

No. of 2018

VIRGIN ISLANDS

**ECONOMIC SUBSTANCE (COMPANIES AND LIMITED
PARTNERSHIPS) ACT, 2018**

ARRANGEMENT OF SECTIONS

Section

1. Short title and commencement.
2. Interpretation.
3. Meaning of finance and leasing business.
4. Meaning of financial period.
5. General prohibition.
6. Meaning of relevant activities.
7. Meaning of “BVI core income-generating activities”.
8. Economic substance requirements.
9. Presumptions of non-compliance for intellectual property business.
10. Assessment of compliance.
11. Requirement to provide information.
12. Penalties for non-compliance with economic substance requirements.
13. Right of appeal.
14. Procedure on appeal.
15. Time for compliance with section 12 notice.
16. Amendments to the 2017 Act.
17. Regulations and Guidance.

SCHEDULE

No. of 2018

**Economic Substance (Companies and
Limited Partnerships) Act, 2018**

**Virgin
Islands**

I Assent

**Governor
, 2018**

VIRGIN ISLANDS

No. of 2018

A Bill for

An Act to Insert Text.

[Gazetted , 2018]

ENACTED by the Legislature of the Virgin Islands as follows:

Short title and
commencement.

1. (1) This Act may be cited as the Economic Substance (Companies and Limited Partnerships) Act, 2018.

(2) The provisions of this Act shall come into force on 1st January, 2019.

Interpretation.

2. In this Act, unless the context otherwise requires,

No. 15 of 2017

“2017 Act” means the Beneficial Ownership Secure Search System Act, 2017;

S.I. 2012 No. 23

“affiliate” bears the same meaning as an “affiliated company” specified in regulation 2(2) of the BVI Business Companies Regulations, 2012, modified so that references to a company include references to a limited partnership, and other expressions appropriate to companies shall be construed as including references to the corresponding persons, documents or organs, as the case may be, appropriate to limited partnerships;

“banking business” has the meaning specified in section 2(1) of the Banks and Trust Companies Act, 1990; No. 9 of 1990

“BVI core income-generating activity” has the meaning given by section 7;

“Commission” means the Financial Services Commission established under the Financial Services Commission Act, 2001; No. 12 of 2001

“company” includes

(a) a company within the meaning of section 3(1) of the BVI Business Companies Act, 2004; No. 16 of 2004

(b) a foreign company within the meaning of section 3(2) of the BVI Companies Act, 2004 which is registered under Part XI of that Act,

but does not include a non-resident company;

“competent authority” means the International Tax Authority;

“Court” means the High Court;

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

(a) purchasing from foreign affiliates

(i) component parts or materials for goods; or

(ii) goods ready for sale; and

(iii) reselling such component parts, materials or goods;

(b) providing services to foreign affiliates,

but does not include any activity included in any other relevant activity except holding business;

“economic substance requirements” has the meaning given in section 8;

“finance and leasing business” has the meaning given by section 3;

“financial period” is defined in section 4;

No. 2 of 2010

“fund management business” means the conduct of an activity that requires the legal entity to hold an investment business license pursuant to section 4 and category 3 of Schedule 3 of the Securities and Investment Business Act, 2010;

S.I. 2012 No. 23

“group” has the meaning specified in regulation 2(1) of the BVI Business Companies Regulations, 2012, modified so that references to a company include references to a limited partnership, and other expressions appropriate to companies shall be construed as including references to the corresponding persons, documents or organs, as the case may be, appropriate to limited partnerships;

“headquarters business” means the business of managing, co-ordinating or controlling business activities for a group as a whole or for members of a group in a specific geographical area;

“high risk IP legal entity” is a legal entity which carries on an intellectual property business and which

- (a) acquired the intellectual property asset
 - (i) from an affiliate; or
 - (ii) in consideration for funding research and development by another person situated in a country or territory other than the Virgin Islands; and
- (b) licences the intellectual property asset to one or more affiliates or otherwise generates income from the asset in consequence of activities (such as facilitating sale agreements) performed by foreign affiliates;

“holding business” means the business of being a pure equity holding entity;

