

**THE STATES OF DELIBERATION**  
**of the**  
**ISLAND OF GUERNSEY**

**THE INCOME TAX (SUBSTANCE REQUIREMENTS) (GUERNSEY) (AMENDMENT)**  
**ORDINANCE, 2018**

The States are asked to decide:-

Whether they are of the opinion to approve the draft Ordinance entitled "The Income Tax (Substance Requirements) (Guernsey) (Amendment) Ordinance, 2018", and to direct that the same shall have effect as an Ordinance of the States.

This proposition has been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

**EXPLANATORY MEMORANDUM**

The purpose of this Ordinance is to provide for the implementation of the EU Code of Conduct Group proposals on business taxation, the object of which is the deterrence and elimination of base erosion profit shifting, by requiring companies tax resident in Guernsey conducting certain activities [eg, banking business] to have a substantial economic presence, and to be undertaking real economic activity, in Guernsey ["substance requirements"] and to make changes to the Income Tax (Guernsey) Law, 1975 to enable the enforcement of, and consequential upon the enactment of, the Ordinance and underpinning regulations.



## **The Income Tax (Substance Requirements) (Guernsey) (Amendment) Ordinance, 2018**

THE STATES, in pursuance of their Resolution of the 6<sup>th</sup> November, 2018<sup>a</sup>, and in exercise of the powers conferred on them by sections 75Q, 203A and 208C of the Income Tax (Guernsey) Law, 1975<sup>b</sup> and all other powers enabling them in that behalf, hereby order:-

### **Amendment of 1975 Law.**

1. The Income Tax (Guernsey) Law, 1975, as amended, is further amended as follows.

2. In section 75B(1) for "or any provision thereof"<sup>c</sup> substitute ", or international tax measure, or any provision thereof, or for the purposes of regulations made under section 171A (regulations in respect of substance requirements)".

3. In section 75C(4)<sup>d</sup>, in the definition of "approved international agreement" -

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<sup>a</sup> Billet d'État No. \*\* of 2018 (proposition \*\*).

<sup>b</sup> Ordres en Conseil Vol. XXV, p. 124; sections 75Q and 203A were inserted by Order in Council No. XVII of 2005 and section 208C was inserted by Order in Council No. V of 2011.

<sup>c</sup> Those words were inserted by the Income Tax (Approved International Agreements) (Implementation) (Guernsey) Ordinance, 2013 (No. I of 2014).

<sup>d</sup> Section 75C was inserted by Order in Council No. XVII of 2005.

- (a) after "in relation to tax" insert "or taxation", and
- (b) after "without limitation, an agreement"<sup>e</sup> insert "or arrangement".

4. In section 75CB(2)(a)(ii)<sup>f</sup> for "or any provision thereof" substitute ", or international tax measure, or any provision thereof, or for the purposes of regulations made under section 171A (regulations in respect of substance requirements)".

5. In section 75CC<sup>g</sup>, in the heading, after "approved international agreements" insert "and international tax measures".

6. After section 75CC(1) insert the following subsections -

"(1A) The Committee may, without prejudice to its powers under subsection (1), by regulation make such provision as it may consider necessary or expedient for the purpose of the implementation of, or of any provision of -

- (a) any agreement or arrangement in respect of tax or taxation -

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<sup>e</sup> Those words were inserted by the Income Tax (Guernsey) (Approved International Agreements) (Amendment) Ordinance, 2014 (No. XXXI of 2014).

<sup>f</sup> Section 75CB(2)(a)(ii) was inserted by the Income Tax (Guernsey) (Amendment) Ordinance, 2014 (No. XIII of 2014).

<sup>g</sup> Section 75CC was inserted by the Income Tax (Approved International Agreements) (Implementation) (Guernsey) Ordinance, 2013 (No. I of 2014).

- (i) made between the States of Guernsey and the government of another territory (or their respective delegates acting within the scope of their authority), or
  - (ii) which is otherwise binding upon Guernsey and governed by international law (including, without limitation, an agreement or arrangement which has been acceded to or ratified by the United Kingdom on behalf of Guernsey), or
- (b) any regulation, directive, decision, recommendation, opinion, obligation, standard, report, code, guidance, finding or other measure in respect of tax or taxation made, issued, adopted, established or otherwise promulgated by or by any institution of the European Union or any international organisation or multilateral body or governed by international law.

