

New substance requirements in the BVI

Maxim van Veluw
4th of March 2019

Index

- Why?
- New BVI Legislation
- Relevant Activities
 - Non-equity Holding
 - Equity Holding
 - IP
- Substance requirements
- What to file?
- Deadlines
- Automatic Disclosure to EU
- Enforcement
- Penalties and right of appeal
- Flow chart
- Conclusion

Why?

- The Code of Conduct Group of the EU created a list (blacklist) of non-cooperative jurisdictions for tax purposes.
 - tax transparency;
 - fair taxation;
 - Compliance with BEPS
- 92 jurisdictions including US and China, and the UK's Crown Dependencies and Overseas were screened
- BVI was placed in "Annex II"
- The BVI meets the EU's criteria
- EU requirements on economic substance from BVI and others such as Bermuda, Cayman and Crown dependencies:

"The jurisdiction should not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction."

New BVI legislation

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

- Economic substance requirements
- Also amends the Beneficial Ownership Secure Search System Act 2017 (“**BOSS act**”)
 - reporting requirements
 - pass information to EU tax authorities
- Economic substance requirements for:
 - All BVI companies and LPs
 - Foreign companies and LPs doing business in the BVI.
 - Unless they can prove that they are **tax-resident elsewhere**

Relevant activities

- “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; (additional substance requirements will apply)
 - (i) distribution and service centre business.

Economic Substance Requirements (non-Equity Holding)

A legal entity complies with the economic substance requirements if;

(1) the relevant activity is directed and managed in the BVI

(2) having regard to the nature and scale of the relevant activity carried on in BVI:

(a) adequate number of suitably **qualified employees** in relation to that activity who are physically present in the BVI

(b) adequate **expenditure** in BVI,

(c) there are physical **offices** or premises as may be appropriate for the BVI core income-generating activities; and

(d) where the relevant activity is **intellectual property** business and requires the use of specific equipment, that equipment is located in the Virgin Islands;

(3) conducts BVI core income-generating activity; and

(4) The income-generating activity can be carried out for the relevant legal entity by another entity

Economic Substance Requirements (Equity Holding)

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

- (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.

High Risk IP legal Entity

- High risk IP legal entity is a legal entity which carries on an intellectual property business and which
 - (a) acquired the IP asset
 - (i) from an affiliate
 - (ii) in consideration of funding research and development by another person situated in a country or territory other than the BVI; and
 - (b) licenses the IP asset to one or more affiliates or otherwise generates income from the asset in consequence of activities performed by foreign affiliates.

Economic Substance Requirements (IP)

- Presumption of **non-compliance** for IP business if
 - (a) activities in BVI do not include; patents, research and development or non-trade intangible assets such as brand, trademark and customer data, marketing, branding and distribution
 - (b) high risk IP entity
- (a) may be rebutted when the activities in the BVI include:
 - Strategic decisions and managing (as well as bearing) the principal risk relating to the development and subsequent exploitation of the intangible asset generating income or
 - Strategic decisions and managing (as well as bearing) the principal risk relating to acquisition by third parties and subsequent exploitation of the intangible asset or
 - Carrying on the underlying trading activities through which the intangible assets are exploited and which lead to the generation of revenue from third parties.
- (b) may be rebutted where a high degree of control over development, exploitation, maintenance, enhancement and protection of the IP asset is exercised by suitably qualified employees of the relevant legal entity who are physically present and perform their function from within the BVI and who are on long-term contracts.

Relevant activities

- Where a company or LP is not carrying on a 'relevant activity', it is not subject to the substance requirements.
- Potential examples:
 - Holding personal use real estate
 - Family investment companies
 - Private trust companies
- Further guidance will hopefully clarify

What to file

- All BVI registered and foreign companies and limited partnerships must 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.
- The information to be provided will be integrated into the BVI's existing Beneficial Ownership Secure Search ("**BOSS**") system.
- The BOSS Act places an obligation on **Registered Agents** in the BVI to keep information up-to-date annually, and competent authorities are able to search the database anonymously.

Deadlines

- Existing companies and limited partnerships are required to comply with the economic substance requirements under the Act by **30 June 2019** and to meet reporting obligations under and the BOSS Act by 30 June 2020.
- New companies and LPs must comply with economic substance requirements immediately and meet the reporting obligations in the Schedule within one year of the date of incorporation or formation respectively.

Automatic Disclosure to EU

- EU member state tax authorities will be notified of the information held on BOSS for a company or LP which has a beneficial owner in the member state, which is registered in a member state.
- The triggers for disclosure are:
 - (1) the company or LP has been found to be in breach of the economic substance requirements
 - (2) 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
 - (3) the company or LP claims to be tax resident in an EU member state.