“income” in respect of an intellectual property asset includes

- (a) royalties;
- (b) capital gains and other income from the sale of an intellectual property asset;
- (c) income from a franchise agreement; and
- (d) income from licensing the intangible asset;

“insurance business” has the meaning specified in section 3(1) of the Insurance Act, 2008; No. 1 of 2008

“intellectual property 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);

“legal entity” means a company and a limited partnership;

“limited partnership” includes

- (a) an existing limited partnership within the meaning of section 2 of the Limited Partnership Act, 2017;
- (b) a limited partnership within the meaning of section 2 of the Limited Partnership Act, 2017; and
- (c) a foreign limited partnership within the meaning of section 2 of the Limited Partnership Act, 2017 which is registered under Part VI of that Act,

No. 24 of 2017

but does not include a non-resident limited partnership;

“Minister” means the Minister responsible for Finance;

“non-resident company” means a company which is resident for tax purposes in a jurisdiction outside the Virgin Islands which is not on Annex 1 to the EU list of non-cooperative jurisdictions for tax purposes;

“non-resident limited partnership” means a limited partnership which is resident for tax purposes in a jurisdiction outside the Virgin Islands which is not on the EU list of non-cooperative jurisdictions for tax purposes;

“pure equity holding entity” is a legal entity which

- (a) has as its primary function the acquisition and holding of shares or equitable interests in other companies which (for these purposes) includes any company or foreign company within the meaning of section 3 of the BVI Business Companies Act, 2004; and

No. 16 of 2004

(b) does not carry on any commercial activity;

“Register of Companies” means the Register of Companies maintained in accordance with section 230(1)(a) of the BVI Business Companies Act, 2004;

No. 24 of 2017

“Register of Limited Partnerships” includes the register maintained in accordance with section 54(1) of the Partnership Act, 1996 and the register maintained in accordance with section 108(1) of the Limited Partnership Act, 2017;

“relevant activities” has the meaning given in section 6;

No. 13 of 2001

“ship” has the meaning specified in section 2(1) of the Merchant Shipping Act, 2001 but does not include a fishing vessel, a pleasure vessel or a small ship (in each case, as defined by section 2(1) of that Act);

“shipping business” means any of the following activities involving the operation of a ship anywhere in the world other than solely within Virgin Islands waters (as defined in section 2(2)(a) of the Merchant Shipping Act, 2001)

- (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.

Meaning of
finance and
leasing business.

3. (1) In this Act, unless the context otherwise requires, “finance and leasing business” means the business of providing credit facilities of any kind for consideration.

(2) For the purposes of subsection (1) but without limiting the generality of that section

- (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).

4. In this Act, unless the context otherwise requires, “financial period” means

Meaning of financial period.

- (a) in the case of a company incorporated on or after 1 January 2019, such period of not more than one year from the date of incorporation as the company shall notify to the competent authority and thereafter each successive period of one year running from the end of that period.
- (b) in the case of a limited partnership formed on or after 1 January 2019, such period of not more than one year from the date of formation as the limited partnership shall notify to the competent authority and thereafter each successive period of one year running from the end of that period.
- (c) in any other case such period of one year ending on a date falling on or after 31 December 2019 as the legal entity shall notify to the competent authority and thereafter each successive period of one year running from the end of that period.

(2) On an application by the legal entity the competent authority may permit an alteration in the legal entity’s financial period by shortening or (where

the legal entity's existing financial period is less than 12 months) lengthening a financial period so as to alter the commencement date for successive financial periods but so that no such altered period shall exceed twelve months in length.

General prohibition.

5. (1) No legal entity may carry on a relevant activity in the Virgin Islands during any financial period ending on or after 31 December 2019 unless it complies with the economic substance requirements in relation to that activity.

(2) A legal entity which carries on more than one relevant activity shall comply with the economic substance requirements in respect of each activity.

Meaning of relevant activities.

6. In this Act, unless the context otherwise requires, "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 business;
- (h) intellectual property business;
- (i) distribution and service centre business.

Meaning of "BVI core income-generating activities".

