Rödl & Partner

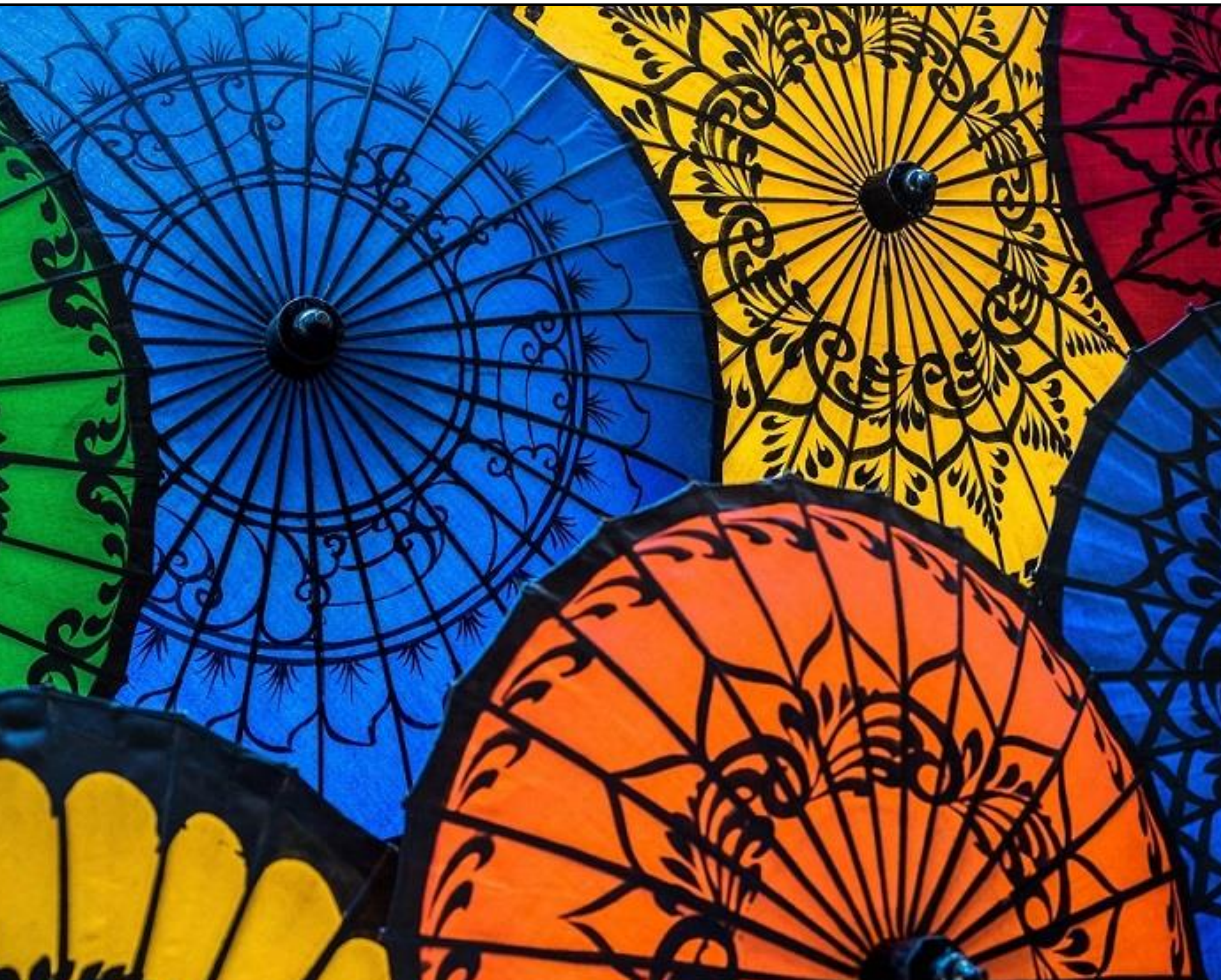
QUARTERLY ASEAN NEWSFLASH

EYE-LEVEL EXCHANGE

Issue:
Q2/2021

Latest news on law,
tax and business in ASEAN

www.roedl.de/asean/ | www.roedl.com/asean/



Rödl & Partner

QUARTERLY ASEAN NEWSFLASH

EYE-LEVEL EXCHANGE

Issue: Q2/2021

Read in this issue:

→ Note from the editor

Dear reader

Welcome to the Q2/2021 edition of our ASEAN Newsflash. This quarter brought some interesting new aspects in the EU-ASEAN relations. In April, the EU-Council approved conclusions on an EU Strategy for cooperation in the Indo-Pacific which includes further negotiations on free trade agreements as well as on partnership and cooperation agreements with some countries in the region. Further, after a long pause caused by the pandemic, progress was made in the negotiations concerning the Comprehensive Economic Partnership Agreement with Indonesia. Also in Indonesia, four new implementing regulations to the Omnibus Law entered into force, which among others provide some long expected facilitation and clarification for the work of foreign staff in Indonesia (although current travel activities remain rather low in the region due to the pandemic). In a parallel move, Malaysia is also going to review its employment legislation including the current minimum wage scheme, while a decree with various new labor regulations in Vietnam became already effective earlier this year.

We would be happy to meet you virtually for a further exchange of thoughts at our upcoming 22nd Forum Global. As one of Germany's largest foreign trade events, the Forum Global offers globally operating companies the opportunity to obtain comprehensive information about current opportunities and challenges on markets worldwide and talk to our colleagues from many jurisdictions. More information on the program can be seen here.

Sincerely yours,

Markus Schlueter
ASEAN Desk
markus.schlueter@roedl.com

Please note: We have received and registered your contact details for the purpose of providing you with our quarterly ASEAN Newsflash. We assume that you are still interested in receiving this publication. Should you wish though to no longer receive the ASEAN Newsflash, please simply send unsubscribe to: bettina.herzog@roedl.com.

→ International Trade

EU Council concludes Strategy for Indo-Pacific Co-operation

What does this mean for future ASEAN/Pacific free trade relations?

On 16 April 2021, the Council approved conclusions on an EU Strategy for cooperation in the Indo-Pacific. Accordingly, the EU intends to reinforce its role as a cooperative partner in the Indo-Pacific, the ongoing cooperation includes development and humanitarian assistance, tackling climate change, biodiversity loss and pollution, and contributing to the upholding of international law including human rights and freedom of navigation.

From a business perspective, the concluding of "ambitious" free trade agreements remains of particular interest for European entrepreneurs. The Council appears concerned about current dynamics in the Indo-Pacific that spurred geopolitical competition, adding to increasing tensions on i.a. trade and supply chains. Hence, diversification of supply chains should contribute to the resilience of the European economy and the reduction of strategic dependencies on critical raw materials.

Commitment to Multilateralism

In light of the aforementioned concerns, the EU Strategy for Cooperation in the Indo-Pacific aims at providing a new impetus by, among others, promoting effective, rules-based multilateralism.

The Council intends to cooperate with Indo-Pacific countries to reform the WTO towards a sustainable and effective multilateral trading system. But it also emphasizes the need to strengthen the EU's strategic trade position in the region amid recent significant regional agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP).

Partnership and Cooperation Agreements

The EU aims at finalizing Partnership and Cooperation Agreements (PCAs) with the ASEAN members Malaysia and Thailand. Such PCAs commonly contain commitments which are central to the EU's foreign policy, including provisions on human rights, non-proliferation, counter-terrorism, the International Criminal Court, migration and taxation. Notably from a business perspective, they also include a trade cooperation section, which shall pave the way for the conclusion of ongoing free trade agreement (FTA) negotiations.

