list of jurisdictions produced by the COCG for the EU Economic and Financial Affairs Council (ECOFIN) in December 2017^[5]. Annex II lists jurisdictions that were identified as raising concerns but had made appropriate commitments to address and resolve them. Within Annex II, Jersey is listed under criterion 2.2, which states that the jurisdiction committed to address concerns relating to the economic substance of companies tax resident in Jersey.

Identical concerns were raised in respect of Guernsey and the Isle of Man, and so the Crown Dependencies have been working closely together to develop legislative proposals which aim to meet the commitment.

In response to requests from the Government of Jersey (and other jurisdictions in respect of which the EU had raised concerns under criterion 2.2) for technical guidance on how to comply with criterion 2.2, on 22 June 2018 the COCG published a Scoping Paper on criterion 2.2^[6] (“the Scoping Paper”).

The Government of Jersey has also engaged closely with the OECD through the Global Forum on Transparency and Exchange of Information for Tax Purposes, the Inclusive Framework on BEPS and a specific voluntary group established to progress discussions on the issue of economic substance. This is particularly relevant as the Scoping Paper broadly asserts “that those expected substance requirements should mirror those used in the [OECD’s] Forum on Harmful Tax Practices (FHTP) in the context of preferential regimes”.

The FHTP guidance on substance requirements in the context of preferential regimes can be found in the “Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 – 2015 Final Report”^[7] and the “Harmful Tax Practices – 2017 Progress Report on Preferential Regimes”^[8].

In partnership with the Crown Dependencies, the Government of Jersey has entered into dialogue with the European Commission (Taxation and Customs Union – TAX UD) and the COCG, both in plenary sessions (with other jurisdictions) and bilateral meetings. Discussions have also taken place with individual EU Member States (this work being co-ordinated by the Channel Islands Brussels Office) and with the OECD Global Forum and the FHTP.

With reference to the Scoping Paper, outline proposals were developed in partnership with the Crown Dependencies to address the concerns of the COCG, consisting of 3 distinct stages –

^[4] See:

<https://statesassembly.gov.je/assemblystatements/2017/2017.12.11%20chief%20minister%20-%20eu%20'blacklist'%20of%20non-cooperative%20jurisdictions%20for%20tax%20purposes%20consolidated.pdf>

^[5] See: <http://data.consilium.europa.eu/doc/document/ST-15429-2017-INIT/en/pdf>. A consolidated and up-to-date version of the report is available at:

http://www.consilium.europa.eu/media/35567/st_6236_2018_rev_3_en_pdf

^[6] See Annex 4 (pages 45-54) of this document:

<http://data.consilium.europa.eu/doc/document/ST-9637-2018-INIT/en/pdf>

^[7] See: <http://www.oecd.org/tax/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance-action-5-2015-final-report-9789264241190-en.htm>

^[8] See: <http://www.oecd.org/tax/beps/harmful-tax-practices-2017-progress-report-on-preferential-regimes-9789264283954-en.htm>

- Stage 1: identify companies carrying on relevant activities
- Stage 2: impose substance requirements on companies undertaking relevant activities
- Stage 3: enforce the substance requirements.

Consistent with the Scoping Paper, the term “relevant activities” being defined by reference to the geographically mobile activities identified by the FHTP as within the scope of their work.

In August, the Government of Jersey issued a consultation document entitled “Consultation on the introduction of substance requirements for companies tax resident in Jersey”^[9], which summarised Jersey’s outline proposal regarding the introduction of substance requirements and sought feedback from interested parties.

There were 35 responses, 25 from corporate groups, 4 from individuals, and 6 from Industry Groupings. The consultation suggests that industry perceives that good corporate governance in Jersey, and high professional standards means that most companies within scope of the substance requirements will be able to demonstrate they meet the substance requirements.

Following the conclusion of the consultation and further discussions with the COCG, the Draft Taxation (Companies – Economic Substance) (Jersey) Law 201- (“the draft legislation”) has been prepared. The draft legislation is broadly consistent with the outline proposals reflected in the consultation document, and reflecting feedback from the COCG.

The Explanatory Note following this Report outlines the provisions of the draft legislation in detail; however, the key elements are –

- Article 5 – outlines the scope and the component elements of the economic substance test
- Article 8 – outlines the circumstances in which the Comptroller will exchange information obtained in relation to economic substance with other jurisdictions
- Article 9 – outlines the sanctions which will be applied where a company is determined to have failed the economic substance test (including, by virtue of Article 19, the ability for the Minister for Treasury and Resources ultimately to request the Royal Court to strike-off the company).

In advance of the debate on the draft legislation, the Comptroller will also release elements of the guidance notes to aid understanding and start to explain how the draft legislation will operate in practice.