7. The expression "BVI core income-generating activities" means relevant activities being carried on from within the Virgin Islands 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 regulatory capital;
 - (v) preparing regulatory reports and returns;
- (b) in respect of distribution and service centre business
 - (i) transporting and storing goods;
 - (ii) managing stocks;
 - (iii) taking orders;
 - (iv) providing consulting or other administrative services;
- (c) in respect of insurance business
 - (i) predicting and calculating risk;
 - (ii) insuring or re-insuring against risk;
 - (iii) providing insurance business services to clients;
- (d) in respect of fund management business
 - (i) taking decisions on the holding and selling of investments;
 - (ii) calculating risks and reserves;
 - (iii) taking decisions on currency or interest fluctuations and hedging positions;
 - (iv) preparing relevant regulatory or other reports for government authorities and investors;
- (e) in respect of finance or 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;
- (f) in respect of headquarters business
 - (i) taking relevant management decisions;
 - (ii) incurring expenditures on behalf of affiliates;
 - (iii) co-ordinating group activities;
- (g) in respect of shipping business
 - (i) managing the crew (including hiring, paying and overseeing crewmembers);
 - (ii) hauling and maintaining ships;
 - (iii) overseeing and tracking deliveries;
 - (iv) determining what goods to order and when to deliver them;
 - (v) organising and overseeing voyages;
- (h) in respect of holding business, all activities related to that business;
- (i) in respect of intellectual property business
 - (i) research and development;
 - (ii) marketing, branding and distribution.

8. (1) A legal entity (other than a pure equity holding entity) complies with the economic substance requirements if
- Economic substance requirements.
- (a) the relevant activity is directed and managed in the Virgin Islands;
 - (b) having regard to the nature and scale of the relevant activity carried on in the Virgin Islands
 - (i) there are an adequate number of suitably qualified employees in relation to that activity who are physically present in the Virgin Islands (whether or not employed by the relevant legal entity or by another entity and whether on temporary or long-term contracts),
 - (ii) there is adequate expenditure incurred in the Virgin Islands,
 - (iii) there are physical offices or premises as may be appropriate for the BVI core income-generating activities; and
 - (iv) where the relevant activity is intellectual property business and requires the use of specific equipment, that equipment is located in the Virgin Islands;
 - (c) the legal entity conducts BVI core income-generating activity; and
 - (d) in the case of income-generating activity carried out for the relevant legal entity by another entity
 - (i) no core income generating activity is carried on out outside the BVI;
 - (ii) only that part of the activities of that other entity which are attributable to generating income for the relevant legal entity shall be taken into account when considering if the relevant legal entity meets the economic substance requirements

- (iii) the relevant legal entity is able to monitor and control the carrying out of that activity by the other entity.

(2) A pure equity holding entity has adequate substance if it

- (a) complies with its statutory obligations under the BVI Business Companies Act, 2004, the Partnership Act, 1996 or the Limited Partnership Act, 2017 (whichever is relevant);
- (b) has adequate employees and premises for holding equitable interests or shares and, where it manages those equitable interests or shares, has adequate employees and premises for carrying out that management.

No. 13 of 2004
No. 5 of 1996
No. 24 of 2017

Presumptions of non-compliance for intellectual property business.

9. (1) This section applies where the relevant activity carried on by the legal entity from within the Virgin Islands is an intellectual property business.

(2) There is a presumption that a legal entity does not conduct BVI core income-generating activity if

- (a) the activities being carried on from within the Virgin Islands do not include any of the activities identified in section 7(i); or
- (b) the legal entity is a high risk IP legal entity which does not carry on from within the Virgin Islands any of the activities identified in section 7(i).

(3) The presumption in subsection (2)(a) may be rebutted where the activities being carried on from within the Virgin Islands include

- (a) taking the strategic decisions and managing (as well as bearing) the principal risks relating to the development and subsequent exploitation of the intangible asset generating income;
- (b) taking the strategic decisions and managing (as well as bearing) the principal risks relating to acquisition by third parties and subsequent exploitation of the intangible asset;

- (c) carrying on the underlying trading activities through which the intangible assets are exploited and which lead to the generation of revenue from third parties.

