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From: General Secretariat of the Council  
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Subject: The EU list of non-cooperative jurisdictions for tax purposes  
– Barbados: final legislation and assessment under criterion 2.2  
= Economic Substance Guidelines (Part 1)

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**Ministry of International Business & Industry  
International Business and Financial Services Unit**

**Barbados Economic Substance Guidelines**

**Issued pursuant to Section 18 (2) of the Companies  
(Economic Substance) Act 2019-43**

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## INTRODUCTION

The Companies (Economic Substance) Act, 2019-43 ("ESA") introducing economic substance requirements for companies in Barbados was approved by Barbados Parliament on 27 November 2019 in response to the work of the Organization for Economic Cooperation and Development ("OECD") as part of the Base Erosion and Profit Shifting ("BEPS") Action 5 and the European Union ("EU") Criterion 2.2 initiatives.

These standards require geographically mobile activities to have economic substance regardless of whether the activities are conducted in a no or nominal tax jurisdiction or in a preferential tax regime of a jurisdiction that has corporate income tax.

The ESA applies to all Barbados resident companies conducting relevant activities and is effective for fiscal periods commencing on the dates prescribed in the Regulations.

This document provides guidance on the scope and application of the ESA. In accordance with Section 18 (2) of the ESA these Guidelines have the force of law.

## SUMMARY OF THE ESA

The now repealed and replaced ESA first came into effect on 1 January 2019, and requires a "resident company" which derives income from the carrying on of a "relevant activity" to satisfy the Economic Substance Test ("ES Test") in relation to that relevant activity. The resident company must be in compliance with the ESA with effect from a fiscal period commencing on or after 1 January 2020.

Core Income Generating Activities ("CIGA") are activities that are of central importance to a resident company in terms of generating income and must be carried on in Barbados. CIGA are defined for each type of relevant activity.

A resident company may satisfy the ES Test by outsourcing the conduct of its CIGA to another person in Barbados, in accordance with the ESA and the guidance as set out below.

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## INFORMATION REQUIREMENTS

A resident company shall, after January 1, 2020, file an Economic Substance Declaration ("declaration") with the Director annually within twelve months after the last day of the end of each fiscal period commencing on the dates prescribed in the Regulations stating:

- (a) whether or not they are carrying on a relevant activity;
- (b) whether or not they derive income a relevant activity
- (c) if the resident company is carrying on a relevant activity, whether or not all of the resident company's income in relation to the relevant activity
  - (i) is subject to tax in a jurisdiction outside of Barbados and, if so, shall provide appropriate evidence to support the liability to tax as may be required by the Director; or
  - (ii) is compliant with economic substance requirements in a jurisdiction outside of Barbados and, if so, shall provide appropriate evidence to support that economic substance as may be required by the Director;
- (d) whether it is beneficially owned or controlled by residents of Barbados , and whether it carries on a relevant activity exclusively in Barbados and derives income solely from such relevant activities; and (e) the date of the end of its fiscal period.

For the purposes of these Guidelines, "control" means the possession, whether directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, a voting trust arrangement or by any other means.

A resident company which is required to satisfy the ES Test must provide the following information:

- business/income types identifying the type of relevant activity;
- amount and type of income by relevant activity;
- amount of operating expenditure by relevant activity;
- details of business address;
- number of (qualified) full time employees;
- confirmation of the CIGA conducted for each relevant activity; and

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- confirmation of whether any CIGA have been outsourced and if so relevant details.

A resident company that is carrying on more than one relevant activity is required to satisfy the ES Test in relation to each relevant activity.

#### ADDITIONAL INFORMATION REQUIREMENTS

The Director may give notice requiring additional documents and information (including a copy of a relevant documents or other records, (or of electronically stored information) as shall be reasonably required to determine whether the resident company has passed or failed the ES Test. Such information shall be in the form approved by the Director and shall be provided within a reasonable time specified by the Director.

A resident company that is required to satisfy the ES Test in relation to a relevant activity must retain for six years after the end of a fiscal period any documents or other records, including any information stored by electronic means that relates to the information required to be provided to the Director.

## SCOPE OF THE ESA

### RESIDENT COMPANY

A resident company for the purposes of the ESA must satisfy all of the prescribed definitions in the ESA, simultaneously.

Therefore a resident company for the purposes of the ESA means a company, whether incorporated in Barbados or elsewhere, or a society with restricted liability organised in Barbados, or an association formed in Barbados (other than an association of underwriters), which is managed and controlled in Barbados.

For the avoidance of doubt and for the purposes of the ESA:

1 A "company" means:

- any body corporate whether incorporated in Barbados or elsewhere and includes a society with restricted liability and an association other than an association of underwriters but does not include a local or public authority.

