



Aspen Global Incorporations Limited

## What is the BVI Economic Substance Legislation?

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The Economic Substance (Companies and Limited Partnership) Act, 2018 (“ESA Act”) was enacted in the British Virgin Islands (“BVI”) on December 28th, 2018 to come into force on January 1, 2019.

### Background

The BVI Substance Act is supplemented by the BVI’s Economic Substance Code (BVI Substance Code) which is currently in draft form and is expected to be finalised by May 2019. The regime applies to the following “legal entities”:

1. Companies and foreign companies incorporated/registered under the BVI Business Companies Act, 2004 (as amended), excluding companies which are not resident in the BVI; and
2. Limited partnerships and foreign limited partnerships formed/registered under the Partnership Act, 1996 or the Limited Partnership Act, 2017, excluding limited partnerships which are not resident in the BVI or which do not have legal personality;

The regime does not include:

- a) An investment fund (within the meaning of applicable BVI legislation); or
- b) A non-resident company and a non-resident limited partnership.

An entity is a “non-resident company” or a “non-resident partnership” if the company/partnership is resident for tax purposes in a jurisdiction outside the BVI which is not on Annex 1 to the EU list of non-cooperative jurisdictions for tax purposes.

### Provisions

The ESA Act provides that a legal entity, is subject to economic substance requirements if it conducts any of the following “*relevant activities*”:

- Banking business
- Insurance business
- Fund management business
- Finance and leasing business
- Headquarters business
- Shipping business
- Holding business
- Intellectual property business

- Distribution and service centre business

### Applicability

The ESA Act provisions apply to BVI Business Companies and Limited Partnerships with legal personality, as well as foreign Companies and Limited Partnerships with legal personality, that are registered in the BVI (hereinafter “Legal Entities”), which are conducting “relevant activities”, unless they can properly validate to be tax resident in a jurisdiction outside the BVI. Limited Partnerships which have not elected to have legal personality, either local or foreign, are not subject to comply with the ESA Act. A legal entity which does not carry on any relevant activity is not subject to comply with the economic substance requirements.

### Economic substance requirements in the BVI

Each legal entity which is not tax resident outside the BVI (other than a pure equity holding entity) must, in relation to any relevant activity, carry out defined core income-generating activities in the BVI and demonstrate economic substance as follows:

1. The relevant activity must be managed & directed in the BVI;
2. There shall be an adequate number of suitably qualified employees who are physically present in the BVI (whether or not employed by the relevant legal entity or by another entity and said employees may be on temporary or long-term contracts);
3. The entities shall incur adequate expenditures in the BVI;
4. The entities shall occupy appropriate brick & mortar or premises in the BVI; and
5. Companies managing intellectual property business which require the use of specific equipment shall place/locate said equipment in the BVI.

### BVI Pure Equity Holding Entities

BVI pure equity holding entities are entities that fall within the scope of the BVI Substance Act, but which carry on no other relevant activity other than holding equity participations in other entities and only earn dividends and capital gains. Pure equity holding entities are subject to reduced substance requirements under the BVI Substance Act.

BVI pure equity holding entities have adequate substance within the BVI if they:

- a) Comply with their statutory obligations under the BVI Business Companies Act, 2004 (as amended) or the Limited Partnership Act, 2017, whichever is relevant (including, for example, requirements to pay annual fees and to make certain filings following corporate events).
- b) The entities must have adequate employees and premises for holding equity participations in the B.V.I. and, where they manage those equity participations; have in the BVI, adequate employees and premises for carrying out said management.

### Reporting Responsibilities

All legal entities shall provide their registered agent sufficient information to enable the to determine whether the entity is carrying on any relevant activity, and, if so, if the legal entity is complying with the legislation requirements.

Legal entities which are not tax resident in the BVI will have to provide evidence from the tax authorities in the jurisdiction where they are tax resident. Proof of registration and evidence of tax payment is required on an annual basis.

Legal entities that are tax resident in a jurisdiction included on the EU list of non-corporative jurisdictions will not be allowed to claim to be tax resident outside of BVI.

### Penalties

The ESA Act outlines the range of penalties to be imposed for failure to provide the required information or for operating in breach of the economic substance requirements. Penalties may include fines, imprisonment and/or the entity to be struck off the Registry.

### Economic Substance Code (Code)

On 23 April 2019, the BVI International Tax Authority (“ITA”) published a draft Code, which is supplementary to the Economic Substance Act providing guidance and rules of practice for the implementation of the new economic substance requirements in the B.V.I. The ESA shall include guidance on the requirements for non-resident entities, the relevant activity definitions, considerations for applying the substance requirements and timelines.

The Act introduced obligations on entities to collect and submit information to enable the ITA to monitor economic substance requirements. This information needs to be submitted on an annual basis.

## Time Schedule of Developments

The Code states that entities must be in a position to comply with the requirements from the commencement of their first “financial period”. The financial period for the purposes of the ESA Act will not necessarily be tied to the entity’s accounting period or fiscal year, and will be determined as follows:

- The first financial period of a legal entity incorporated or formed on or after 1 January 2019 will commence on the date of incorporation or formation and generally will be one year from that date.
- The first financial period of a legal entity incorporated or formed before 1 January 2019 will begin on 30 June 2019 and generally will be 12 months.

The final Code is expected to be published by the end of May 2019, following an educational campaign and may probably include additional amendments deemed necessary by the BVI Government.