(4) The presumption in subsection (2)(b) may be rebutted where a high degree of control over the development, exploitation, maintenance, enhancement and protection of the intellectual property asset is exercised by suitably qualified employees of the relevant legal entity who are physically present and perform their functions from within the Virgin Islands and who are on long-term contracts.

10. (1) The competent authority may determine that a legal entity has not complied with the economic substance requirements during any financial period of the legal entity ending on or after 31st December 2019, provided that such determination is made no later than 6 years after the end of the financial period to which the determination relates.

Assessment of compliance.

(2) The time limit in subsection (1) does not apply if the competent authority 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 legal entity or by any other person.

11. (1) In addition to its reporting requirements under section 10(3) of the 2017 Act, a legal entity shall provide any information reasonably required by the competent authority in order to assist the competent authority in making a determination under section 10.

Requirement to provide information.

(2) The competent authority 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 competent authority may reasonably require for the purpose of facilitating the competent authority's exercise of functions under this Act.

(3) A person who fails to provide information without reasonable excuse, or who intentionally provides false information in response to a request under this section commits an offence and is liable

- (a) on summary conviction, to a fine not exceeding forty thousand dollars or to imprisonment for a term not exceeding two years or both, or

- (b) on conviction on indictment, to a fine not exceeding seventy five thousand dollars or to imprisonment for a term not exceeding five years, or both.

Penalties for non-compliance with economic substance requirements.

12. (1) On a first determination of non-compliance under section 10, the competent authority shall issue a notice to the legal entity notifying it

- (a) that the competent authority has determined that the legal entity has not complied with the economic substance requirements for that financial period;
- (b) of the reasons for that determination;
- (c) of the amount of penalty imposed on the legal entity under subsection (2);
- (d) of the date from which the penalty under subsection (2) is due, being not less than 28 days after the issue of the notice;
- (e) of what action the competent authority considers should be taken by the legal entity to meet the economic substance requirements and the date by which such action needs to have been taken; and
- (f) of the legal entity's right of appeal under section 13.

(2) The amount of penalty referred to in subsection (1)(c) is such amount as is determined by the competent authority subject to a maximum penalty of

- (a) in the case of a high risk IP legal entity, fifty thousand dollars; and
- (b) in the case of all other legal entities, twenty thousand dollars.

(3) If a legal entity fails to comply with any requirements imposed upon it under paragraph (e) of subsection (1) within the time there stated, or within such longer period as the competent authority may allow, the competent authority shall issue a second determination.

(4) On a second determination of non-compliance under section 10, the competent authority shall issue a further notice to the legal entity notifying it

- (a) that the competent authority has determined that the legal entity has not complied with the economic substance requirements;
- (b) of the reasons for that determination;
- (c) of the amount of the additional penalty imposed on the legal entity under subsection (5);
- (d) of the date from which the penalty under subsection (5) is due, being not less than 28 days after the issue of the notice;
- (e) that the competent authority may make a report to the Commission under subsection (6);
- (f) of what action the competent authority considers should be taken by the legal entity to meet the economic substance requirements and the date by which such action needs to have been taken; and
- (g) of the legal entity's right of appeal under section 13.

(5) The amount of the additional penalty referred to in subsection (4)(c) is such amount as is determined by the competent authority subject to a maximum penalty of

- (a) in the case of a high risk IP legal entity, four hundred thousand dollars; and
- (b) in the case of all other legal entities, two hundred thousand dollars.

(6) Following the issue of a notice under subsection (4), the competent authority shall consider whether to provide the Commission with a report of the matters referred to in that notice together with any additional information (whether or not provided to the competent authority under section 11).

(7) In its report to the Commission under subsection (6), the competent authority may, if it considers it appropriate to do so having regard to all the circumstances of the case, require the Commission to strike the legal entity off the Register of Companies or the Register of Limited Partnerships, as appropriate.

(8) If at any time following the service of a first determination of non-compliance under section 10 the competent authority decides that there is no realistic possibility of the legal entity meeting the economic substance requirements, it may serve notice on the Commission requiring it to strike the legal entity off the Register of Companies or the Register of Limited Partnerships, as appropriate.

Right of appeal.

13. A legal entity upon whom a notice has been served by the competent authority under section 13 may

- (a) appeal against the determination under section 10; and
- (b) appeal against the amount of any penalty imposed.