Financial and manpower implications

Administration of the Economic Substance Law by the Taxes Office will require a sum of £50,000 in 2019 for systems upgrades. Further resources in terms of staff costs will also be needed from 2020 onwards in order to build a team within the Taxes Office focussed on compliance activities around Economic Substance; this figure has yet to be finalised but will be determined and included within the expenditure plans shown in the Government Plan.

^[9] See:

<https://www.gov.je/Government/Consultations/Documents/Consultation%20on%20the%20in%20roduction%20of%20substance%20requirements%20for%20companies%20tax%20resident%20in%20Jersey.pdf>

Human Rights

The notes on the human rights aspects of the draft Law in the **Appendix** have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

APPENDIX TO REPORT

Human Rights Notes on the Draft Taxation (Companies – Economic Substance) (Jersey) Law 201-

These Notes have been prepared in respect of the Draft Taxation (Companies – Economic Substance) (Jersey) Law 201- (the “draft Law”) by the Law Officers’ Department. They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers’ opinion, the draft Law is compatible with the European Convention on Human Rights (“ECHR”).

These Notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

The draft Law requires that those who conduct certain defined activities in Jersey should have economic substance in Jersey. The reason is to prevent blacklisting by the European Union as part of its Code Group process. The long-term effect is to regulate economic activity in Jersey and, through removal from the Companies register, prevent such activity by those who do not have economic substance. It is a matter of regulating how certain economic undertakings must conduct themselves in Jersey. Regulatory requirements affect property rights (Article 1 of Protocol 1 to the European Convention on Human Rights). Such regulation invariably involves privacy rights (Article 8 of the Convention) as information must be obtained, and may, where there is a lack of economic substance, be provided to relevant foreign competent authorities.

However, whilst the draft Law address a new subject, it follows established norms of investigation and provision of information. There is nothing in terms of its mechanics to established international tax co-operation procedures, it is bringing equivalent mechanics to the area of economic substance. Similarly, saying that for a company to be carrying out defined activity in Jersey it must meet economic substance activity, is no different conceptually to requirements in the Financial Services (Jersey) Law 1998 for regulated businesses to have a “principal person” in Jersey. It is to say that a company cannot do X unless it conforms to requirement Y. Human rights law does not pretend to lay down codes of economic regulation, and providing that there is a “fair balance”, A1P1 is satisfied. That is clearly the case here, particularly considering the economic imperatives of the EU Code Group process.

It should be noted that in all areas where the Jersey authorities will use police powers (i.e. penalties to support obtaining information, penalties for failing to meet regulatory requirements) there are appropriate rights of appeal. Where offences are created, they are subject to the ordinary law.

I note that legal professional privilege is not dealt with specifically. By reason of the rule of construction set out by the House of Lords in *R v Special Commissioner, ex p. Morgan Grenfell*, it is unnecessary to make special provision for legal professional privilege.

Explanatory Note

This Law makes provision for imposing an economic substance test on certain Jersey companies and for determining whether the test is met by assessing the extent of certain activities carried out in Jersey by such companies and taking appropriate enforcement action where necessary.

Articles 1 to 4 are interpretation provisions. In particular they define various types of business: “banking business”; “finance and leasing business”; “fund management business”; “headquarters business”; “holding company business”; “insurance business”; “intellectual property holding business”; “shipping business” and “distribution and service centre business”. These businesses are referred to in this Law as “relevant activities”. Particular activities included within each of these definitions that are carried on in or from Jersey are referred to in this Law as “Jersey core income-generating activities”. A “resident company”, that is, a company regarded as resident in Jersey under Article 123 of the Income Tax (Jersey) Law 1961 (“1961 Law”), which undertakes any of these relevant activities is subject to the “economic substance test” in *Article 5*.

Article 5 provides that the economic test must be met by a resident company and sets out how the economic substance test is met in relation to relevant activities. The test is met if there takes place in Jersey an adequate level of certain activities relating to direction and management; if there are an adequate number of people working in Jersey; if there is adequate expenditure incurred in Jersey; if there are adequate physical assets in Jersey and if the resident company conducts Jersey core-income generating activity.

Article 6 makes provision for the Comptroller of Taxes to determine that a resident company has not met the economic substance test for a financial period of the company starting after 1st January 2019.

Article 7 requires a resident company to provide the Comptroller with any information the Comptroller requires to determine whether the economic substance test has been met.