(1B) An agreement, arrangement or measure described in paragraph (a) or (b) of subsection (1A) is referred to in this Law as an **"international tax measure"**.

(1C) The power to enact regulations conferred on the

Committee by subsection (1A) arises only in the case of an international tax measure which has been specified for the purposes of this Law by Resolution of the States."

7. In section 75CC(2) -

- (a) after "an approved international agreement" insert ", or international tax measure,", and
- (b) after "the agreement" wherever appearing insert ", measure".

8. In section 75CC(3) -

- (a) after "an approved international agreement" insert "or international tax measure", and
- (b) in paragraphs (a) and (b) after "the agreement" wherever appearing insert "or measure".

9. In section 75CC(4) -

- (a) after "under subsection (1)" insert "or (1A)",
- (b) in paragraphs (a), (b) and (c) after "any approved international agreement" insert ", or international tax measure,",
- (c) in paragraph (c) after "which agreement" insert ", measure", and

(d) in paragraph (d) after "any approved international agreement" insert ", or international tax measure,".

**10.** In section 75K(6)<sup>h</sup> -

(a) after "pursuant to the provisions of an approved international agreement" insert "or a request for information made pursuant to the provisions of an international tax measure",

(b) after "in accordance with the provisions of the agreement" insert "or measure", and

(c) in subparagraph (i) after "the requesting state" insert "or (as the case may be) of the territory from or in respect of which the request for information is made".

**11.** In section 75M(1) -

(a) in paragraph (d)<sup>i</sup> after "an approved international agreement" insert "or international tax measure", and

(b) after paragraph (d) insert the following paragraph -

"or (e) regulations made under section 171A

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<sup>h</sup> Section 75K was inserted by Order in Council No. XVII of 2005.

<sup>i</sup> Section 75M(1)(d) was inserted by the Income Tax (Approved International Agreements) (Implementation) (Guernsey) Ordinance, 2013 (No. I of 2014).

(regulations in respect of substance requirements),".

12. In section 75M(2) -

(a) in paragraph (d)<sup>j</sup> after "an approved international agreement" insert "or international tax measure", and

(b) after paragraph (d) insert the following paragraph -

"or (e) regulations made under section 171A (regulations in respect of substance requirements), ".

13. In section 75O<sup>k</sup> -

(a) after the definition of "electronic form" add the following definition -

""**international tax measure**" has the meaning given by section 75CC(1B),",

(b) for the definition of "tax" substitute the following -

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<sup>j</sup> Section 75M(2)(d) was inserted by the Income Tax (Approved International Agreements) (Implementation) (Guernsey) Ordinance, 2013 (No. I of 2014).

<sup>k</sup> Section 75O was inserted by Order in Council No. XVII of 2005.



""**tax**" means -

- (a) income tax under this Law, and
- (b) any tax imposed by the laws of another territory and of a class or description specified in or under -
  - (i) an approved international agreement or international tax measure, or
  - (ii) regulations made under section 75CC,

and "**taxation**" shall be construed accordingly,".

14. After section 171 insert the following Part -

"PART XIVA  
SPECIAL PROVISIONS AS TO BUSINESS TAXATION -  
SUBSTANCE REQUIREMENTS

**"Regulations in respect of substance requirements.**

171A. (1) The Committee may by regulation make such provision as it thinks fit in respect of the requirements and criteria that must be complied with or fulfilled by or in respect of a company resident in Guernsey ("**substance requirements**") in order to ensure that real economic activity is being carried on or undertaken in Guernsey in respect of the profits and income of the company.

(2) In determining whether or not real economic activity is being carried on or undertaken for the purposes of subsection (1), regard may be had (without limitation, and in addition to the matters set out in subsection (3)) to the substantial economic presence and substantial activities of the company in question in Guernsey and to the adequacy of the nexus between the company's activities and its profits or income.