Procedure on appeal.

14. (1) Notice of an appeal under section 13 stating the ground of appeal shall be filed at the Court within 30 days of the date of the notice issued under section 12.

(2) The notice under subsection (1) shall be served on the competent authority who shall be entitled to appear and be heard at the hearing of the appeal.

(3) On an appeal, the Court may

- (a) confirm, vary or revoke the determination;
- (b) confirm, vary or cancel the penalty.

Time for compliance with section 12 notice.

15. The time for complying with the requirements specified in a notice issued under section 12 shall run from the later of

- (a) the date of the notice; or
- (b) if notice of appeal under section 13 is filed, the date on which the appeal is finally determined or withdrawn.

16. Schedule 1 to this Act contains amendments to the 2017 Act which shall have effect.

Amendments to the 2017 Act. Schedule 1

17. (1) The Minister, with the approval of the Cabinet, may make regulations with respect to any obligations imposed by this Act or prescribing anything requiring to be prescribed under this Act, including:

Regulations and Guidance.

- (a) expanding upon the meaning of any of the terms defined or referred to in section 2;
- (b) making more detailed provision for how a legal entity is to meet the economic substance requirements.

(2) The power conferred by subsection (1) includes power to make such incidental, supplementary, consequential or transitional provision as appears to the Minister to be expedient for the purposes of the regulations or order.

(3) The competent authority may issue guidance on how the economic substance requirements may be met, including without prejudice to the generality of the foregoing, guidance on the meaning of any expression used in this Act or in regulations made under this section.

(4) Regard shall be had to any guidance under subsection (3) concerning the interpretation of any expression.

(5) The competent authority may revise guidance issued under subsection (3) from time to time and a reference to published guidance includes a reference to revised guidance.

(6) Guidance issued under subsection (3) shall be published by the competent authority in a manner which the competent authority considers will bring it to the attention of those most likely to be affected by it.

SCHEDULE

The 2017 Act is amended as follows:

- (a) in section 2(1) (Interpretation), by inserting the following new or amended definitions in their appropriate alphabetical order:

“BVI core income-generating activity” has the meaning given to it for the purpose of the Economic Substance (Companies and Limited Partnerships) Act, 2018;

“corporate and legal entity” means

No. 16 of 2004 (a) a company as defined under section 3 of the BVI Business Companies Act, 2004;

No. 24 of 2017 (b) an existing limited partnership as defined under section 2 of the Limited Partnership Act 2017;

(c) a limited partnership as defined under section 2 of the Limited Partnership Act 2017;

(d) a foreign company as defined under section 3 of the BVI Business Companies Act 2004;

(e) a foreign limited partnership as defined under section 2 of the Limited Partnerships Act 2017;

No. 7 of 2018 “competent authority” means the International Tax Authority established under the International Tax Authority Act 2018;

“economic substance requirements” means the requirements for economic substance in the carrying out of relevant activities which are imposed by the Economic Substance (Companies and Limited Partnerships) Act, 2018;

“financial period” has the meaning given to it for the purpose of the Economic Substance (Companies and Limited Partnerships) Act, 2018;

“non-resident company” has the meaning assigned to it under section 2 of the Economic Substance (Companies and Limited Partnerships) Act, 2018;

“non-resident limited partnership” has the meaning assigned to it under section 2 of the Economic Substance (Companies and Limited Partnerships) Act, 2018;

“overseas competent authority” means the competent tax authority for an overseas territory or country, as specified in regulations

“relevant activity” has the meaning assigned to it under section 2 of the Economic Substance (Companies and Limited Partnerships) Act, 2018;

“intellectual property business” has the meaning assigned to it under section 2 of the Economic Substance (Companies and Limited Partnerships) Act, 2018.

(b) in section 4 (Implementation of the exchange of notes)

(i) by replacing subsection with the following:

“(1) This Act shall apply for the purposes of

(a) giving effect to the exchange of notes;

(b) giving effect to the EU Information Exchange Protocol;

(c) the provision of information to facilitate the monitoring and enforcement of the economic substance requirements.”.