Article 8 requires the Comptroller to provide information provided under *Article 7* to the competent authority in the European Union in which resides a holding body, ultimate holding body or ultimate beneficial owner, of any resident company in relation to which the Comptroller has determined that the economic substance has not been met. In the case of a “high risk IP company” however, the information must be provided to such a competent authority for each financial period starting on or after 1st January 2019, regardless of whether or not the economic substance test has been met. A “high risk IP company” is defined in *Article 1*. Essentially it means a company carrying on the business of holding intellectual property assets for the purpose of generating income from them where such assets have not been created by it and the income is generated in conjunction with “foreign connected persons”, that is persons who are not resident in Jersey and “connected” to the resident company within the meaning of the 1961 Law. It also includes a company which holds intellectual property assets but there are no research and development, marketing or distribution activities conducted in Jersey in relation to those assets.

Article 9 requires the Comptroller to impose a penalty on a resident company which the Comptroller has determined has failed to meet the economic substance test. The penalty may be such amount as is determined by the Comptroller up to £10,000. If the resident company fails to meet the economic substance test for a further financial

period, the Comptroller must impose a further penalty (in addition to the penalty previously imposed) of up to £100,000.

Article 10 sets out a maximum penalty of £3,000 to which a person is liable for failing to provide information that the person is required to provide under *Article 7* or for knowingly providing inaccurate information to the Comptroller.

Article 11 makes provision for the Comptroller to determine the amount of penalty to which a person is liable under *Article 10* and to impose it on the person.

Article 12 sets out a right of appeal against a penalty on the ground that liability does not arise. It also provides for a person to appeal against its amount.

Article 13 makes provision for a Commission of Appeal under the 1961 Law to be constituted to hear an appeal under *Article 12*.

Article 14 requires a penalty to be paid within 30 days from the date it is due, or if later, the date that any appeal is determined or withdrawn.

Article 15 makes provision so that the Comptroller's power to disclose information under *Article 8* is not affected by any confidentiality obligation arising elsewhere, whether by statute, contract or otherwise.

Article 16 makes provision for persons authorized by the Comptroller to enter business premises for the purpose of investigating compliance with any provision of this Law.

Article 17 makes provision for offences and penalties relating to a person who obstructs or fails to assist an authorized person acting under *Article 16*.

Article 18 allows the States to amend, by Regulations, any of the definitions in Articles 1 to 5 and any of the Articles relating to penalties (*Articles 9 to 14*).

Article 19 amends the Companies (Jersey) Law 1991 ("1991 Law"). New Article 143A is inserted in that Law to enable the Minister for Treasury and Resources, after receiving a report from the Comptroller under *Article 9* of this Law that a company has not met the economic substance test, to apply to the court. New Article 143B allows the court, following such an application, to make such order as it thinks fit for the purpose of requiring the company to meet the test, including regulating the conduct of the company's affairs or requiring the company to take any particular action. The 1991 Law is further amended to allow the court to wind up a company following an application for the purpose by the Minister for Treasury and Resources following a report from the Comptroller to the Minister under *Article 9* of this Law.

Article 20 sets out the title of this Law and provides that it comes into force on 1st January 2019.



Jersey

DRAFT TAXATION (COMPANIES – ECONOMIC SUBSTANCE) (JERSEY) LAW 201-

Arrangement

Article

1	Interpretation	13
2	Meaning of “finance and leasing business”	17
3	Meaning of relevant activities	17
4	Meaning of “Jersey core income-generating activities”	18
5	Requirement to meet economic substance test	19
6	Assessment of whether economic substance test is met	20
7	Requirement to provide information	20
8	Exchange of information to competent authorities	21
9	Penalties where the economic substance test is not met	21
10	Penalties for failure to provide information or for inaccurate information	22
11	Imposition of penalties for failure to provide information or for inaccurate information	23
12	Right of appeal against penalty	23
13	Commission of Appeal and procedure on appeal against penalty	23
14	Enforcement of penalties	24
15	Confidentiality	24
16	Power to enter business premises and examine business documents	24
17	Obstructing an authorized person	25
18	Regulations and consequential amendments	25
19	Companies (Jersey) Law 1991 amended	25
20	Citation and commencement	26



Jersey

DRAFT TAXATION (COMPANIES – ECONOMIC SUBSTANCE) (JERSEY) LAW 201-

A LAW to make provision for imposing an economic substance test on Jersey resident companies and for determining whether the test is met by assessing the extent of certain relevant activities carried out by such companies and taking appropriate enforcement action.

