Rödl & Partner

QUARTERLY ASEAN NEWSFLASH

EYE-LEVEL EXCHANGE

Issue:
Q4/2020

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:
Q4/2020

Read in this issue:

→ Note from the editor

→ International Trade

- RCEP signed at ASEAN Summit

→ Indonesia

- Investment Licensing under the Indonesian Omnibus Law
- Tax aspects under the Indonesian Omnibus Law

→ Malaysia

- Immigration Update West Malaysia – Q4 2020
- MyFutureJobs Portal
- Employment Pass Processing through MIDA
- New Appointment System
- Malaysia My Second Home (MM2H)
- MYEntry
- Malaysia´ s 2021 Budget Announced
- Choosing an Accounting Standard for your entity in Malaysia

→ Myanmar

- Second edition of e-Governance Master Pan
- The new Myanmar Economic Recovery and Reform Plan
- Myanmar Tourism Rules
- Trademark Registrations

→ Philippines

- Bayanihan Act II
- Stricter BIR TP Guidelines

→ Singapore

- Apostille soon to be introduced

→ Thailand

- Coronavirus
- Trade
- Taxes

→ Vietnam

- New law on investment
- Remarkable legal issues in the Law on Enterprise 2020
- Key Issues

→ Digital ASEAN Forum 2021

- ASEAN Insights – Staying safe but getting close
- SAVE THE DATES:

→ Note from the editor

Dear reader

Welcome to the Q4/2020 edition of our ASEAN Newsflash. In this quarter we have seen some interesting news from the Asia-Pacific region regarding the further development of global trade, while the EU and USA still struggle with the grave impact of the pandemic.

Notably, the REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP was signed on 15 November, which will likely increase China's economic dominance in the region. On the other hand it may be expected that the Biden administration with Antony Blinken as designated secretary of state will strengthen the focus on multilateral cooperation again, which might even result in a participation of the US in the renegotiated Comprehensive and Progressive Agreement for Trans-Pacific Partnership. So far, we do not see a clear multilateral approach of the EU in the Asia-Pacific region, although there have been some indications in the past that the Singaporean and Vietnamese FTAs might serve as a model for an ASEAN-EU FTA. Amid an increasingly unstable global economic climate that drew European interest further towards Southeast Asia, the parties relaunched negotiations in 2017 with the initiation of a stocktaking exercise. However, two years later negotiations had stalled again due to i.a. some reluctancy of the EU to include Cambodia and Myanmar in the FTA negotiations, both being under scrutiny for their human rights records.

The ongoing dispute between the EU and ASEAN's major palm oil producers appears to be another obstacle for negotiations. Given these barriers to a multilateral approach, the EU currently rather seems likely to pursue further bilateral negotiations. This could shed a light on Thailand as potential next FTA partner. The EU and Thailand already initiated talks on an FTA in 2013. These were put on hold one year later, when the Thai military seized power in a coup. In 2017, the EU laid out conditions for the resumption of proceedings, claiming a return to democratic governance and political pluralism in Thailand. But while Thailand and the EU have meanwhile engaged in exploratory talks, there has not yet been an announcement whether the parties aim to enter official negotiations. This will likely depend on the development of the current political tensions in the Kingdom.

Anyway, we presume that with each bilateral trade agreement, the need for a multilateral agreement will recede. Given that the upcoming agreements with further ASEAN nations will likely take several years for negotiation and ratification proceedings, EU companies meanwhile might want to explore options to use the other regional FTAs for their supply chain and investment considerations. Moreover, legislative changes in the investment regulations, like currently in Indonesia and Vietnam, may open new business perspectives.

Together with various other topics, these issues will be discussed in our DIGITAL ASEAN FORUM 2021. We regret that we may still not meet you personally this time, but trust that this online alternative will bear some interesting insights for you as well. More to the agenda and schedule can be seen at the end of this publication.

We wish you a healthy and, despite all our shared pandemic concerns, also a Happy Festive Season ahead.

Markus Schlueter
ASEAN Desk
markus.schlueter@roedl.com

→ International Trade

RCEP signed at ASEAN Summit

Eight years after the member states of the Association of Southeast Asian Nations (ASEAN) together with Australia, China, India, Japan, New Zealand, and South Korea issued a joint declaration to initiate the negotiations of the Regional Comprehensive Economic Partnership (RCEP), the world's largest free trade agreement in terms of GDP and population has finally been signed on 15 November 2020 during the 37th ASEAN summit.