The envisaged PCA with Malaysia, for example, includes general principles for the parties to engage in a dialogue on trade and investment-related matters with a view to strengthening and advancing bilateral trade between them, and striving towards an FTA. This comes with the background that FTA-negotiations between the EU and Malaysia were already initiated in 2010, and then put on hold after seven rounds in 2012 at the request of Malaysia. Later, a stocktaking exercise was conducted in 2016-17 to assess prospects for further negotiations. However, it appears that the Malaysian government has not yet taken a position on the possible resumption of negotiations.

Negotiations on an FTA with Thailand were launched in March 2013, and four rounds took place until April 2014; so far no further negotiating rounds have been scheduled. However, in October 2019 the Council concluded on the importance of taking steps towards a resumption of negotiations with Thailand, and the parties have since engaged in a respective mapping exercise.

Free Trade Agreements

In order to further level the playing field in the Indo-Pacific, the EU strategy targets to further explore and negotiate trade and investment agreements in the region, such as those with Japan, South Korea, Singapore and Vietnam. In this regard, the conclusion of free trade agreements is intended with Australia, New Zealand and the ASEAN-member Indonesia. Negotiations for an EU-Indonesia free trade agreement were launched on 18 July 2016, and ten rounds have been held so far.

The latest round has been conducted per video-conference from 22 February to 5 March 2021, after a long pause due to the global pandemic. According to the last negotiation report, the recent discussions included, among others, the regulatory provisions and related market access offers for financial, telecommunication or transport services, and they aimed at a better idea of possible future market access liberalization. Negotiations further focused on investment protection provisions, notably the coverage of subsidies, expropriation, observance of written commitment and denial of benefits.

The next round is planned for early July 2021.

→ International Trade

RCEP – Implications for Trade in Services via Commercial Presence in Thailand

Thailand has completed the domestic procedures to ratify the Regional Comprehensive Economic Partnership (RCEP) in February 2021. The instrument of ratification must still be deposited with the ASEAN Secretary-General, who has been designated as Depositary for this Convention.

RCEP provides in Chapter 8 for the liberalization of trade in services between member states by eliminating some restrictive and discriminatory measures affecting such trade. The services chapter contains, among others, provisions on market access, national treatment, most-favored-nation treatment, and local presence, which are subject to the Annex lists of specific obligations of the Parties or the lists of reservations and non-conforming measures, as well as individual additional obligations. The spectrum includes any service in any sector except services supplied in the exercise of governmental authority. Services are possible via different modes of supply, here we look at the establishment of a commercial presence, which means any type of business or professional establishment, including through either (i) the constitution, acquisition, or maintenance of a juridical person or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Party for the purpose of supplying a service.

Thailand made commitments that are set out in its Schedule in Annex II (which is named Schedules of Specific Commitments for Services), which are the specific commitments it undertakes under the RCEP Service Chapter. This means a commitment to provide market access and national treatment for the service activity in question on the terms and conditions specified in the schedule. National treatment means the principle of states giving others the same treatment as one's own nationals.

Thailand's Schedules of Specific Commitments are divided into so called (i) horizontal commitments and (ii) sector-specific commitments. Generally, under the horizontal commitments, only a limited liability company, or a type of legal entity as specified in the Schedule, which is incorporated and registered in Thailand pursuant to Thai laws and regulations is permitted. The commercial presence must therefore meet one of the following horizontal categories which is respectively indicated in the sector-specific commitments:

CATEGORY	ELIGIBLE SERVICES
CATEGORY 3.1: Foreign equity participation may not exceed 49 percent of registered capital, number of foreign shareholders less than half of total number	SERVICES I.A.: Architectural, Engineering, Industrial design, Real Estate involving own or leased property (different types, e.g. renting or leasing services involving own or leased residential property), Advertising, Technical testing and analysis, Packaging, Convention, Construction Work for Buildings/Civil Engineering, Installation and Assembly Work, Hotels and Restaurants as well as Travel Agency and Tour Operator, most financial services, Commission Agency, Wholesale trade of sports goods as well as Chemical and pharmaceutical used in food processing industry

CATEGORY	ELIGIBLE SERVICES
CATEGORY 3.2: Foreign equity participation may not exceed 51 percent of registered capital, additional conditions	Sanitation and similar services
CATEGORY 3.3: Foreign equity participation may not exceed 70 per cent of registered capital, additional conditions	SERVICES I.A.: Veterinary, Software implementation/consultancy, Data processing/Database, different types of R&D, Sales of internet advertising space (except on commission), Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)/Machinery and equipment (on a fee or contract basis), Translation and interpretation, Specialised medical services provided in private hospital, Sales a fee or contract basis of medical goods

The conditions of the first category seem comparable with the general principle which determines the applicability of the Thai Foreign Business Act B.E. 2542 (FBA). These sectors are subject to commitment in other modes of supply, but with regard to the establishment of a local presence, the respective RCEP commitments do not seem any more favorable than those under the already existing local investment and market entry regulations in Thailand.

In the second category, a slight share majority in a commercial presence would be permitted, but still a 49 percent local JV partner is required. There are only very few services in this category.

The third category goes quite beyond the 49 percent threshold imposed by the FBA, but a market access for 100 percent foreign investment is not provided in this category as well. Furthermore, under this (as well as under the previously mentioned second) category, a limited liability company or a type of legal entity as specified in this Schedule, which is owned or controlled by foreigners, must meet additional conditions: among others it shall operate through a joint venture with a juridical person of Thai nationality, and a minimum capital requirement rate referred to in applicable Thai laws and regulations shall be applied to limited liability companies.

Further, with regard to limitations on National Treatment, in the second and third category a limited liability company or a type of legal entity as specified in this Schedule must apply for a certificate of business operation as stipulated by the Section XI of the FBA and the Ministerial Regulation Prescribing Rules and Procedures Pertaining to the Application for a Foreign Business Certificate B.E. 2546 (2003).

It can be concluded that while some service sectors will see further market opening for a commercial presence in Thailand, provided the project is covered via the investment chapter of RCEP, the pact does not provide any market opening for 100 percent foreign invested services in Thailand.

Foreign service providers would thus need to resort to local regulations governing investment promotion, foreign business licensing or other means of exemption from FBA-restrictions.

Contact for more information

Markus Schlueter
T +49 221 9499 093 42
markus.schlueter@roedl.com

→ Indonesia

Changes in the Manpower Sector Following the Enactment of Indonesia's Omnibus Law

Following the issuance of Omnibus Law No. 11 of 2020 on Job Creation ("JOB CREATION LAW"), the government has now enforced four new implementing manpower regulations. Below are the highlighted changes in the manpower sector, in comparison to Law No. 13 of 2003 on Manpower ("MANPOWER LAW") and its relevant implementing regulations.

I. SIMPLIFICATION OF FOREIGN WORKER EMPLOYMENT LICENSING

– Under Government Regulation No. 34 of 2021 on the Utilization of Foreign Workers, effective as of 1 April 2021 (GR 34/2021), a Work Permit is now no longer stipulated as a requirement. Foreign workers and their sponsors are now only obliged to obtain a Foreign Workers Utilization Plan (*Rancangan Penggunaan Tenaga Kerja Asing* or "RPTKA") approved by the Ministry of Law and Human Rights ("MOLHR"), as well as immigration permits. The licensing requirement is even further simplified for certain groups of foreign workers, who are not required to obtain the RPTKA approval.

II. MAXIMUM PERIOD OF EMPLOYMENT FOR FIXED-TERM EMPLOYMENT AGREEMENT

– Employment agreements based on a certain period of time may be agreed for a maximum 5-year term. However, the maximum period shall include any future extensions along, in addition to the initial period of employment. For example, if the initial period of employment is agreed for 3 (three) years, the agreement may only be extended once for another 2 (two) years, or multiple times for shorter periods that shall not exceed 2 (two) years collectively.