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Interpretation

In this Law –

“1961 Law” means the Income Tax (Jersey) Law 1961¹;

“authorized person” means the Comptroller or any person authorized by the Comptroller to perform functions under Article 17;

“banking business” means, in respect of a resident company, a deposit taking business which the resident company must be registered to carry on under Article 9 of the Banking Business (Jersey) Law 1991²;

“business document” means any document –

- (a) that relates to the carrying on of a business, trade, profession or vocation by any person; and
- (b) that forms part of any record under any enactment;

“business premises” means premises used in connection with the carrying on of a business, trade, profession or vocation;

“Commission” means a Commission of Appeal constituted under Article 13(3);

“competent authority”, in respect of a country or territory other than Jersey, means the authority designated in or for the purposes of an

approved agreement or an approved obligation within the meaning of the Taxation (Implementation) (Jersey) Law 2004³;

“Comptroller” means the Comptroller of Taxes;

“connected person” in relation to a resident company, has the same meaning as in Article 3A of the Income Tax (Jersey) Law 1961⁴;

“deposit-taking business” has the meaning in Article 3 of the Banking Business (Jersey) Law 1991⁵;

“distribution and service centre business” means the business of either or both of the following –

- (a) purchasing from foreign connected persons –
 - (i) component parts or materials for goods, or
 - (ii) goods ready for sale; andreselling such component parts, materials or goods;
- (b) 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;

“finance and leasing business” has the meaning given by Article 2;

“financial period” has the same meaning as in Article 4A of the 1961 Law;

“foreign connected person” means a person connected with a resident company, such person not being resident or regarded as resident in Jersey;

“fund management business” means –

- (a) the business of being a functionary who –
 - (i) is required to hold a permit under the Collective Investment Funds (Jersey) Law 1988⁶ to carry on that business, and
 - (ii) is a manager or an investment manager as referred to in Group 2 in Part 2 of the Schedule to that Law; or
- (b) the business of a person who is required to be registered under the Financial Services (Jersey) Law 1998 to carry on fund services business and is any of the following –
 - (i) a manager or investment manager as referred to in Article 2(10)(a) of that Law,
 - (ii) a trustee as referred to in Article 2(10)(c) of that Law, except where a separate manager has been appointed to the unclassified fund or unregulated fund,
 - (iii) a member of a partnership as referred to in Article 2(10)(d) of that Law, except where a separate manager has been appointed to the unclassified fund or unregulated fund;
- (c) a person carrying on a business by virtue of which the activities of a company are excluded from fund services business under the Financial Services (Jersey) Law 1998⁷ by virtue of Article 3 and paragraph 21 of Schedule 2 to that Law;

- (d) the business of being a person who is the equivalent of a person referred to in paragraph (b) or (c) in respect of a fund which would be a scheme falling within the definition of “collective investment fund” in Article 3 of the Collective Investment Funds (Jersey) Law 1988⁸ except that the offer of units in the scheme or arrangement is not an offer to the public within the meaning of that Article;

“headquarters business” means the business of providing any of the following services to one or more foreign connected persons of the resident company –

- (a) the provision of senior management;
- (b) the assumption or control of material risk for activities carried out by, or assets owned by, any of those connected persons;
- (c) the provision of substantive advice in connection with the assumption or control of risk referred to in paragraph (b),

but does not include anything falling within the definition of financing and leasing business, intellectual property holding business, insurance business, or banking business;

“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 in an intellectual property asset which it holds for the purposes of its business,
- (ii) acquired the intellectual property asset –
- (A) from a connected person, or
- (B) in consideration for funding research and development by another person situated in a country or territory other than Jersey; and
- (iii) licences the intellectual property asset 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 core-income generating activities;

“holding body” has the same meaning as in Article 2 of the Companies (Jersey) Law 1991⁹;

“holding company” means a resident company which –

- (a) is a holding body;
- (b) has as its primary function the acquisition and holding of shares or equitable interests in other companies; and
- (c) does not carry on any commercial activity;

“holding company business” means the business of being a holding company;

“income” in respect of an intellectual property asset includes –

- (a) royalties;
- (b) income from a franchise agreement; and
- (c) income from licensing the intangible asset;

“insurance business” means, in respect of a resident company, long-term business or general business within the meaning of Article 1 of the Insurance Business (Jersey) Law 1996¹⁰ which the resident company must be authorized to carry on by a category A permit or category B permit under that Law;

“intellectual property holding business” means the business of holding intellectual property assets;

“intellectual property asset” means any intellectual property right in intangible assets, including but not limited to copyright, patents, trade marks, brand, and technical know-how, from which identifiable income accrues to the business (such income being separately identifiable from any income generated from any tangible asset in which the right subsists);

“Jersey core income-generating activity” has the meaning given by Article 4;

“Minister” means the Minister for Treasury and Resources;

“registrar of companies” or “registrar” has the same meaning as in Article 1 of the Companies (Jersey) Law 1991¹¹;

“relevant activities” has the meaning given in Article 3;

“resident company” means a company regarded as resident in Jersey under Article 123 of the 1961 Law;