(ii) by inserting the following new subsection (5):

“(5) The government may make, or procure that the competent authority makes, disclosures of information held on RA databases to the persons, in the circumstances and on the terms set out Schedule 4”;

(c) in section 7 (Exempt person), by inserting in subsection (1), before the full stop the words, “unless it carries on a relevant activity.”

(d) in section 9 (Duty of registered agent to identify beneficial owners)

(i) by replacing subsection (2) with the following:

“(2) A corporate and legal entity shall

- (a) identify any person who is a beneficial owner or registrable legal entity of that corporate and legal entity, or, if it is registered on a recognised stock exchange, shall give details of its stock exchange registration;
 - (b) identify whether it carries on one or more relevant activities, and if so which relevant activities; and
 - (c) ascertain the information prescribed in sections 10(3)(e) and (f).”.
- (ii) by inserting the following new subsection (6A):

“(6A) A corporate and legal entity shall notify the registered agent of any relevant activities carried on during the relevant financial period and any information prescribed in section 10(3)(f) to (h) within a period following the end of the financial period to be fixed by regulations.”.
- (e) in section 10 (Duty to maintain RA database)
 - (i) by inserting the following new subsection (3)(a)(vi):

“(3)(a)(vi) any relevant activities which it carries on, and”;
 - (ii) by re-numbering the existing subsection (3)(a)(vi) as (3)(a)(vii);
 - (iii) by inserting the following new subsection (3)(e) to (h):

“(e) with respect to any corporate and legal entity which is registered on a recognised stock exchange, details of the stock exchange listing.
- (f) with respect to any corporate and legal entity which carries on a relevant activity and is a non-resident company or a non-resident limited partnership, the jurisdiction in which it is tax resident together with evidence to support that tax residence.
- (g) with respect to any corporate and legal entity which carries on a relevant activity, and which is not a non-resident company or a non-resident limited partnership, in relation to each such activity which it carries on during a financial period ending after 31st December 2019, and in respect of that period

- (i) the total turnover generated by the relevant activity;
 - (ii) the amount of expenditure incurred on the relevant activity within the BVI;
 - (iii) the total number of employees engaged in the relevant activity;
 - (iv) the number of employees engaged in the relevant activity within the BVI;
 - (v) the address of any premises within the BVI which is used in connection with the relevant activity and the address of each such premises;
 - (vi) the nature of any equipment located within the BVI which is used in connection with the relevant activity;
 - (vii) the names of the persons responsible for the direction and management of the relevant activity, together with their relationship to the company and whether they are resident in the BVI;
- (h) with respect to any corporate or legal entity which carries on an intellectual property business, in addition to the particulars supplied under section 10(3)(f), in relation to that activity
- (i) whether or not the corporate or legal entity is a high risk IP legal entity within the meaning of section 2 of the Economic Substance (Companies and Limited Partnerships) Act, 2018;
 - (ii) whether the corporate or legal entity wishes to contest the rebuttable presumption introduced by section 9(2)(a) or, as the case may be 9(2)(b) of the Economic Substance (Companies and Limited Partnerships) Act, 2018;
 - (iii) if the corporate or legal entity wishes to contest such a rebuttable presumption the facts and matters relied upon for that purpose.
- (i) with respect to any corporate or legal entity which carries on a relevant activity and which is not a non-resident company or a non-resident limited partnership, but for which BVI core income-generating activity is carried out by another entity, the name of the entity which carries out that activity on its behalf, together with details of the resources deployed by that entity in carrying out the activity on its behalf.”.

(f) by inserting after section 10, the following new section 10A:

“Duty of registered agent with respect to section 10(3)(g) and 10(3)(h)(ii).

10A. (1) For each corporate and legal entity which carries on a relevant activity the registered agent acting in respect of that corporate or legal entity shall supply the particulars required by section 10(3)(g) within a period following the end of the relevant financial period to be fixed by regulations.

(2) For each corporate and legal entity which carries on a relevant IP activity and which has stated that it wishes to contest the rebuttable presumption referred to in section 10(3)(h)(ii) the registered agent acting in respect of that company shall supply the evidence relied on for that purpose within a period following the end of the relevant financial period to be fixed by regulations.”.