– For agreements made based on the completion of work, no maximum period of employment is set by Government Regulation No. 35 of 2021 on Fixed-Term Employment Agreements, Outsourcing, Working and Resting Hours, and Termination of Employment, effective as of 2 February 2021 (GR 35/2021). The agreement may be concluded for any period of time, until the work is deemed completed. Such period must be clearly estimated based on the assessment of the work itself, and the criteria for completion must be comprehensively stipulated in the agreement.

– The types of works which are eligible to be conducted under the fixed-term employment agreements are similar with the ones stipulated in the Manpower Law.

III. REGISTRATION OF FIXED-TERM OF EMPLOYMENT AGREEMENT TO GOVERNMENT AUTHORITIES

– Based on GR 35/2021, fixed-term employment agreements must now be registered by the employer to either the Ministry of Manpower through an online system within 3 days of the signing date, or to local manpower authorities within 7 days after the signing date, if the online system is not yet available.

IV. COMPENSATION ON THE TERMINATION OF FIXED-TERM EMPLOYMENT AGREEMENT

– In accordance with Law 11/2020 and GR 35/2021, employers are required to pay compensation to fixed-term employees at the expiry or termination of a fixed-term employment agreement. If the fixed-term employment agreement is extended, the compensation will be payable upon the termination or expiry of the extension. Further, GR 35/2021 stipulates that the formula for calculating the compensation is as follows:

<table>
<tr><th>COMPLETED TERM OF SERVICE</th><th>AMOUNT OF COMPENSATION</th></tr>
<tr><td>12 months consecutively</td><td>1 (one) month salary</td></tr>
<tr><td>1 month up to 12 months</td><td rowspan="2">$\frac{\text{Term of Service}}{12}$ x 1 (one) month salary</td></tr>
<tr><td>More than 12 months</td></tr>
</table>

However, it should be noted that foreign employees hired for a fixed term period are not entitled to receive such compensation.

V. AMENDED CALCULATION OF COMPENSATION PAYMENT FOR TERMINATION OF PERMANENT EMPLOYMENT

– In the event of termination, employers are required to compensate their workers with a package of payment consisting of (a) severance payment, (b) reward of service payment, and (c) substitution of rights. The amounts of these payments are determined by multiple factors, namely wages, term of service, and reason of the termination.

– Pursuant to GR 35/2021, the minimum severance payment limit is lowered, as employers may provide 50 percent and 75 percent less than 1 (one) time amount of payment for certain reasons of termination.

VI. DURATION AND COMPENSATION FOR OVERTIME

– Overtime has previously been limited in the Manpower Law to 3 (three) hours per day and 14 (fourteen) hours per week. In GR 35/2021, the limit is increased to 4 (four) hours per day and 18 (eighteen) hours per week, which does not include overtime work done during weekly rest periods and/or national holidays.

– Overtime pay calculation is based on the monthly salary with the same formula as stipulated in the previous regulation, Ministry of Manpower Decree No. KEP. 102/MEN/VI/2004 on Overtime and the Compensation (“MOM Decree 102/2004”).

VII. PENSION FUND CONTRIBUTIONS TO BE CALCULATED INTO COMPENSATION PAYMENT

– Article 58 of GR 35/2021 specifies that employers who have registered their employees to a pension fund program according to the laws and regulations on pension fund, may calculate their paid contributions as part of the compensation payment provided for employees whose employment is terminated for any reasons as elaborated in point 5 above.

– Pursuant to Law No. 11 of 1992 on Pension Fund (“Pension Fund Law”), a pension fund program may be either administered by employers themselves or a third party financial institution, including banks and insurance companies, aimed at providing benefits for retired employees and employees who become disabled. This pension fund complements the implementation of the similar mandatory Pension Security Program under the Social Security Administration Agency (“BPJS”).

– If the calculation of benefits from such pension fund program is less than the severance, reward of service and separation payment, then the employer shall compensate the difference. Further stipulations of this standard provision may be agreed upon in the employment agreement, company regulations, or a collective employment agreement.

VIII. MINIMUM WAGE

– Government Regulation No. 36 of 2021 on Wage Policy, effective as of 2 February 2021 (GR 36/2021), further specifies that the wages provided for employees working for 1 (one) year or more shall be made in accordance with the established structure and scale of wages by the employer.

– The previously existing Provincial Minimum Wage (Upah Minimum Provinsi or “UMP”) and Regency/City Minimum Wage (Upah Minimum Kabupaten/Kota or "UMK") remains to be implemented with certain conditions such as regional economic growth or inflation. However, provisions concerning sectoral minimum wage is no longer stipulated in GR 36/2021.

IX. MINIMUM WAGE EXEMPTION FOR MICRO AND SMALL ENTERPRISES

– Pursuant to GR 36/2021, micro and small enterprises may be exempted from implementing the minimum wage policy for their employees.

– The wages for micro and small enterprises may be determined based on an agreement between the employer and the employee. The wage agreement shall be at least equal to a certain percentage of the average public consumption at the provincial level, which is 50 percent (fifty percent). In determining the wage percentage, the agreed wage value shall be at least 25 percent (twenty five percent) above the poverty threshold at provincial level.

X. PROVISIONS ON HOURLY WAGES

– GR 36/2021 adds new provisions regarding hourly wages, which shall only apply to part-time workers. Working part-time is further defined as working for less than 7 (seven) hours per day and 35 (thirty five) hours per week.

– The hourly wages may be determined by agreement between the employer and their workers, however, it must not be lower than the resulting value of the following formula:

Hourly wages:	$\frac{\text{Wages per month}}{126}$

The division value, 126, may be reviewed in the future in case of significant changes in the median working hour

Contact for more information

Vita Surya Nirmala
T +62 21 5050405-1034
vita.surya@roedl.com

.

→ Indonesia

BKPM transformed into Ministry of Investment

The head of the Indonesian Investment Coordinating Board (*Badan Koordinasi Penanaman Modal* or BKPM), Mr. Bahlil Lahadalia, has been appointed as Minister of Investment by president Joko Widodo on 28 April 2021, which transforms the BKPM into a new Ministry of Investment.

This change to Ministerial level comes with the respective granting of power to issue decrees and create regulations. The appointment is the second cabinet reshuffle within five months; in December 2020, six ministers have been replaced. It currently does not seem fully clear which further authority the Ministry of Investment shall have compared to the former status of BKPM as non-ministerial government agency.

As such, BKPM already had the authority to issue regulations concerning investments, e.g. recent implementing regulations concerning risk-based business licensing. It also remains to be seen to what extent the creation of the new ministry will help to tackle some main barriers like the lack of coordination between ministries and regional administrations, and respective obstacles to harmonize the procedures and rules between central government and regional administrations.

Contact for more information

Markus Schlueter
T +49 221 9499 093 42
markus.schlueter@roedl.com

→ Indonesia

New tax incentives to mitigate the effects of Covid-19

Following the outbreak of Covid-19 in 2020, the government issued Minister of Finance Regulations in order to provide incentives for taxpayers and businesses being impacted by the current pandemic. The Indonesia government continues to provide tax incentives in 2021 (as shown below).

The tax incentives at a glance

1. Employee income tax borne by the government: This is applicable to employees with an annual salary of less than IDR 200 million, working for companies which are eligible for tax incentives;
2. Final income tax (0.5 percent) is borne by the government: This is only applicable to taxpayers with an annual sales revenue of less than IDR 4.8 billion, having been subject to PP-23/2018;
3. Exemption of Article 22 income tax upon import;
4. 50 percent reduction of the monthly Article 25 income tax instalments;
5. Accelerated VAT refund process for taxpayers claiming VAT refund of less than IDR 5 billion. This is applicable for the eligible taxpayers.