- 2 The following are expressly included in the definition of "resident company":
- a company, whether incorporated in Barbados or elsewhere, or a society with restricted liability organised in Barbados, or an association formed in Barbados (other than an association of underwriters), which is managed and controlled in Barbados.
  - a company incorporated outside of Barbados, that is registered in Barbados as an external company that is not regarded as a tax resident company in the jurisdiction of incorporation.
  - A company incorporated in Barbados as an entity but which is not tax resident in any other jurisdiction.
- 3 The following are expressly excluded from the definition of "resident company":
- any unincorporated body or association which does not have separate legal personality, including a general partnership, and a limited partnership;
  - a trust
  - a company (or entity) that is tax resident outside of Barbados, and
  - a public Director.

#### TAX RESIDENT OUTSIDE BARBADOS

A company incorporated in Barbados is not regarded as a resident company for the purposes of the ESA if it is tax resident outside Barbados.

Likewise, a company incorporated outside of Barbados, that is registered in Barbados as an external company is not regarded as a resident company if it is tax resident outside Barbados. The Director will regard a company, an external company and a branch of a resident company as tax resident outside Barbados if such company is subject to tax on the income from a relevant activity in another jurisdiction. The Director will require any such company claiming to be tax resident outside Barbados to produce satisfactory evidence to substantiate the same.

Such evidence should include evidence of its tax residence in that jurisdiction and evidence that an appropriate tax return has been submitted to the relevant tax authority of that jurisdiction in relation to the relevant activity. In the absence of such evidence,

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the Director will regard any such company as a resident company that is subject to the ESA.

In this context, a "branch" refers to a business unit or division of the resident company that is not a separate legal person from the resident company. An external company, or branch of a resident company carrying on a relevant activity in a jurisdiction with economic substance legislation shall not be considered to be a resident company.

For the purpose of the application of these Guidelines, an entity which is incorporated in Barbados but which is not tax resident in any other jurisdiction shall be treated as a resident company.

#### **LIQUIDATION OR OTHERWISE CEASING TO CARRY ON RELEVANT ACTIVITIES**

A resident company will, so long as it exists, continue to have any obligations which the ESA imposes on it. Liquidators (or equivalent) must ensure that the resident company continues to satisfy all of its obligations under the ESA. If a resident company is in liquidation, winding up or other equivalent process, it must continue to satisfy the ES Test for any period during which it carries on relevant activities. Reporting will be required with respect to any period during which the resident company earns income derived from carrying on relevant activities.

#### **THE ECONOMIC SUBSTANCE TEST ("ES TEST")**

##### **TEST OF DIRECTION AND MANAGEMENT**

An entity which is a resident company for the purposes of the ESA will have to comply with the requirement to be directed and managed in Barbados. The entity will be deemed to be managed and directed in Barbados where-

- a) its board of directors, as a whole, has the appropriate knowledge and expertise to discharge its duties as a board of directors;
- b) meetings of the board of directors are held in Barbados at adequate frequencies given the level of decision making required;
- c) there is a quorum of directors physically present in Barbados during the meetings described in (b) above;

- d) the minutes of those meetings record the making of strategic decisions of the relevant entity at the meeting; and
- e) it keeps all such director meeting minutes and appropriate records in Barbados.

The directed and managed test is designed to ensure that there are an adequate frequency of board meetings held and attended in Barbados (although it is not necessary for all meetings to be held in Barbados).

What constitutes an adequate frequency of meetings in Barbados will be dependent on the relevant activities of the relevant entity.

The test also looks to ensure that the associated minutes and records are kept in Barbados and that the board is a decision making body with the appropriate knowledge and experience. In the case where there are corporate directors, the requirements will apply to the individual(s) (officers of the corporate director) actually performing the duties.

#### **COMPLIANCE WITH THE ES TEST**

A resident company must satisfy the ES Test in relation to any income derived from relevant activities which it carries on.

A resident company is subject to the ESA from the date on which the resident company commences the relevant activity unless the resident company was in existence prior to 1 January 2019 in which case it must comply with the ESA by 1 January 2020.

A resident company that carries on a relevant activity, but which derives no income is not obliged to meet the requirements of the ES Test. This scenario could arise in cases where a company was incorporated and remained dormant or where a company is in its final stages of liquidation and therefore earning no income. Such a company is however still required to file an ES Declaration. There is an expectation that carrying on relevant activities will result in the generation of income and if there is any indication that a resident company is seeking to manipulate/artificially suppress its income to avoid the substance requirements, action will be taken by the Director in accordance with the legislation.

#### **REDUCED ES TEST**

There is a reduced ES Test for single purpose equity holding companies, as described below under the heading "single purpose equity holding company".