“ship” has the same meaning as in Article 1 of the Shipping (Jersey) Law 2002¹² but does not include –

- (a) a fishing vessel (as defined by that Article);
- (b) a ship to the extent that it is used as a pleasure vessel (as defined by Article 169(6) of that Law); or
- (c) a small ship (within the meaning of Article 1 of that Law);

“shipping business” means 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 –

- (a) the business of transporting, by sea, persons, animals, goods or mail;
- (b) the renting or chartering of ships for the purpose described in paragraph (a);
- (c) the sale of travel tickets or equivalent, and ancillary services connected with the operation of a ship;
- (d) 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;
- (e) the management of the crew of a ship;

“ultimate beneficial owner” means an individual who owns 25% or more of the share capital of a company including an individual deemed to own shares in the circumstances set out in sub-paragraphs (a) and (b) of paragraph (1) of Article 82A of the Income Tax (Jersey) Law 1961¹³.

2 Meaning of “finance and leasing business”

- (1) In this Law “finance and leasing business” means the business of providing credit facilities of any kind for consideration.
- (2) For the purposes of paragraph (1) but without limiting the generality of that paragraph –
 - (a) consideration may include consideration by way of interest;
 - (b) 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.
- (3) Where an advance or credit repayable by a customer to a person is assigned to another person, that other person is deemed to be providing the credit facility for the purposes of paragraph (1).
- (4) Any activity falling within the definition of “banking business”, “fund management business” or “insurance business” is excluded from the definition in paragraph (1).

3 Meaning of relevant activities

- (1) In this Law “relevant activities” mean any of the following activities –
 - (a) banking business;
 - (b) insurance business;
 - (c) fund management business;
 - (d) finance and leasing business;
 - (e) headquarters business;
 - (f) shipping business;
 - (g) holding company business;
 - (h) intellectual property holding business;
 - (i) distribution and service centre business.
- (2) For the purposes of paragraph (1)(a), banking business does not include banking business carried on by a company which the Jersey Financial Services Commission is satisfied is registered under the Banking Business (Jersey) Law 1991¹⁴ solely for business continuity and liable to pay a reduced annual fee accordingly under the Commission’s published fees under Article 15 of the Financial Services Commission (Jersey) Law 1998¹⁵.

4 Meaning of “Jersey core income-generating activities”

The expression “Jersey core income-generating activities” means relevant activities being carried on from within Jersey and includes –

- (a) in respect of banking business –
 - (i) raising funds, managing risk including credit, currency and interest risk,
 - (ii) taking hedging positions,
 - (iii) providing loans, credit or other financial services to customers,
 - (iv) managing capital and preparing reports and returns to the Jersey Financial Services Commission or any body or entity with equivalent functions relating to the supervision or regulation of such business;
- (b) in respect of insurance business –
 - (i) predicting and calculating risk,
 - (ii) insuring or re-insuring against risk and providing insurance business services to clients;
- (c) in respect of fund management business –
 - (i) taking decisions on the holding and selling of investments,
 - (ii) calculating risk and reserves,
 - (iii) taking decisions on currency or interest fluctuations and hedging positions,
 - (iv) preparing reports and returns to investors and the Jersey Financial Services Commission or any body or entity with equivalent functions relating to the supervision or regulation of such business;
- (d) in respect of finance and leasing business –
 - (i) agreeing funding terms,
 - (ii) identifying and acquiring assets to be leased (in the case of leasing),
 - (iii) setting the terms and duration of any financing or leasing,
 - (iv) monitoring and revising any agreements,
 - (v) managing any risks;
- (e) in respect of headquarters business –
 - (i) taking relevant management decisions,
 - (ii) incurring expenditures on behalf of group entities,
 - (iii) co-ordinating group activities;
- (f) in respect of shipping business –
 - (i) managing crew (including hiring, paying and overseeing crew members),
 - (ii) overhauling and maintaining ships,
 - (iii) overseeing and tracking deliveries,
 - (iv) determining what goods to order and when to deliver them, organising and overseeing voyages;

- (g) in respect of holding company business, all activities related to that business;
- (h) in respect of intellectual property holding business –
 - (i) taking strategic decisions and managing (as well as bearing) the principal risks related to development and subsequent exploitation of the intangible 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 intangible asset,
 - (iii) carrying on the underlying trading activities through which the intangible assets are exploited leading to the generation of revenue from third parties,
 - (iv) research and development, branding or distribution;
- (i) in respect of distribution and service centre business –
 - (i) transporting and storing goods, components and materials,
 - (ii) managing stocks,
 - (iii) taking orders,
 - (iv) providing consulting or other administrative services.