In late 2019, during the 35th ASEAN summit, India had withdrawn from the negotiations due to concerns to further open the market and possible negative effects on the domestic economy, while the remaining parties concluded the negotiations for all 20 chapters of the RCEP.

Digital Summit and Joint Leaders´ Statement

The 37th ASEAN summit, influenced by the covid-19 pandemic, was organized and held as a DIGITAL SUMMIT, so the signing ceremony had to be digital, too. During the ceremony, each country's trade minister signed a separate copy while his or her head of state or government stood nearby and watched. The purpose of the RCEP is to eliminate trade barriers and to establish new investment opportunities, which should help to facilitate business operations and promote development in the economies of the member countries.

It was further acknowledged in a JOINT LEADERS' STATEMENT, that the RCEP Agreement is deemed critical for the region's response to the covid-19 pandemic, and shall play an important role in building the region's resilience through an inclusive and sustainable post-pandemic economic recovery process. However, the RCEP does not venture into critical issues like the protection of intellectual property, independent labor unions and the environment, or limiting government subsidies to state-owned enterprises. With only a minimal consensus to be found by the signatory states, the RCEP rather modestly touches these controversial aspects, particularly in comparison with the standards that can be seen in EU free trade agreements.

Trade in Goods

The Trade in Goods Chapter contains key elements that govern the implementation of goods-related commitments to foster the trade liberalization among the Parties. These include granting of national treatment to goods of the other Parties, as well as the reduction or elimination of customs duties and the reaffirmation of commitments in the WTO Ministerial Decision on Export Competition.

The Chapter also sets out rules to determine the applicable tariff treatment in case of different tariff preferences applied by a Party. It further contains provisions on non-tariff measures, including the general elimination of quantitative restrictions, increased transparency on the application of non-tariff measures as well as on the administration of import licensing procedures and respective fees and formalities.

The Parties also agreed on a process to conduct technical consultations on non-tariff measures adversely affecting trade between them. The Customs Procedures and Trade Facilitation Chapter moreover targets the simplification of customs procedures and the harmonization of customs procedures with international standards, which in some parts go beyond the WTO Trade Facilitation Agreement. The details of the staged commitment implementation are provided in an annex to the Chapter.

Rules of Origin (ROO)

EU-companies may only benefit from the new trade rules under certain prerequisites. The Rules of Origin (ROO) Chapter determines which goods are originating under the RCEP Agreement and therefore eligible for preferential tariff treatment. The ROO Chapter is divided into (i) Section A: RULES OF ORIGIN and (ii) Section B: OPERATIONAL CERTIFICATION PROCEDURES.

It provides articles on originating goods and goods wholly obtained or produced, and an Annex on PRODUCT-SPECIFIC RULES (PSR), which set out requirements to determine the originating status of goods. The Chapter also lists those minimal operations and processes which would be considered insufficient to confer the originating status on goods using non-originating materials. Given the geographic configuration of the RCEP, the Parties ensured that the ROO Chapter includes clear direct consignment rules to avoid originating goods inappropriately losing their originating status. If a good does not satisfy a change in tariff classification rule in the PSR, it could still acquire originating status under certain *de minimis* rules. Other elements under Section A cover the TREATMENT OF PACKAGING MATERIALS AND CONTAINERS for transportation and

shipment, or the treatment of ACCESSORIES, SPARE PARTS AND TOOLS. In Section B we see rules governing procedures to (i) apply for the RCEP proof of origin, (ii) claim preferential tariff treatment and (iii) verify the originating status of a good. The annexes to the ROO Chapter include (i) product-specific rules, covering all tariff lines at the HS 6-digit level and (ii) minimum information requirements listing the required information for a certificate or a declaration of origin.

Trade in Services

RCEP shall facilitate services trade among the Parties through substantial removal of restrictive and discriminatory measures affecting trade in services. The Services Chapter contains i.a. provisions on market access, national treatment, most favored nation treatment and local presence, which are subject to the PARTIES' SCHEDULES OF SPECIFIC COMMITMENTS or the SCHEDULES OF RESERVATIONS AND NON-CONFORMING MEASURES, as well as additional commitments. The services commitments are scheduled to use the negative list approach, either on the date of entry into force of the RCEP Agreement, or within a defined time period after the date of its entry into force. It should be noted that most Parties made quite comprehensive reservations, and it remains to be seen to what extent markets will in practice be further opened to services, particular with regard to the establishment of a local presence.