(g) in section 17 (Regulations)

(i) by renumbering the existing section as subsection (1).

(ii) by adding the following new subsection (2):

“(2) The power conferred by sub-section (1) includes power to make such incidental, supplementary, consequential or transitional provision as appears to the Minister to be expedient for the purposes of the regulations or order.”.

(h) by adding the following new Schedule 4

“1. In this Schedule unless the context otherwise requires:

“economic substance requirements” has the meaning given by 2 of the Economic Substance (Companies and Limited Partnerships) Act, 2018;

“relevant overseas competent authority” means, in relation to any corporate or legal entity, the competent authority for each state in which

(a) a beneficial owner resides; or

- (b) within which a registrable legal entity is registered;
or
- (c) within which the corporate or legal entity is registered; or
- (d) within which the corporate or legal entity claims to be tax resident;

“required information” means all the information stored in the RA database for the corporate or legal entity in question.

2. The competent authority shall disclose or procure the disclosure of the required information to each relevant overseas competent authority in respect of any company or legal entity which satisfies one or more of the following conditions:

- (a) it has been determined to be in breach of the economic substance requirements in accordance with section 10 of the Economic Substance (Companies and Limited Partnerships) Act, 2018;
- (b) it carries on an IP relevant activity and has either
 - (i) stated pursuant to section 10(3)(h)(ii) that it does not wish to contest the rebuttable presumption introduced by section 9(2)(a) of the Economic Substance (Companies and Limited Partnerships) Act, 2018 to the effect that it does not carry on the relevant IP activity in the BVI; or
 - (ii) has stated pursuant to section 10(3)(h)(ii) that it does wish to contest the rebuttable presumption introduced by section 9(2)(a) of the Economic Substance (Companies and Limited Partnerships) Act, 2018 to the effect that it does not carry on the relevant IP activity in the BVI; or
 - (iii) it is a high risk IP legal entity within the meaning of section 2 of the Economic Substance (Companies and Limited Partnerships) Act, 2018.

(c) it claims to be tax resident in an EU Member state.”

Passed by the House of Assembly this day of , 2018.

Speaker.

Clerk of the House of Assembly.

OBJECTS AND REASONS

This Bill seeks to address the EU concerns about misuse of BVI companies for profit shifting. Following the assessment of the BVI against criteria set by the Council of the European Union, BVI's tax system was provisionally considered to be harmful because of the "*de facto* lack of substance for entities doing business in or through" the territory. In response, the Government made a commitment to implement reforms by the end of 2018 to ensure that BVI businesses have sufficient economic substance.

The Organisation for Economic Cooperation and Development (OECD) has recently adopted substantial activities requirements to be applied to jurisdictions that levy low or zero corporate income tax that mirror the approach taken by the EU, thus making the requirements a global standard.

The issue of harmful tax practices increased in importance during the 1990s. EU Member States adopted a Code of Conduct for Business Taxation in 1997 and established the Code of Conduct Group (COCG) to police it. This was followed in 1998 by the OECD's Report, "Harmful Tax Competition: An Emerging Global Issue".

An area of concern identified in both the EU's Code of Conduct and the OECD's report was the granting of tax advantages without also requiring real economic activity and substantial economic presence in the jurisdiction offering the advantages. The OECD's report specifically looked at the issue in the context of jurisdictions that imposed low or zero corporate income tax.

Currently, BVI is placed in "Annex II" of the list of jurisdictions produced by the COCG and endorsed by the EU Economic and Financial Affairs Council (ECOFIN). Annex II lists jurisdictions that were identified as raising concerns but had made appropriate commitments to resolve them and therefore, this Bill seeks to achieve that.

The Bill would introduce the substantive economic substance requirements, and which also amends the Beneficial Ownership Secure Search System Act 2017 (No. 24 of 2017) ("the BOSS Act") so as to impose reporting requirements and the obligation to pass information to EU tax authorities in appropriate cases.