	YEAR 2020	YEAR 2021
1	Article 21 employee income tax borne by the government	Article 21 employee income tax borne by the government
2	Final income tax is borne by the government , for taxpayers having sales revenue maximum of IDR 4.8 billion	Final income tax is borne by the government , for taxpayers having sales revenue maximum of IDR 4.8 billion
3	Exemption of Article 22 income tax upon imports	Exemption of Article 22 income tax upon imports
4	50 percent reduction of the monthly Article 25 income tax instalments	50 percent reduction of the monthly Article 25 income tax instalments
5	Accelerated VAT refund process for taxpayers claiming VAT refund of less than IDR 5 billion	Accelerated VAT refund process for taxpayers claiming VAT refund of less than IDR 5 billion
	TAX REGULATIONS:	TAX REGULATION:
	PMK 23/2020 covering 1 Apr-27 Apr 2020	PMK 09/2021 covering Jan-Jun 2021 tax periods
	PMK 44/2020 covering 27 Apr-16 Jul 2020	Further tax regulation is expected.
	PMK 110/2020 covering 16 Jul-31 Dec 2020	

The incentives are eligible for :

- taxpayers in a specific industry-code (“KLU/ Klasifikasi Lapangan Usaha); or
- export-oriented taxpayers having particular import facilities; or
- taxpayers operating in bonded-area.

Clients may want to check if they are eligible or whether or not their specific industry code is covered by such tax incentives.

Contact for more information

Wahyu Indradi
T +62 21 5056 0405
wahyu.indradi@roedl.com

→ Malaysia

The EU Indo-Pacific strategy and its effect on European companies doing business in Malaysia

On 16 April 2021, the Council of the European Union (“EU”) has approved the EU Strategy for cooperation in the Indo-Pacific (“Strategy”); please refer to our International Trade Section above for further information.

While under the chapter on trade, the Guidelines highlighted that the EU aims to revive the negotiations with Malaysia on a Free Trade Agreement (FTA), the Strategy only speaks about a modernized Partnership and Cooperation Agreement (PCA) with Malaysia, without expressly mentioning the aim of entering into an FTA. PCAs usually follow a broader scope and do not directly aim to liberalize trade in a manner of FTAs.

Given the general nature of the Strategy, it remains to be seen if and how the EU and Malaysia will cooperate in terms of trade in the future. According to recent media coverage, industry groups in the EU and also Malaysia intend to lobby for a restart of trade talks on an FTA between the EU and Malaysia. The negotiations for an FTA began in 2010, but were suspended due to the controversy about palm oil. In 2018, the EU has decided to phase out the use of palm oil in biofuels from 2030. Malaysia, the world’s second largest producer of palm oil, has filed a complaint with the World Trade Organization over this EU palm oil ban. Considering the low impact of the EU ban on Malaysia’s palm oil production, but the overall potentially positive impact of a Malaysia-EU FTA on Malaysian exports to the EU - mainly industrial goods and electronics -, industry groups are optimistic about the future of a trade deal between the EU and Malaysia.

Currently, entrepreneurs should consider the entire trade treaty network available in the region, namely the ASEAN Trade in Goods Agreement, the ASEAN Plus Free Trade Agreements, the Comprehensive and Progressive Trans Pacific Partnership and the not yet ratified Regional Comprehensive Economic Partnership Agreement, in order to ensure the application of preferential trade agreements on their business.

Contact for more information

Christian Swoboda
T +65 62 3867 70
christian.swoboda@roedl.com

→ Malaysia

Minimum Wage Order 2020 & Employment Act 1955 to be reviewed

The Minimum Wage Order 2020 ('the 2020 Order') came into force in February 2020, and introduced a two-tiered minimum wage based on the place of employment of the employee. In consideration of the current economic conditions, and to ensure that the earnings of employees remain relevant, the Prime Minister of Malaysia, Tan Sri Muhyiddin Yassin, has announced that the 2020 Order is being reviewed.

The Prime Minister has requested stakeholders to provide their suggestions and concerns to address the issue of minimum wage in Malaysia. The Prime Minister has likewise indicated plans to improve and amend the labor law, particularly the Employment Act 1955 ('EA Act'), to include a coverage of all workers in the private sector, regardless of the employees´ salaries (currently, the protection under EA for employees in the private sector is subject to a salary cap), to extend maternity leave to 90 days, to provide a 3 days' paternity leave (currently there is no paternity leave in the private sector) and to reduce the weekly working hours from 48 to 45 hours, amongst others.

In light of these upcoming changes, we urge entrepreneurs to review, amongst others, their employee handbook and employment contracts to be ahead of the anticipated changes.

Contact for more information

Geetha Salva
Advocate & Solicitor
Geetha Salva & Associates
in Association with Rödl & Partner
T +60 3 2276 5580
geetha.salva@gsa-law.com

→ Malaysia

Relaxation of incentive conditions for manufacturing and service projects approved by MIDA

Companies that have been granted incentives are required to comply with certain conditions, and to implement their approved projects within a stipulated timeframe, as outlined in the approval letters issued by MIDA (Malaysian Investment Development Authority). The conditions could include a minimum amount of investment in fixed assets, incurring minimum amounts of research and development expenditure, hiring employees with certain levels of qualification, partnering with local businesses and educational institutions, and others.

On 6 April 2021, it was announced that the Malaysian Government has agreed to relax certain conditions imposed on manufacturing and service companies that have been granted incentives by MIDA. This is part of the Malaysian Government's initiative to continue fostering the country's economic revitalization efforts by facilitating investments and restoring investor confidence, which is a very welcome move.

With this relaxation, relevant companies may now be given some leeway to achieve the required thresholds or to meet the implementation timelines of the approved projects, subject to compliance with certain criteria set by the Malaysian Government. The relaxation of the conditions will apply for the period between 2020 and 2021.

It is very important to note that this proposed relaxation is not automatic. Companies seeking to apply for the relaxation are required to submit their requests to MIDA as soon as possible, along with the relevant supporting justification and documentation.

Why is it important for companies benefiting from tax incentives to take immediate action? There has been an increasing trend of tax audits being carried out by the MIRB on companies benefiting from tax incentives, with a focus on the following issues:

- Whether the company is carrying out the relevant approved activities and/or producing the approved products;
- Whether the relevant activities or milestones have been carried out within the prescribed timelines;
- Whether the company has strictly met the conditions imposed in relation to the tax incentives.

Any shortfalls may result in the tax incentives being revoked, possibly on a retrospective basis. This may result in significant additional taxes and penalties being imposed.

The Malaysian Government's recognition of the challenges being faced by companies due to the Covid-19 pandemic and the resulting Movement Control Orders is very welcomed. Companies benefiting from tax incentives should capitalize on this opportunity to:

- Undertake a "health check" exercise to assess whether all aspects and conditions of the tax incentives have been strictly complied with; and
- Where any omissions are detected, the company should approach MIDA immediately to request the relevant relaxations. The request to MIDA should be supported with relevant facts and detailed justifications.

Whilst the Government's announcement only mentioned the period 2020 to 2021, companies should use this opportunity to also identify and attend to any omissions detected for earlier years, where relevant.

→ Malaysia

Special Investment Tax Allowance for the E & E sector: Guidelines and procedures

In Budget 2020, to further promote high value-added activities in the E&E sector, and to help the sector transition to Industry 4.0 and a 5G digital economy, it was proposed that companies in the E&E sector, whose Reinvestment Allowance ("RA") period has expired, be eligible to apply for a special ITA. Applications for the incentive must be received by MIDA between 1 January 2020 and 31 December 2021.