5 Requirement to meet economic substance test

- (1) Subject to paragraph (8), a resident company must satisfy the economic substance test in relation to any relevant activity carried on by it.
- (2) A resident company meets the economic substance test in relation to a relevant activity if –
 - (a) the company is directed and managed in Jersey in relation to that activity;
 - (b) having regard to the level of relevant activity carried on in Jersey –
 - (i) 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 and whether on temporary or long-term contracts),
 - (ii) there is adequate expenditure incurred in Jersey, and
 - (iii) there are adequate physical assets in Jersey;
 - (c) the company conducts Jersey core-income generating activity; and
 - (d) in the case of Jersey core-income generating activity carried out for the relevant company by another entity, it is able to monitor and control the carrying out of that activity by the other entity.
- (3) The test in paragraph (2)(a) is satisfied if –
 - (a) the company's board of directors meets in Jersey at an adequate frequency having regard to the amount of decision-making required at that level;
 - (b) at such board meetings described in sub-paragraph (a), there is a quorum of directors physically present in Jersey;

-
- (c) the minutes of such board meetings described in sub-paragraph (a) record the making of strategic decisions of the company at the meeting;
 - (d) the directors of the company have the necessary knowledge and expertise to discharge the duties of the board; and
 - (e) the minutes of all board meetings and the records of the company are kept in Jersey.
- (4) The Comptroller may issue guidance on how the economic substance test may be met, including without prejudice to the generality of the foregoing, any expression used in this Article for the purpose of that test, including the meaning of “adequate”.
- (5) Regard must be had to any guidance under paragraph (4) concerning the interpretation of any expression.
- (6) The Comptroller may revise guidance issued under paragraph (4) from time to time and a reference to guidance includes a reference to revised guidance.
- (7) Guidance issued under paragraph (4) must be published by the Comptroller in a manner which the Comptroller considers will bring it to the attention of those most likely to be affected by it.
- (8) A resident company is not required to meet the economic substance test if it has no gross income in relation to a relevant activity carried on by it.

6 Assessment of whether economic substance test is met

- (1) The Comptroller may determine that a resident company has not met the economic substance test during any financial period of the company starting on or after 1st January 2019, provided that such determination is made no later than 6 years after the end of the financial period to which the determination relates.
- (2) Paragraph (1) does not apply if the Comptroller is not able to make a determination within the 6 year period by reason of any deliberate misrepresentation or negligent or fraudulent action by the resident company or by any other person.
- (3) In relation to a high risk IP company, for the purposes of paragraph (1) the Comptroller must determine that the economic substance test is not met during a financial period unless the company provides sufficient information to satisfy the Comptroller that the test is met.

7 Requirement to provide information

- (1) A resident company must provide any information reasonably required by the Comptroller in order to assist the Comptroller in making a determination under Article 6.
- (2) The Comptroller may serve notice on any person requiring the person to provide, within the period specified in the notice and at such place as is specified in the notice, such documents and information as the

Comptroller may reasonably require for the purpose of facilitating the Comptroller's exercise of functions under this Law.

8 Exchange of information to competent authorities

- (1) Subject to paragraph (2), if the Comptroller determines under Article 6 that a resident company has not met the economic substance test for a financial period, the Comptroller must provide the information provided under Article 7 relating to that company for that period to –
 - (a) the competent authority of the country or territory in the European Union in which resides –
 - (i) a holding body,
 - (ii) the ultimate holding body of the resident company, and
 - (iii) an ultimate beneficial owner; and
 - (b) if the resident company is incorporated outside Jersey, the competent authority of the country or territory in which the resident company is incorporated.
- (2) In respect of a high risk IP company, regardless of whether or not the Comptroller has made a determination under Article 6 in respect of it, the Comptroller must provide the information provided to the Comptroller under Article 7 in respect of that company for each financial period of the company starting on or after 1st January 2019 to –
 - (a) the competent authority of the country or territory in the European Union in which resides –
 - (i) a holding body,
 - (ii) the ultimate holding body of the resident company, and
 - (iii) an ultimate beneficial owner; and
 - (b) if the high risk IP company is incorporated outside Jersey, the competent authority of the country or territory in which the company is incorporated.