(3) Substance requirements may include, without limitation, requirements and criteria in respect of -

- (a) the company's connection with and activity and presence in Guernsey (whether business, financial, physical, legal, economic or otherwise),
- (b) its governance, decision-making, direction, management, administration, control and ownership (legal and beneficial),
- (c) without prejudice to paragraph (b), its board meetings and the minutes thereof and its company records,
- (d) its profits and income and the source and generation thereof,
- (e) its employees and other staff and their numbers, tasks, skills and qualifications,

- (f) its overheads, costs, expenses and other expenditure (operating, capital or otherwise),
  - (g) its offices and other premises and other physical assets,
  - (h) its core income-generating activity and the conduct thereof,
  - (i) its compliance with obligations arising under any statutory provisions applicable to it or its business or undertaking,
  - (j) the adequacy of any of the matters referred to in the preceding paragraphs.
- (4) For the purposes of this section -
- (a) subsection (4) of section 75CC applies to substance requirements as it applies to an approved international agreement, and
  - (b) the reference in section 75CC(4) to regulations under subsection (1) of section 75CC includes a reference to regulations under subsection (1) of this section.

**Specific matters in relation to which regulations may make provision.**

171B. (1) Regulations under section 171A may, without

limitation, and without prejudice to any other power under this Law in respect of the making of regulations, make provision in respect of -

- (a) the class or description of companies in respect of which substance requirements apply (including, without limitation, provision that substance requirements apply, exclusively or otherwise, in respect of companies carrying on or undertaking business or other activities of a class or description specified in the regulations as "**relevant activities**"),
- (b) the definition of relevant activities and other expressions used in section 171A and in the regulations,
- (c) the identification of companies -
  - (i) carrying on or undertaking relevant activities or other business or activities specified in the regulations,
  - (ii) of classes or descriptions specified in the regulations (including, without limitation, companies which are holding companies or collective investment vehicles or which receive income arising from intellectual property assets or rights), or

- (iii) in respect of which or the profits or income of which there is or is considered to be a greater risk of artificial profit shifting,
- (d) the substance requirements applicable to companies described in paragraph (c),
- (e) appeals in respect of determinations that the substance requirements are or are not applicable and met, penalties and other matters,
- (f) the issue by the Director of guidance -
  - (i) in respect of substance and the adequacy thereof and the meaning of expressions used in the regulations, and
  - (ii) generally for the purposes of providing clarification or guidance in respect of the provisions of or for the purposes of, or in connection with the administration, implementation or enforcement of, the regulations,
- (g) audit requirements,

- (h) the obtaining, delivery, making available, furnishing and/or exchanging of documents and information (including, without limitation, on a spontaneous basis),
- (i) the designation of competent authorities and other authorities, bodies or entities in Guernsey and in other jurisdictions and, without prejudice to paragraph (h), the disclosure of documents and information to them,
- (j) the reporting and notification of matters specified in the regulations and the filing of documents and information in respect thereof,
- (k) the making of statements and declarations,
- (l) the detection, investigation, prosecution, sanctioning and other consequences (civil, criminal, administrative or regulatory) of contraventions of or failures to comply with the regulations and otherwise in respect of enforcement, remedies, penalties, procedures and proceedings including, in relation to companies registered in the Register of Companies within the meaning of section 496 of the Companies (Guernsey) Law, 2008 or section 163 of the Companies (Alderney) Law, 1994, and without limitation, striking-off,

- (m) the supervision, monitoring and verification of compliance,
- (n) the making of site visits (with agreement, with notice and without agreement, or without notice or agreement and subject to judicial approval), including without limitation provision as to -
  - (i) the powers that may be exercised in the course of or in consequence of, or otherwise for the purposes of, site visits,
  - (ii) the persons who may exercise those powers,
  - (iii) the purposes for which, and the grounds upon which, site visits may be made or any of those powers may be exercised, and
  - (iv) the premises at which site visits may be made,
- (o) the suspension of the operation of all or any of the provisions of any regulations under section 171A during the period of operation of the suspending regulations or during such period

as may be specified therein.

(2) Regulations under section 171A may make provision in respect of persons or entities or classes or descriptions of persons or entities other than companies, and references in section 171A and this section to companies shall be construed accordingly."

15. In section 203A(1)(b) after "supplementary" insert ", savings".

16. In section 205(2) after "(within the meaning of section 75C)," insert "or international tax measure, or for the purposes of regulations made under section 171A (regulations in respect of substance requirements),".

17. In section 209(1) insert the following definitions in the appropriate alphabetical order -

""**relevant activities**": see section 171B(1)(a),"

""**substance requirements**": see section 171A(1),".

**Citation.**

18. This Ordinance may be cited as the Income Tax (Substance Requirements) (Guernsey) (Amendment) Ordinance, 2018.

**Commencement.**

19. This Ordinance shall come into force on the 1<sup>st</sup> December, 2019.