Following the above proposal, the Guidelines and Procedures for the Application of Special ITA for the E&E sector ("E&E Guidelines") have been published by MIDA on 26 March 2021.

The E&E Guidelines stipulate that eligible companies will be able to apply for a special ITA of 50 percent on qualifying capital expenditure for a period of five years, to be set off against 50 percent of statutory income, commencing from the date of the approval letter. This incentive will be legislated by way of an exemption order which will be issued in due course.

To qualify for the incentive, a company needs to:

- Be a Malaysian-resident company which is incorporated under the Companies Act 1965 or 2016;
- Possess a valid business license from the relevant local authority;
- Possess a Manufacturing License ("ML") from the Minister of International Trade & Industry ("MITI"), or a confirmation letter from MIDA providing an exemption from ML requirements;
- Be engaged in manufacturing activities in the E&E sector and intend to reinvest for the purpose of expansion, automation, diversification and modernization;
- Have fully exhausted its 15-year RA claim period by 31 December 2019, while currently not enjoying any other tax incentives approved by the Government;
- Have an investment of at least MYR1.5 million in capital expenditure in the proposed project, within the five-year period; and
- Have incurred the minimum amount of annual operating expenditure and hired the minimum number of Malaysian full-time employees, as proposed by the company.

In addition, companies must also participate in one of the following programs:

a. <u>Vendor Development Programme:</u>

   Develop at least two new local vendor companies in one of the following subsectors:

   - Electronics components
   - Electronics consumers

- Electronics industrial
- Electrical

b. Human Capital Development Program

- Participate in internship programs with local universities and/or polytechnics or industrial training placements by Technical and Vocational Education and Training ("TVET") institutions for at least five Malaysian interns per year, with a minimum training period of three months throughout the incentive period;
- Collaborate with local universities on curriculum enhancement in E&E-related syllabus; or
- Undertake up-skilling and/or re-skilling programs with local universities, polytechnics or technical institutions.

→ Malaysia

Updated tax collection framework

On their website, the Malaysian Inland Revenue Board ("MIRB") has published the updated tax collection framework (new Framework) dated 3 February 2021. The new Framework is broadly similar to the earlier framework, and provides guidance to IRB officers, taxpayers, employers and appointed tax agents on tax collection procedures, so that the process may be undertaken efficiently and effectively under the various tax legislations. The new Framework also explains the withholding tax and general tax refund procedures.

Some of the key changes

To encourage the use of online payments, the new Framework stipulates that the MIRB will no longer be accepting tax payments made via cheques which are sent by mail or courier. The stoppage will be implemented in phases and halted completely by 1 April 2021. The new Framework also stipulates that the IRB will no longer be accepting tax payments made by way of cash or cheque at its payment counters. Limited exceptions apply.

The new Framework stipulates that the CP500 income tax estimates will be based on the tax payable for the immediate-preceding year of assessment ("YA"). Previously, it was based on the tax payable of two or three YAs prior to the current YA.

The new Framework clarifies that in case a tax instalment (per CP204 or CP204A) is not remitted by the stipulated due date, pursuant to Section 107C(9) of the ITA, a 10 percent penalty will be imposed on the unpaid amount without any further notice being served.

→ Malaysia

Extended time for tax returns under the Labuan Business Activity Tax Act 1990 for YA 2021

The MIRB has issued a letter dated 11 March 2021 to the Association of Labuan Trust Companies ("ALTC"), to confirm that Labuan entities would be granted an automatic extension of time until 31 August 2021 to submit their tax returns for YA 2021 (based on the financial year ended in 2020). The extension will only apply to Labuan entities which are up to date with their tax filings (i.e. until YA 2020) and payments.

The letter also clarifies the following:

- Where a company's net profit/loss amount before tax in its audited financial statement is denominated in a currency other than Ringgit Malaysia (MYR), the exchange rate published by the Accountant General Department of Malaysia is to be used to compute the amount in MYR for the purpose of completing Column A12, i.e. the net profit column of the LE1 Form, i.e. Return of Profits by a Labuan entity under Section 5 and Subsection 2B(1A) of the LBATA;
- A Labuan entity which is dormant is still required to file an LE1 Form together with a formal notification letter and audited accounts or financial

statements. Where the audited accounts or financial statements are not prepared, management accounts are also acceptable.

A Labuan entity is considered dormant if it:

- Has never commenced operations since the date of its incorporation;
- Has previously been in operation or carried on business but has now ceased operations or business ;
- Does not have any significant accounting transaction for one financial year before the occurrence of substantial change (i.e. 50 percent or more) in its equity shareholding. This means that there is no recording entry in the company's accounts other than the minimum expense for compliance with stipulated statutory requirements. The minimum expenses referred to are as follows:
  - Filing of the company's annual return to the Companies Commission of Malaysia or Labuan Financial Services Authority;
  - Secretarial fee for filing of company's annual return;
  - Tax filing fee;
  - Audit fee; and
  - Accounting fee
- A Labuan entity is not considered dormant if it owns shares, real properties, fixed deposits and other similar investments including income such as rent, interest etc. (if any) received by virtue of the mentioned ownership.

Contact for more information

Priya Selvanathan
T +60 3 2276 2755
priya.selvanathan@roedl.com

→ Myanmar

Current Situation

The attempted coup by the military in Myanmar has brought the country's opening course to a standstill since 1 February of this year, and reversed the rather stable development of the last ten years, with the result of the current outbreaks of violence and the politically and economically unstable conditions in Myanmar.

The situation not only remains unstable, but is currently unsafe. Daily outbreaks of violence are reported nationwide. This even increasingly includes public spaces in the major cities.

Even if the short and medium-term prospects of Myanmar are clearly clouded due to the current developments, the country still holds enormous potential which needs to be further developed in the future. The large number of reforms and infrastructure measures that have been initiated in the past should accelerate modernization as soon as the current conflict is defused.

On the other hand, the longer a political solution is delayed, the more damage the country could suffer. The loss of confidence in the country's development by foreign investors may have a longer lasting impact, depending on how the current situation unfolds.

In particular, the banking system that has been painstakingly rebuilt and modernized in recent years, is likely to come under increasing pressure. The access to cash remains very limited due to withdrawal restrictions by the Central Bank as well as by the private banks. Please note that the banking system is currently only partially operational, and international transfer is also impacted. We advise you to ensure the feasibility before undertaking major transactions.

The greatest damage, however, will be borne by the civilian population, which is already suffering from the extensive collapse of the health and education system, the general security situation and the scarce supply of cash, apart from the restrictions of internet services and the steadily deteriorating basic services.

It is advisable to maintain cash reserves. While the collection of tax as well as electricity bills came almost to a standstill in the recent months, the authorities are currently attempting to reignite the collection.

We strongly advise to register any foreign staff with the responsible embassies, to follow security notifications and to advise carefully. Due to the current situation, it is recommendable to stay at home and work from home as much as possible, to avoid public spaces and commutes within cities, and to keep up with the news and developments.

Furthermore, it seems advisable to consider due diligences of your existing and potential local business partners as further sanctions as well as various other anti-military actions are anticipated. Due to the ongoing partial restrictions of internet services, it is vital to ensure that effective internal and external communication plans are installed and guidelines for staff or external business partners are provided.

Our office remains open and operational and we will continue to try our best to guide our clients through this challenging time!