9 Penalties where the economic substance test is not met

- (1) If the Comptroller determines under Article 6 that a resident company has failed to meet the economic substance test for a financial period, the Comptroller must issue a notice to the company notifying it –
 - (a) that the Comptroller has determined that the resident company does not meet the economic substance test for that period;
 - (b) of the reasons for that determination;
 - (c) of the amount of penalty imposed on the company under paragraph (2);
 - (d) of the date from which the penalty under paragraph (2) is due, being not less than 28 days after the issue of the notice;
 - (e) of what action the Comptroller considers should be taken by the company to meet the economic substance test; and

-
- (f) of the company's right of appeal under Article 12.
 - (2) The amount of penalty referred to in paragraph (2)(c) is such amount as is determined by the Comptroller subject to a maximum penalty of £10,000.
 - (3) If, for the financial period following a financial period in which a notice was issued under paragraph (1) ("further financial period"), the Comptroller determines the resident company has failed to meet the economic substance test, the Comptroller must issue a further notice to the resident company notifying it –
 - (a) that the Comptroller has determined that the resident company does not meet the economic substance test for the further financial period;
 - (b) of the reasons for the determination;
 - (c) of the amount of penalty imposed on the company under paragraph (4) (in addition to the penalty previously imposed under paragraph (1));
 - (d) of the date from which the penalty under paragraph (4) is due, being not less than 30 days after the issue of the notice;
 - (e) that the Comptroller may make a report to the Minister under paragraph (5);
 - (f) of what action the Comptroller considers should be taken by the company to meet the economic substance test; and
 - (g) of the company's right of appeal under Article 12.
 - (4) The amount of penalty referred to in paragraph (2)(c) is such amount as is determined by the Comptroller subject to a maximum penalty of £100,000.
 - (5) Following the issue of a notice under paragraph (2), the Comptroller may provide the Minister with a report of the matters referred to in that notice together with any additional information (whether or not provided to the Comptroller under Article 7).

10 Penalties for failure to provide information or for inaccurate information

- (1) A person is liable to a penalty not exceeding £3,000 if the person fails to provide information that the person is required to provide under Article 7.
- (2) A person is liable to a penalty not exceeding £3,000 if –
 - (a) in complying with a requirement under Article 7 the person provides inaccurate information; and
 - (b) condition A or B is met.
- (3) Condition A is that the person knows of the inaccuracy at the time the information is provided but does not inform the Comptroller at that time.
- (4) Condition B is that the person –
 - (a) discovers the inaccuracy after the information is provided to the Comptroller; and
 - (b) fails to take reasonable steps to inform the Comptroller.

- (5) Liability to a penalty under this Article does not arise if the person satisfies the Comptroller or (on an appeal under Article 12), the Commission, that there is a reasonable excuse for the failure.
- (6) If a person had a reasonable excuse for a failure but the excuse has ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse has ceased.

11 Imposition of penalties for failure to provide information or for inaccurate information

- (1) If a person becomes liable to a penalty under Article 10 the Comptroller may determine the amount of penalty and impose it on the person.
- (2) If the Comptroller imposes a penalty, the Comptroller must notify the person –
 - (a) of the reasons for imposing the penalty;
 - (b) of the amount of penalty imposed on the person;
 - (c) the date from which the penalty is due, being not less than 28 days after the issue of the notice; and
 - (d) of the person's right of appeal under Article 12.
- (3) A penalty under this Article may only be imposed within the period of 6 years beginning with the date on which the person became liable to the penalty and, in the case of a person liable to a penalty under Article 10(2), within the period of 12 months beginning with the date on which the inaccuracy first came to the attention of the Comptroller.

12 Right of appeal against penalty

A person upon whom a penalty is imposed by the Comptroller may –

- (a) appeal against it on the ground that liability to that penalty does not arise; and
- (b) appeal against its amount.

13 Commission of Appeal and procedure on appeal against penalty

- (1) Notice of an appeal under Article 12 must be given to the Comptroller –
 - (a) in writing; and
 - (b) before the end of the period of 30 days beginning with the date on which notification to the person under Article 9 or 11 was given.
- (2) The notice under paragraph (1) must state the ground of appeal.
- (3) The Comptroller shall notify the Commission of an appeal under Article 12.
- (4) A Commission of Appeal shall be constituted for the purpose of hearing an appeal under Article 12 as it would be constituted from the

Commissioners of Appeal appointed under Article 10(1) of the 1961 Law for the purpose of hearing appeals under the 1961 Law.

- (5) On an appeal under Article 12(1), the Commission may confirm or cancel the penalty.
- (6) On an appeal under Article 12(2), the Commission may –
 - (a) confirm the penalty; or
 - (b) substitute another amount for the penalty which the Comptroller would have power to impose.
- (7) Subject to this Article and Article 14, the provisions of Part 6 of the 1961 Law shall have effect in relation to appeals under Article 12 as they have effect in relation to an appeal against an assessment to income tax.

14 Enforcement of penalties

- (1) A penalty under this Law must be paid before the end of the period of 30 days beginning with the date mentioned in paragraph (2).
- (2) That date is the later of –
 - (a) the date from which the penalty is due under Article 9(1)(d) or 11(2)(c); or
 - (b) if notice of appeal under Article 12 is given, the date on which the appeal is finally determined or withdrawn.
- (3) A penalty under this Law may be enforced as if it were income tax charged in an assessment and due and payable.