The Bill would apply to all companies and limited partnerships ("LPs") which are registered in the BVI, other than non-resident companies and LPs. A non-resident company or LP is a company or LP which is resident for tax purposes in a jurisdiction outside the BVI. However, it is not possible to claim to be non-resident by reason of a tax residence in a state or territory which has been included on the EU list of non-co-operative jurisdictions.

The Bill would also apply to all "foreign companies" and to all "foreign LPs". A foreign company is a company incorporated outside the BVI which is registered

as a foreign company under Part XI of the Business Companies Act 2004. Any foreign company which carries on business in the BVI must be registered. A foreign LP is defined in section 2 of the Limited Partnership Act 2017 ("LPA"), and must be registered under the provisions equivalent to Part XI of the Business Companies Act 2004 (which are to be inserted into in the Limited Partnership Act, 2017).

The effect is that the economic substance requirements are to be imposed on all BVI companies and LPs unless they can prove that they are tax-resident elsewhere, and on all foreign companies and LPs doing business in the BVI.

The Bill would impose a requirement for economic substance in the BVI for all relevant activities as identified by the OECD guidance annexed to the Scoping Paper on criterion 2.2 of the EU listing exercise (see section 6 and the related definitions in section 2). Each company and LP which is not tax resident outside the BVI must, in relation to any relevant activity, carry out defined core income-generating activities in the BVI (see clauses 7 and 8(1)(c)). It must also demonstrate economic substance by reference to adequacy of expenditure, employees and premises in the BVI (clause 8(1)(b)). The EU recommended additional requirements for intellectual property holding businesses (now adopted in the recently published OECD guidance on substance in low and zero tax regimes. These are imposed by clause 9. All these requirements are in line with EU and OECD guidance.

All BVI registered and foreign companies and limited partnerships would be required to provide information to enable the competent authority to monitor whether a company is carrying on relevant activities and (if so) whether it is complying with the economic substance requirements. These obligations are in addition to the obligation to report on beneficial ownership as required by existing section 10(3)(a) of the BOSS Act.

The amendments to the BOSS legislation would compel companies and LPs to submit the basic information about their status and relevant activities on an annual basis. This information can be analysed by the competent authority and used as the basis of risk based investigation and enforcement of the economic substance requirements. Any such investigation and enforcement will probably require further information to be supplied, and the power to require that information is to be found in clause 11.

The authority charged with operating the BOSS system and enforcing the economic substance requirements is the International Tax Authority ("ITA") established under the International Tax Authority Act 2017 (No. 24 of 2017).

The BOSS system will be used by the ITA to generate monitoring reports and to identify companies engaged in high-risk areas of business (such as intellectual property business) where specific and careful monitoring will be required; other cases which require further investigation; and cases of non-compliance.

In addition to offsite monitoring using information held on the BOSS system, ITA will conduct periodic on-site audits. These will be prioritized according to risk and also conducted on a random sample basis to complement the risk based approach.

Penalties are imposed both for failure to provide required information, and for operating a company or LP in breach of the economic substance requirements. Section 11 allows the ITA to require "any person" to provide information. Failure to provide information or providing false or misleading information can lead to a fine of up to \$75,000 and up to 5 years in prison (clause 11 and BOSS Act section 16).

The penalties for operating a company or LP in breach of the economic substance requirements are a fine of up to \$20,000 following a first determination by the ITA that the company is in breach (\$50,000 for a so-called "high risk IP legal entity"). If the breach is not remedied the ITA must issue a second determination, at which point the fine rises to a maximum of \$200,000 (\$400,000 for a high risk IP legal entity), and the ITA must consider reporting the company to the Financial Services Commission with a view to it being struck off.

A new Schedule 4 to the BOSS Act sets out the circumstances in which EU member state tax authorities will be notified of the information held on BOSS relating to companies of interest to them. The notification will occur in respect a company or LP which has a beneficial owner in the member state, which is registered in a member state or claims to be tax resident in a member state. The triggers for disclosure are:

- (a) the company or LP has been found to be in breach of the economic substance requirements;
- (b) The company or LP carries on an IP relevant activity and either accepts that it does not have substance in the BVI, or claims that it does have substance, but is a "high risk" IP company or LP;
- (c) the company or LP claims to be tax resident in an EU member state.

Premier and Minister of Finance