Contact for more information

Lutz Koch
T +95 1 9345 242

lutz.koch@roedl.com

Alexander Rindfleisch
T +95 1 9345 242
alexander.rindfleisch@roedl.com

→ Philippines

CREATE Tax Reform

After years of deliberations, Republic Act 11534, also known as the “Corporate Recovery and Tax Incentives for Enterprises Act” (CREATE), has been signed into law on 26 March 2021 with effect as of 11 April 2021 (15 days after is publication). However, some of the provisions, such as the corporate tax rate, may have effect from 1 July 2020 onward.

CREATE is the largest fiscal stimulus program in the country´s history. Despite the early intention to lower the corporate income tax rate of the Philippines (which was previously amongst the highest in ASEAN), and the overdue consolidation of tax and other incentives scattered over loads of partially antique rules and regulations, the final version of the act primarily aims at fostering the recovery of businesses negatively affected by the pandemic; amongst others, by attracting more (foreign) investment.
With effect as of 1 July 2020, CREATE reduces Corporate Income Tax (CIT) to 25 percent for domestic and resident foreign corporations, and 20 percent for domestic corporations with net taxable income not exceeding 5 million PhP and with total assets not exceeding 100 million PhP. Moreover, the minimum corporation income tax rate will be lowered to 1 percent between 1 July 2020 and 30 June 2023 – thereafter it will be back to 2 percent. For non-resident foreign corporations that derive income with the Philippines, the CIT rate will also be set at 25 percent based on gross income. For Non-Profit Proprietary Educational Institutions and Hospitals, the CIT will be 1 percent from July 1 2020 until 30 June 2023, thereafter the previous 10 percent CIT will apply again.

Incentives to be granted by the government to businesses will be rationalized to become more performance-bases, targeted, timebound, and fully transparent. A Fiscal Incentives Review Board (FIRB) will be created to oversee the investment promotion agencies (IPAs) and to formulate core guidelines. The IPAs under the delegated authority from the FIRB, are authorized to grant incentives to the extent of the approved registered project or activity under a Strategic Investment Priority Plan (SIPP). Qualified registered enterprises will be entitled to an income tax holiday (ITH) followed by either a special corporate income tax (SCIT) of 5 percent based on gross income earned, in lieu of all taxes, or regular Corporate Income Tax Rate but with enhanced deductions. Furthermore, the availment of the incentives is "Tier Based", depending on the nature of the incentivized activity/industry and the location of the business, focusing on higher incentives for areas outside the main cities/regions. Based on the categorization of the project, the incentives are time-bound. Due to a veto by the President for certain provisions, it remains to be seen to what extend companies that availed of incentives may register again for a new set of incentives if they engage in a new activity that is entitled to incentives.

However, President Duterte vetoed nine provisions, which include the increase of the value-added tax-exempt threshold on sales of real property, 90-day period for processing of general tax refunds, and redundant incentives for domestic enterprises.

We will of course be happy to provide more details on the significant changes under the CREATE tax reform.

→ Philippines

Covid-19 Update

In terms of case numbers, Covid related death cases and extreme challenges to hospital capacities, the Philippines coped "relatively" passable with the challenges faced in 2020, thanks to strict lockdowns and quarantine measures, the famous resilience of Filipinos and the support of the private economy. Nonetheless, the Philippines recorded the highest contraction of the gross domestic product in its history (- 9,5 percent).

Entrepreneurs were optimistic that within 2021, the Philippines could climb-back to the pre-pandemic economic heights, being one of the most promising growth and investment areas in South East Asia.

In the author's opinion, nothing has changed with regards to the promising long term perspectives for the country. However, it will take a little longer – maybe much longer – than many expected until the archipelago will fully recover from the Covid-crisis. Like many other countries the Philippines were hit by another wave of Covid cases (primarily in March/April 2021). This time, the case numbers rose up to 11,095 new recorded cases/204 deaths per day (12 April 2021) – compared to below 2,000 – 5,000 cases per day throughout 2020. Hospitals were and are partially operating above their capacity limits. Luckily, after a new lockdown followed by a Modified Enhanced Community Quarantine and, lately until 31 May, Strict General Community Quarantine for the National Capital Region+, the case numbers dropped back to 2,000 – 5,000 cases per day.

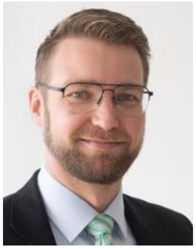
The economy is gradually opening up again. GDP growth number for Q1/2021 – before the "second lockdown" in April – stands at -4.1 percent. The latest annual forecast by the Asian Development Bank as of 28 April expects a fragile recovery to approx. +4.5 percent (from 6.5 percent) in 2021, and 5.5 percent in 2022. According to the recent AHK Philippine Economic Business Survey, only one out of ten companies expect an economic recovery this year. Nonetheless, 50 percent of the companies consider their current situation to be satisfactory. 62 percent of the surveyed companies foresee a comparable business development/expectation for the coming 12 months, while "only" 29 percent envision a more positive development.

Most companies and government organizations still work to a significant part based on work-from-home arrangements which can best be experienced through the low traffic situations in Metro Manila and relatively empty office buildings, malls etc. More than a year in the pandemic, the Philippines is the only country where schools remained continuously closed on a mix of distant learning, printed modules and TV/radio lessons.

Based on the latest international travel restrictions, Filipino Citizens, Balikbayan and Foreign nationals with valid and existing (work/long-term) visas are allowed to enter the country. Tourist and business travelers as well as those on Special Resident Retiree Visas need to obtain an entry exemption permit. Equally, if practically not more important, the number of inbound travelers remains limited to 1,500 per day. Furthermore, arriving passengers are subject to a 14 days facility-based quarantine, and a negative RT-PCR test result.

The Philippines introduced a roadmap for the Covid-19 vaccine rollout, prioritizing groups at highest risk, such as frontline health care workers and vulnerable groups determined by age and health. In Q1 of 2021, the government of the Philippines launched nationwide vaccination programs. As of 15 May 2021, a total of 2.2 million individuals (approx. 2.1 percent of the population) received their first vaccination dose; 675.799 (approx. 0.6 percent of the population) are fully vaccinated. Starting from end of Q2/2021, the vaccination process will gain further traction by the private economy/companies supplying direct purchases of vaccines to their employees, family members etc.

Contact for more Information



Dr. Marian Majer
T +63 2 84791 785
marian.majer@roedl.com

→ Singapore

DTA between Singapore and Germany amended as of 29 March 29 2021

The Protocol amending the Agreement for the Avoidance of Double Taxation ("DTA") between Singapore and Germany was signed on 9 December 2019, and entered into force on 29 March 2021.

The Protocol incorporates internationally agreed minimum standards to counter treaty abuse, and amends the maximum withholding tax rates that may be charged between both countries.

Key changes introduced by the Protocol

- PERMANENT ESTABLISHMENT – Longer test period for construction related activities from 6 months to 12 months, which raises the threshold for residents of a contracting state to trigger a taxable presence in the other contracting state;
- WITHHOLDING TAX – Reduction in withholding tax rates on dividend, interest and royalty payments:
  - Dividends – reduced from 15 percent to 10 percent. The reduced rate of 5 percent for qualifying participants of more than 10 percent in the paying company will remain unchanged;
  - Interest – reduced from 8 percent to 0 percent;
  - Royalties – reduced from 8 percent to 5 percent.
- ROYALTIES – The scope of the royalties article is narrowed with the removal of "the use of, or the right to use, industrial, commercial or scientific equipment" from the definition of royalties;
- CAPITAL GAINS – Broadening of the scope of capital gains tax whereby gains derived from sale of shares representing more than 50 precent of the vote, value or capital stock in a company held for less than 12 months will be subject to capital gains tax;
- MUTUAL AGREEMENT PROCEDURE ("MAP") – Introduction of a mechanism that will allow taxpayers to request arbitration in eligible MAP cases that have not been resolved between the competent authorities of Singapore and Germany in three years.