15 Confidentiality

- (1) The Comptroller's power to disclose information under Article 8 has effect despite any obligation as to confidentiality or other restriction on the disclosure of information imposed by statute, contract or otherwise.
- (2) Disclosure of information under this Law does not breach –
 - (a) any obligation of confidentiality in relation to the information so disclosed; or
 - (b) any other restriction on the access to or disclosure of the information so accessed.

16 Power to enter business premises and examine business documents

- (1) An authorized person may examine and take copies of any business document that is located on business premises.
- (2) The power under paragraph (1) may be exercised only for the purpose of investigating any issue relating to compliance with any provision of this Law.
- (3) An authorized person may at any reasonable hour enter business premises for the purpose of exercising the power under paragraph (1).

- (4) An authorized person may by notice require any person to produce any specified business document at the business premises where the business document is located for the purpose of enabling the authorized person to exercise the power under paragraph (1) in relation to that document.

17 Obstructing an authorized person

- (1) A person is guilty of an offence if, without reasonable excuse, the person –
- (a) obstructs an authorized person in the exercise of the authorized person’s powers under Article 16; or
 - (b) fails to provide such reasonable assistance as an authorized person may require when the authorized person is exercising his or her powers under Article 16.
- (2) A person who intentionally alters, suppresses or destroys any business document that has been specified in a notice under Article 7(2) is guilty of an offence.
- (3) A person who is guilty of an offence under paragraph (1) is liable to imprisonment for a term of 6 months and to a fine.
- (4) A person who is guilty of an offence under paragraph (2) is liable to imprisonment for a term of 2 years and to a fine.

18 Regulations and consequential amendments

- (1) The States may by Regulations amend –
- (a) any of the definitions in Articles 1 to 4;
 - (b) Articles 9 to 14 (penalties).
- (2) Regulations under this Article may include such consequential, incidental, supplementary and savings provisions as the States think necessary or expedient, including provisions which amend any other enactment.

19 Companies (Jersey) Law 1991 amended

In the Companies (Jersey) Law 1991 –

- (a) after Part 20 of the Companies (Jersey) Law 1991¹⁶ there shall be inserted the following Part –

“PART 20A

ECONOMIC SUBSTANCE TEST

143A Power for Minister for Treasury and Resources to apply to Court

If the Minister for Treasury and Resources receives a report from the Comptroller of Taxes under Article 9(5) of the Taxation (Companies –

Economic Substance) (Jersey) Law 201-¹⁷, that a company has not met the economic substance test within the meaning of that Law, the Minister for Treasury and Resources may apply to the court for an order under Article 143B.

143B Powers of court

- (1) If, on receiving an application under Article 143A, the court is satisfied that the company which is the subject of the report has not met the economic substance test, the court may make such order as it thinks fit requiring the company to take any action specified in the order for the purpose of meeting the test, including, without prejudice to the generality of the foregoing, any action described in Article 143(2).
 - (2) If, under paragraph (1), a court orders a company to take any action described in Article 143(2), paragraphs (3) to (5) of that Article shall apply, as if an order under paragraph (1) were an order under that Article.”;
- (b) In Article 155 –
- (i) in paragraph (2) after the words “the Minister” there is inserted “or the Minister for Treasury and Resources following receipt of an Article 9(5) report”,
 - (ii) in paragraph (3) after the words “the Minister” there is inserted “or by the Minister for Treasury and Resources following receipt of an Article 9(5) report”,
 - (iii) after paragraph (6) there is inserted –
- “(7) In this Article “Article 9(5) report” means a report to the Minister for Treasury and Resources under Article 9(5) of the Taxation (Companies – Economic Substance) (Jersey) Law 201-¹⁸.”.

20 Citation and commencement

This Law may be cited as the Taxation (Companies – Economic Substance) Jersey Law 201- and comes into force 1st January 2019.

-
- 1 *chapter 24.750*
 - 2 *chapter 13.075*
 - 3 *chapter 17.850*
 - 4 *chapter 24.750*
 - 5 *chapter 13.075*
 - 6 *chapter 13.100*
 - 7 *chapter 13.225*
 - 8 *chapter 13.100*
 - 9 *chapter 13.125*
 - 10 *chapter 13.425*
 - 11 *chapter 13.125*
 - 12 *chapter 19.885*
 - 13 *chapter 24.750*
 - 14 *chapter 13.075*
 - 15 *chapter 13.250*
 - 16 *chapter 13.125*
 - 17 *P.121/2018*
 - 18 *P.121/2018*