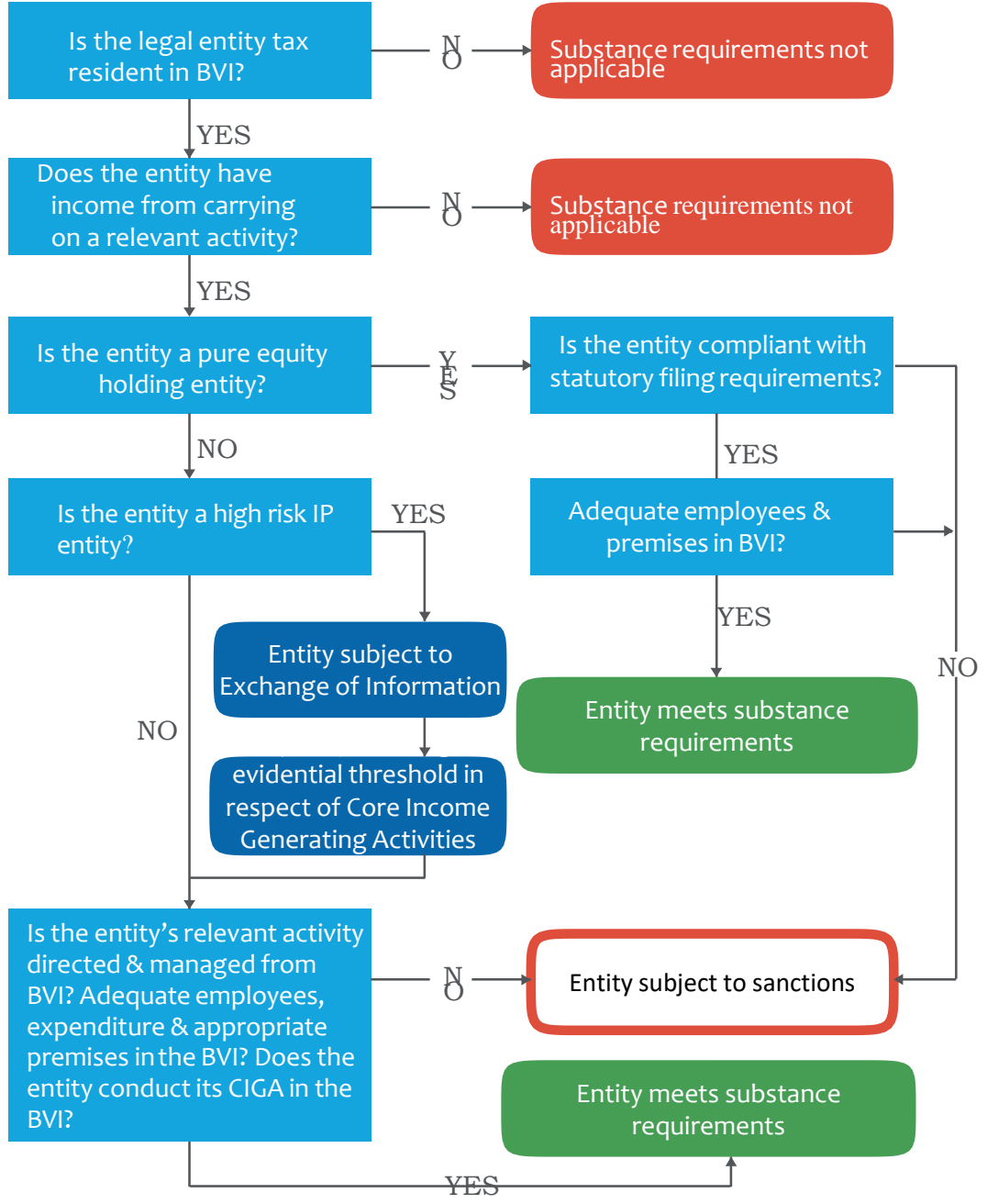
Enforcement

- International Tax Authority (“ITA”) responsible enforcing the economic substance requirements
- BOSS system will be used for:
 - generate monitoring reports
 - to identify companies engaged in high-risk areas (IP)
- Further periodic on-site audits (random and based on risk profile)
- 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, (no later than 6 years after)
- The time limit above 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.

Penalties

- 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
- The penalties for operating a company or LP in breach of the economic substance requirements are a fine of up to \$20,000 (\$50,000 for a so-called “high risk IP legal entity”).
- If the breach is not remedied the fine rises to a maximum of \$200,000 (\$400,000 for a high risk IP legal entity), and potential strike off.
- There is a right of appeal to the above penalties

Economic Substance (Companies and Limited Partnerships) Act, 2018



Conclusion

- Uncertainty
- Observations:
 - Build/move activities to BVI
 - Obtain tax residency in other jurisdiction
 - Restructure/Redomicile to UK, Ireland, Malta, Hungary, Netherlands, Luxembourg, Hong Kong, Singapore
 - Some offshore jurisdictions are considering implementation of territorial based tax model
- Further guidance coming soon (end March)



Thank you for your attention!
Questions?