This Protocol aims to enhance cross border trade and investment between both countries by lowering the withholding tax rates on income flows arising from cross border business activities; and to bring the DTA into line with international standards by incorporating internationally agreed minimum standards to counter treaty abuse and amending the Exchange of Information Article.

→ Singapore

Tightened immigration rules and border control measures

As a result of the ongoing pandemic and the Indian variant of the Covid-19 virus in Singapore, the city state has tightened its measures to fight the spread and to prevent a second wave.

Since mid-May, restaurants and schools are closed and "work from home" is again the default position. A maximum of two persons are allowed to form a group in public and visit another household (there are, of course, exemptions).

International Conferences scheduled to take place in Singapore this summer, like e.g. the World Economic Forum and the Shangri-la Dialogue, have been cancelled.

Tourists still cannot enter Singapore. Only those in essential services may enter Singapore with the prior approval of the authorities.

All pass holders (e.g. work pass holders and dependants) must obtain the relevant Entry Approvals to enter Singapore. New entry applications for pass holders from higher-risk countries* are currently no longer accepted.

Pass holders from higher-risk countries who earlier obtained an Entry Approval with an arrival date prior to 5 July 2021, are not allowed to enter Singapore.

Affected pass holders will have their In-Principle Approval validities extended.

As of 8 May 2021, prevailing border measures that apply to incoming travelers are determined based on the travelers' recent travel history in the past consecutive 21 days (as opposed to the previously assessed travel history period of 14 days).

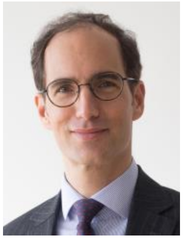
Further, all travelers with recent travel history to higher risk countries are now required to serve a 21-day Stay Home Notice at dedicated facilities (instead of the previous 14-day Stay Home Notice).

The Reciprocal Green Lanes ("RGL") which facilitates short-term essential business and official travel between Singapore and Germany, Indonesia, Malaysia, Japan, the Republic of Korea, and Brunei are suspended until further notice.

Only 1 of the 7 RGL established between Singapore and other countries remains open – the arrangement with China.

* Higher-risk countries refer to all countries except for Australia, Brunei, Hong Kong, Macao, Mainland China, and New Zealand.

Contact for more information



Dr. Paul Weingarten
T +65 62 3867 70
paul.weingarten@roedl.com

→ Thailand

Covid Situation

Thailand is currently experiencing the third wave of Covid-19 cases. Thus, the national government as well as local and provincial government bodies have enacted multiple measures to curb the spread of the disease, including mask mandates in public (violations can be fined with THB 20,000), and reinstating a mandatory 14-day quarantine for international travelers. Additionally, access to Thailand is only permitted if a traveler obtains a Certificate of Entry (currently not issued to travelers from India), has a negative Covid-19 test not older than 72 hours prior to departure, has insurance covering treatment for Covid-19 with coverage of not less than USD 100,000 and has a booked and paid quarantine arrangement in Thailand with one of the certified alternate state quarantine provider hotels.

In general, Thailand is differentiating three control zones:

- maximum and strict controlled areas (including Bangkok and Nonthaburi);

– maximum controlled areas: and

– controlled areas.

Different restrictions apply to public gatherings, dine-in options, and access to venues depending on the zone. Everybody staying in Thailand should regularly check the relevant restrictions in their respective zones, as these are subject to change.

Overall, the Thai government has commenced with a vaccination program, and procures additional doses for the population. The plan is to ensure herd immunity within 2021. In addition, there are discussions on easing access requirements for travelers who can demonstrate that they have received the vaccine. However, these plans are not finalized yet. For now, we assume that easing will commence earliest in October or November 2021, depending on the further progress of the pandemic.

→ Thailand

Reduction of Social Security Contributions

The contributions to social security by employers and employees have been lowered for the period of 1 June to 31 August. During this period, a rate of 2.5 percent applies (lowered from 5 percent). The reduction shall help companies and individuals during economically challenging times. Similar reductions have been granted before during the pandemic and have been found to be an effective tool to help the economy.

→ Thailand

Extended tax filing deadlines

The Ministry of Finance extended the deadline for filing Corporate Income Tax returns as well as making the due tax payment with the competent Revenue Department.

Under announcement No 3, issued 30 April 2020, companies whose original deadlines were May and June 2021, may file tax returns and make the payments within 30 June 2021. The extensions include related filing obligations concerning transfer pricing.

→ Thailand

Personal Data Protection Act

The enforcement of the Thai Personal Data Protection Act has been postponed by one more year. Now, the PDPA is scheduled to take effect on 1 June 2022.

The PDPA was passed two years ago and was scheduled to become effective at the end of May 2020. However, due to the pandemic-related economic pressure, the government decided to postpone the implementation in order to ease the burden for businesses in Thailand. Now, since Thailand is experiencing the third wave of Covid cases, the government renewed this decision.

While there is a clear need for privacy protection, given the current economic situation, the decision was expected and seemed overall reasonable to ensure an ongoing economic recovery.

→ Thailand

Amendment to the Civil and Commercial Code

The statutory interest rate prescribed by the Civil and Commercial Code has been lowered by the Emergency Decree on Amending the Civil and Commercial Code, dated 9 April 2021. In the past (for the last 95 years), the rate has been 7.5 percent. Now, the general rate has been lowered to 3 percent. However, for pecuniary debt or interest during a period of default, a general rate of 5 percent applies.

The government remarked that the former rate put an undue burden on debtors, especially during the current crisis. Thus, the reform was necessary to help with the economic recovery.

Contact for more information

Martin Chrometzka
T + 66 2 0263 258
martin.chrometzka@roedl.com

→ Vietnam

New Decree providing guidelines for the implementation of the Law on Investment

Following the change of the new Law on Investment no. 61/2020/QH14 dated 17 June 2020 (the "LOI") which became effective as of 1 Jan 2021, on 26 March 2021, the Government enacted Decree 31/2021/NĐ-CP (the "DECREE 31") which became effective on the same date, to provide detailed regulations and guidelines for the implementation of a number of articles of the LOI. Decree 31 is reputed as a notifiable stride to foster the investment into Vietnam.

Key Issues

Investment conditions to be applied by investors and foreign investors

As a general rule, the LOI allows for the investors (including domestic investors, foreign investors and foreign invested enterprises – FIE) to conduct any business investment activities which are not prohibited by the LOI. Accordingly, the LOI provides the mechanism on conditions for investors when investing in doing business in Vietnam, including the following:

Business lines banned from business investment ("Banned Business List")

The investors, irrespective of their nationality, are banned from doing business in the lines listed in Annex I (kinds of drugs), Annex II (kinds of chemicals) and Annex III (kinds of agriculture/animals) and the other kinds of 5 business lines listed in the LOI.

Business lines which are conditional to the investors ("Conditional Business List")

The investors, irrespective of their nationality, are subject to satisfaction of conditions when conducting business in lines which are conditional, and need to have these applied prior to the commencement of businesses, as regulated in the LOI under Annex IV. There are 227 conditional businesses in total, including the trading business, e-commerce, vocational education, real estate business, etc. The conditional business investment are applied in the following forms: license/certificate/confirmation/approval. Conditional business and the related conditions are publicly published in the NBRP.

Business lines subject to restriction on market access ("Restricted Market Access List")

For the first time, he Government, through its enacted Decree 31, provided the list of business lines (Annex I of Decree 31) which are subject to restriction on market access for foreign investors. This list includes (i) list of market inaccessible businesses and (ii) list of conditional market accessible businesses.

