

Key EPA Provisions on Investment and Investors

The principal objective of the EPA, including the chapter on Commercial Presence (Investment), is to support the sustainable development of the CARIFORUM States. In this regard, the relevant sections of the Agreement outline the applicable arrangements for the reciprocal liberalisation of market access for investment and investors. Investors should note that there are no commitments relating to the privatisation of public enterprises. In addition, the Agreement does not cover subsidies granted by Member States of either CARIFORUM or the European Union (EU) and both sides retain the right to regulate and to introduce new regulations to meet legitimate policy objectives.

Definition of Beneficiaries

In agreements dealing with foreign investment and establishment rights, it is important to understand the scope of coverage. In this context, those seeking to make use of the EPA should note the following key definitions as they relate to who or what is eligible to benefit from the provisions of the Agreement.

- A ‘natural person of the EC Party’ or ‘natural person of the Signatory CARIFORUM States’ means a national of one of the Member States of the European Union or of the Signatory CARIFORUM States (such as Saint Lucia) according to their respective legislation;
- A ‘juridical person’ means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;
- A ‘juridical person of a Party’ means a juridical person of the EC Party or a Signatory CARIFORUM State (Saint Lucia) set up in accordance with the laws of a Member State of the European Union or of a Signatory CARIFORUM State respectively, and having its registered office, its central administration, or its principal place of business in the territory to which the Treaty establishing the European Community applies or in the territory of a Signatory CARIFORUM State, respectively.

International Business Companies: In the context of the CARIFORUM-EC Economic Partnership Agreement, International Business Companies, domiciled in Saint Lucia and seeking to benefit from the provisions of the EPA, must be undertaking active business.

Substantive Business is a requirement

These IBCs should be aware that when a juridical person has only its registered office or central administration in Saint Lucia, it shall not be considered as a juridical person of Saint Lucia unless it engages in “**substantive business operations**” in Saint Lucia. The EC considers our concept of “**Substantive Business Operations**” (see Art. V, paragraph 6 of the GATS) as being equivalent to

its concept of **‘effective and continuous link ‘with the economy of a particular Member State** (see Art. 48 of the EC Treaty).

Shipping Companies: Notwithstanding the preceding paragraph, shipping companies, which are controlled by nationals of Saint Lucia (a Signatory CARIFORUM State) or of a Member State of the European Union but have been established in a ‘third country’, may also benefit from the provisions of this Agreement. However, in order to be entitled to such benefits, the vessels of the shipping companies must be registered in accordance with their respective national legislation and carry the flag of a Member State of the European Union or of a Signatory CARIFORUM State (Saint Lucia).

Commercial presence

For purposes of the EPA, ‘commercial presence’ means any type of business or professional establishment resulting from the formation, acquisition or maintenance of a juridical person. The creation or maintenance of a branch or representative office within the EC or a CARIFORUM country (such as Saint Lucia) for the purpose of performing an economic activity would also be classified as a ‘commercial presence’. Shareholding and other types of capital participation as well as long-term loans of a participating nature may all be included under the umbrella of the ‘constitution’ or ‘acquisition’ of a juridical person if the investment is made with a view towards controlling the juridical person or effective participation in its management. In the context of the EPA, ‘economic activity’ **does not** include activities carried out in the exercise of governmental authority, such as activities which are carried out neither on a commercial basis nor in competition with economic operators.

Activities not covered: The EPA provisions on ‘commercial presence’ apply to all economic activities except:

- Mining, manufacturing and processing of nuclear materials;
- production of or trade in arms, munitions and war material;
- audio-visual services;
- national maritime cabotage (this covers transport services for the carriage of passengers or goods originating and terminating in the particular CARIFORUM or EC country); and
- national or international air transport services and services directly related to the exercise of traffic rights.