

British Virgin Islands Economic Substance Requirements – 'Relevant Activity' of 'Finance and Leasing Business'

For general background on The Economic Substance (Companies and Limited Partnerships) Act, 2018 (the "Economic Substance Act"), the related draft International Tax Authority Economic Substance Code that was issued on 22 April 2019 (the "Guidance") and for the meaning of 'legal entity', please click [here](#).

This update assumes that an entity has already been determined to be a 'legal entity' under the Economic Substance Act and that the 'legal entity' is now considering whether it is carrying on one of the nine categories of geographically mobile 'relevant activities' - in particular, under the 'finance and leasing business' category.

What is 'Finance and Leasing Business'?

'Finance and leasing business' in the Economic Substance Act is defined to mean 'the business of providing credit facilities of any kind for consideration'.

The Economic Substance Act further provides (at section 3) that:

- (a) the 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;
- (c) 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;
- (d) any activity falling within the definition of 'banking business', 'fund management business' or 'insurance business' is excluded from this definition (please refer to our separate updates on these separate categories of 'relevant activities').

Economic Substance Test

If a 'legal entity' only carries on a 'relevant activity' that is a 'finance and leasing business', it will be subject to the economic substance test set out in the Economic Substance Act. The economic substance test can be satisfied in relation to that 'finance and leasing business' if the 'legal entity' ensures that:

- (a) the 'finance and leasing business' is directed and managed in the British Virgin Islands;

- (b) having regard to the nature and scale of the 'finance and leasing business':
 - (i) there are an adequate number of suitably qualified employees in relation to that activity who are physically present in the British 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 British Virgin Islands;
 - (iii) there are physical offices or premises as may be appropriate for the core income-generating activities (as described below in the context of 'finance and leasing business');
- (c) the legal entity conducts core income-generating activity in the British Virgin Islands as described below in the context of 'finance and leasing business': 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 outside the British Virgin Islands;
 - (ii) only that part of the activities of that other entity which are solely attributable to generating income for the relevant legal entity and not for any other 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.

British Virgin Islands Core Income Generating Activities

The relevant British Virgin Islands core income generating activities in the context of 'finance and leasing business' include:

- (a) agreeing funding terms;
- (b) identifying and acquiring assets to be leased (in the case of leasing);
- (c) setting the terms and duration of any financing and leasing;
- (d) monitoring and revising any agreements; and
- (e) managing any risks.

The Guidance on 'Finance and Leasing Business'

The Guidance contains some additional sector specific provisions in respect of 'finance and leasing business'. It provides that what is caught by section 3 is a finance and leasing business. An entity which provides credit as an incidental part of a different sort of business will not thereby be treated as carrying on a finance and leasing business.

Thus, for example, a builder's merchant which supplies goods on account, thereby offering short term credit, will not be carrying on a finance and leasing business. Only where the provision of credit can be seen to be a business activity in its own right will the entity be treated as if its business, or part of its business, is a finance and leasing business.

Entities which carry on a factoring activity, by which they purchase and then collect another business's book debts, will be treated as carrying on a finance and leasing business.

The Guidance also clarifies that entities which hold debt or debt instruments for the purpose of investment will not be regarded as being in the business of providing credit facilities.

Further, the Guidance states that although the activity is described as finance and leasing, the essence of the activity, as the definition makes clear, is the provision of credit facilities. So the mere fact that an entity leases items does not mean it is carrying on a finance and leasing business. So short term hiring out of vehicles, boats or equipment is not caught.

What to do if a Legal Entity is Carrying on the 'Relevant Activity' of 'Finance and Leasing Business'

It is worth noting that there are a range of consequences for breaches of the Economic Substance Act (including financial penalties and potential striking-off).

If you have any specific questions in relation to a 'legal entity' conducting 'finance and leasing business' or this update, please speak to your usual Maples Group contact or:

British Virgin Islands

Richard May

+1 284 852 3027
richard.may@maples.com

Chris Newton

+1 284 852 3043
chris.newton@maples.com

Ruairi Bourke

+1 284 852 3038
ruairi.bourke@maples.com

Dubai

Philip Ireland

+971 4 360 4073
philip.ireland@maples.com

Hong Kong

Matt Roberts

+852 3690 7405
matt.roberts@maples.com

Richard Spooner

+852 2971 3046
richard.spooner@maples.com

London

Matthew Gilbert

+44 7466 1608
matthew.gilbert@maples.com

Singapore

Michael Gagie

+65 6922 8402
michael.gagie@maples.com

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