Therefore, in addition to the Banned Business List and Conditional Business List, the foreign investors shall be subject to the Restricted Market Access List. There are 25 business lines are inaccessible for the foreign investors and 58 business lines are conditional accessed by the foreign investors. This list also comprises the business similarly to the Conditional Business List such as trading business, logistic, e-commerce, education services, real estate business, etc.

Accordingly, market access conditions to be applied by foreign investors include: (i) ratio of foreign investors' ownership in charter capital, (ii) forms of investment (which we will further discuss in the following section), (iii) scope of investment activities, and (iv) capacity of foreign investors, (v) other conditions which are required by the Government specifically with regard to applicable laws, decrees, regulations.

Forms of investment

The LOI and Decree 31 set forth the forms of investment allowed for foreign investors to invest into a business in Vietnam, and their correspondent investment procedure requirements, including the following basic 4 forms:

1. Investment through establishment of a business entity;
2. Investment in the form of capital contribution or purchase of shares or stakes;
3. Execution of an investment project (by a foreign invested enterprise – FIE);
4. Investment in the form of a business cooperation contract (BCC);
5. New forms of investment and types of business entities prescribed by the Government's regulations.

In general, when the foreign investors invest in Vietnam following model (i), the conditions as mentioned the List of Restricted Market Access must be followed and satisfied. Further, prior to the establishment of an economic organization (FIE), the foreign investor must obtain an investment project and needs to carry out the procedures for the issuance of an Investment Registration Certificate (IRC). It is noted that all the conditions required for the foreign investors in the List of Restricted Market Access Sectors shall be carefully evaluated by the investment licensing authorities.

After the issuance of an IRC, the foreign investors shall go through the enterprise registration procedure to have the Enterprise Registration Certificate (ERC) issued. From the date of issuance of the ERC, the economic organization established by the foreign investor (FIE) is the investor implementing the investment project as prescribed in the IRC.

Investment form (i) would be time consuming, since the foreign investors need to satisfy the required investment conditions (or in form (ii), go through investment procedures by obtaining an M&A approval in certain cases as required by law), especially in specific investment sectors such as trading business or real estate business (which are required to comply with legal capital and land conditions (in case of acquisition of land located in areas deemed vital to national security, e.g. islands and in border and coastal communes, wards and towns)).

Due to such the investment conditions, the foreign investors would prefer to invest in Vietnam under other forms such as form (iii) - Execution of an investment project (by a foreign invested enterprise – FIE) – with the effect of being treated as domestic investors, so they might avoid having to go through lengthy investment procedures.

Foreign ownership threshold to enjoy treatment of a domestic investor

Through the form of investment (iii), the LOI regulates investments with an FIE being the executor of an investment project in Vietnam. Accordingly, such an economic organization or in this case, an FIE, must satisfy the conditions and carry out the relevant investment procedures in accordance with the regulations applicable to foreign investors, when the investment through establishment of another economic organization or the investment in capital contribution/purchase of shares or contributed capital in another economic organization (M&A), meets one of the criteria below:

a. More than 50 percent of the charter capital are being held by a foreign investor (s) [F1];
b. More than 50 percent of the charter capital are being held by F1 [F2];

c. More than 50 percent of the charter capital are being held by (a) foreign investor(s) and F1.

Accordingly, the economic organizations (or in this case, an FIE) not falling into the categories specified in (a), (b) and (c) above, shall comply with the investment conditions and procedures applicable for domestic investors upon investing in establishing organizations or M&A activities in other economic organizations.

In other words, the FIE could be seen and treated as "foreign enterprise" unless it meets the requirements to be treated as a domestic investor.

This is an important principle because foreign investors may participate in numerous industries that were only reserved for domestic companies by having the correct structure and investment layer in relation to foreign owership in an economic organization. In practice we have witnessed many foreign investors acting directly through the wholly owned subsidiary of F2 (called F3) engaging in certain industries, and be treated as domestic companies. On the other hand, there remains a theoretical risk that the authorities may challenge the structure because of the foreign investor still being the owner of the subsidiaries through multi-layers. The interpretation of laws could differ between the provincial authorities.

Investment incentives

There are two remarkable changes in the investment incentives under the new investment regulations: (i) Additional form of incentive and (ii) changes in the list of incentivized entities.

In addition to the previous three incentive forms under the previous investment law, which are incentivized CORPORATE INCOME TAX ("CIT") rates, CIT holiday, CIT reduction; EXEMPTION FROM IMPORT TAX as well as EXEMPTION AND REDUCTION OF LAND LEVY AND RENT, ACCELERATED DEPRECIATION and increasing the DEDUCTIBLE EXPENSES upon calculation of taxable income have been added as a new form of investment incentives. The new forms of investment incentive allowing for accelerated depreciation and increase of deductible expenses for CIT calculation allow to defer the CIT in first years of operation. The accelerated depreciation will also aid the change of technology. Detailed guidance in this regards is expected to be issued by the Ministry of Finance.

New entities which are eligible to investment incentives under the current investment regulations include:

– Start-up projects, national innovation centers as well as research and development centers;

– Business investment in small and medium-sized enterprises' product distribution chain; business investment in technical establishments supporting small and medium-sized enterprises, small and medium-sized enterprise incubators; business investment in co-working spaces serving small and medium-sized enterprises and startups prescribed by the Law on Small and Medium-Sized Enterprises.

In addition, the new investment regulations set out more conditions for special incentivized projects of which the capital is at least VND 6,000 billion. Specifically, in addition to the previous condition of capital disbursement of at least VND 6,000 billion within three years, the project must have a total revenue of at least VND 10,000 billion per year within three years from the year in which the revenue is earned, or the project must employ more than 3,000 employees in order to be eligible for investment incentives under the current investment regulations.

To conclude

It is to say that the new provisions of the LoI and Decree 31 represent the efforts of the Vietnamese Government in building a more transparent and consistent legal framework for foreign investment into Vietnam. Since the new regulations have just recently come into effect, the interpretation of these regulations may vary by the individual Authorities´ point of view.

Contact for more information

Michael Wekezer
T +84 28 7307 2788
michael.wekezer@roedl.com

→ Upcoming Events

22nd Forum Global (German Language)

This year's Forum Global will take place from 22 June to 1 July 2021, from Tuesday to Thursday in both weeks. Once again, this year´ s event will be hosted fully virtually.
Please click here for the detailed event program. Please note that all sessions will be held in German.

Our ASEAN team will be contributing a session on supply chains and local sales markets in Indonesia, Thailand and Vietnam:

MITTWOCH, 23. JUNI 2021
08.30 – 09.15 UHR

Wachstumsmärkte Indonesien, Thailand und Vietnam – Supply Chain und lokale Absatzmärkte in der Praxis	REFERENTEN MARKUS SCHLÜTER (Rödl & Partner ASEAN) MARTIN CHROMETZKA (Rödl & Partner Thailand) MICHAEL WEKEZER (Rödl & Partner Vietnam)
BITTE REGISTRIEREN SIE SICH HIER	

WIR FREUEN UNS AUF SIE!

www.roedl.com/asean

Imprint

ASEAN Newsletter | Q2 2021

Publisher:
Rödl & Partner Bangkok
Empire Tower 3, 25th Floor, 1 South Sathorn Road
Yannawa, Sathorn, 10120 Bangkok
Phone: +66 2 0263 258
E-Mail: bangkok@roedl.com
www.roedl.de
www.roedl.com

Responsible for the content:
Markus Schlueter
markus.schlueter@roedl.com

Layout/Type:
Bettina Herzog
bettina.herzog@roedl.com