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A company which is beneficially owned or controlled by residents of Barbados that is not part of a MN Group, and carries on a relevant activity exclusively in Barbados and derives income solely from such relevant activities; shall not be required to provide any other documents or additional information unless as specifically required to do so by the Director.

#### COMPLIANCE TIMELINE FOR GRANDFATHERED RESIDENT COMPANIES

A grandfathered resident company shall not be required to comply with the ESA until 1 January 2021, even where provisions of the ESA contain requirements or criteria that are described as necessitating "historical compliance". A grandfathered resident company must demonstrate that it is in compliance and complies with the provisions of the ESA from 2 January 2021 onwards.

#### CORE INCOME GENERATING ACTIVITIES (CIGA)

CIGA means activities that are of central importance to a resident company in terms of generating income and, if carried on in respect of a relevant activity, must be carried on in Barbados. A resident company must conduct the appropriate elements of CIGA. The elements listed in the definition of CIGA in relation to each relevant activity are necessary to generating income and are not exhaustive. It is a question of fact in each case as to which activities are actually undertaken to generate income. The assessment of economic substance in Barbados will include careful consideration of what CIGA are being undertaken by the resident company in Barbados.

"Outsourcing" describes the manner in which a resident company is permitted to outsource its CIGA and clarifies that there are no restrictions on outsourcing activities that are not CIGA.

#### INTERPRETATION OF "ADEQUATE"

The Director's guidance is that in each case "adequate" shall mean "as much or as good as necessary for the relevant requirement or purpose".

What is adequate for each resident company will be dependent on the particular facts and circumstances of the resident company and its business activity. As such, the directors (or equivalent) of each resident company should address their minds to these questions and make their determination in good faith. A resident company must ensure that it maintains and retains appropriate records to demonstrate the adequacy of the resources utilized and expenditures incurred.

The application of these words to a particular type of relevant activity may be included in the section below headed "Sector-Specific Guidance on Relevant Activities".

Given the stringent regulatory requirements in Barbados, which result in significant overlap with the substance requirements, it is expected that relevant entities licensed to carry on banking business, insurance business or licensed fund management business will already generally be operating in Barbados with adequate resources and expenditure. However, those relevant entities will still be subject to the ESA.

Adequate physical assets include but are not limited to maintaining an appropriate place of business or plant, property and equipment.

#### **RELEVANT ACTIVITIES CONDUCTED BY ANY OTHER PERSON ("OUTSOURCING")**

A resident company may satisfy the ES Test in relation to a relevant activity if its CIGA in relation to that relevant activity is conducted by any other person in Barbados and the resident company is able to monitor and control the carrying out of the CIGA by that other person. This monitoring by the resident company must be conducted in Barbados.

Only that part of the relevant activity of that other person which is attributable to generating income for the resident company shall be taken into account in considering whether the resident company satisfies the ES Test.

That is, the ESA does not prohibit a resident company from outsourcing some or all of its activity. Outsourcing, in this context, includes outsourcing, contracting or delegating to third parties or to entities in the same group.

However, if some or all of the CIGA is outsourced, the resident company must be able to demonstrate that it has adequate supervision of the outsourced activities and that those CIGA are undertaken in Barbados.

Where CIGA are outsourced, the resources of the service provider in Barbados will be taken into consideration when determining whether the employees and physical assets test is met. The employees of the service provider can be counted for the purpose of identifying the employees of the resident company used to satisfy the ES Test. This must be verified to ensure that only the portion of full time equivalent employee time directly used in the service of the resident company is counted.

There must be no double counting if the services are provided to more than one resident company carrying out relevant activities.

The resident company remains responsible for ensuring that accurate information is reported on its declaration and this will include precise details of the resources employed by its service providers, for example based on the use of timesheets.

Where there are corporate directors, these will be looked through, to the individuals (officers of the corporate director) actually performing the duties of the director.

A resident company may outsource activities which are not CIGA to service providers which are located in or outside Barbados. Such activities may include, for example, back office functions, IT, payroll, legal services, or other expert professional advice or specialist services provided, in each case, they are not of central importance to the resident company in terms of generating income in respect of a relevant activity.

Resident companies that are conducting banking business, insurance business, and fund management business will be subject to the industry specific guidance in addition to the principles set out above under the ESA.

Where a company fails to meet the ES test due to an inadequate number of employees who are physically present in Barbados, only minor breaches thereof can benefit from the first notice without financial penalty procedure.

#### **EMPLOYEES**

Directors should be counted as a fraction of a full time employee commensurate with the time commitment of the role, and to the extent that they are performing the relevant CIGA for the business.

The qualifications that are considered to be adequate will depend on the relevant sector that the company has activity in, the CIGA and the duties performed by those employees. Qualifications taken into account could include academic qualifications, vocational qualifications, relevant industry technical qualifications and also qualification by relevant experience.