Investment

In this light, the tenth chapter of the RCEP covers investments and contains provisions on protection, liberalization, promotion and facilitation. It includes a most favored nation treatment clause, and commitments on the prohibition of performance requirements that go beyond multilateral obligations under the WTO Trade Related Investment Measures (TRIMS) Agreement.

Ratification

It should be noted that in this stage, the RCEP has only been signed and is neither ratified nor in effect. Prior to the entry into force it shall be subject to ratification, acceptance, or approval by each signatory State in accordance with its applicable legal procedures.

The instrument of ratification, acceptance, or approval of a signatory State needs to be deposited with the Depositary (which will be the Secretary-General of ASEAN who is designated as the Depositary for this Agreement). The RCEP shall enter into force for those signatory States that have deposited their instrument of ratification, acceptance, or approval, 60 days after the date on which at least six signatory States which are Member States of ASEAN, and three other signatory States have deposited their instrument of ratification, acceptance, or approval with the Depositary.

After the date of entry into force of the RCEP, it shall enter into force for any other signatory state 60 days after the date on which it has deposited its instrument of ratification, acceptance, or approval with the Depositary. Entry into force could therefore require some 1-2 years depending on the pace of ratification.

Contact for further information

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

→ Indonesia

Investment Licensing under the Indonesian Omnibus Law

On 5 October 2020, the Indonesian House of Representatives approved the job creation law, which is commonly known as "Omnibus Law". The Omnibus Law has been promulgated after having been signed by President Joko Widodo on 2 November. On the same date, it has also been signed by the Minister of Law and Human Rights, and is now effective as Law No. 11 of 2020, issued in the State Gazette of the Republic of Indonesia No. 245 of 2020. This legal instrument aims at attracting investment, and stimulating the economy by i.a. simplifying the licensing process and harmonizing various business related laws and regulations that are deemed to be obstructive towards foreign investments. The Omnibus Law supersedes earlier provisions on the same regulated subject matter. It governs a wide range of topics, e.g. employment or environmental issues, but in this article we will focus on the investment licensing mechanisms which appear of certain interest from a foreign investment perspective.

The Investment Law of 2007 and guiding legislation remain the main reference for capital investment activities in Indonesia, but the Omnibus Law opens a broader range of sectors to foreign direct investment, which were previously at least partially closed. So far, Article 12(1) of the Investment Law stated that “all business fields are open to direct investment, except for those that are declared as closed to investment or open subject to conditions.”

Amendment of investment regulations

This provision has been amended under the Omnibus Law to read as follows: “All business fields are open to direct investment, except for those that are declared as closed to investment or which constitute activities that are reserved to the central government.” Hence, the removal of the wording “open subject to conditions” can be interpreted to mean that all business activities will become either fully open or closed for capital investment, or may only be conducted by the central government. This can also be seen from the deletion of paras 4 and 5 in Art 12 of the Investment Law; esp. para 4 made reference to criteria and requirements for business fields that are closed or open with requirements, which so far was particularly defined in the Negative List, that governs investment conditions and restrictions under a presidential decree. It is not yet clear whether and to what extent the amendments will lead to a removal or substantial revision of the current Negative List. The omnibus law states that further provisions regarding investment requirements shall be governed by a Presidential Regulation, which so far has not been issued.

The government currently aims at accelerating the drafting of 44 implementing regulations for the Omnibus Law which consists of 40 Draft Government Regulations and 4 Draft Presidential Regulations, with a target of completion in late November or early December 2020. Until now, 30 implementing regulations have been drafted already. With regard to this implementing legislation it remains to be seen (i) what the future criteria of the different sectors will be (possibly large-size investment, investment in labor intensive business sectors, as well as high-tech and digital-based business sectors will remain relevant), (ii) what investment requirements will be imposed by the central government for the different sectors and (iii) how foreign ownership restrictions, which are currently imposed on many sectors, e.g. distribution or transportation, will be regulated.

Risk-based business assessment

The Omnibus Law revises the business licensing mechanism by introducing a new concept of risk-based business assessment. Accordingly, business activities are divided into low, medium and high risk categories. Business licensing will be processed through an electronic system. The granting of the relevant license or permission will be determined by the risk level and the business scale rating. The respective assessment shall take into account aspects such as the (i) type of business activities, (ii) business location, (iv) scarcity of resources or (iv) volatility risks. The risk level and business scale rating are divided into different categories.

- LOW RISK BUSINESS requires a Business Identification Number (NIB), which is the legal requirement for the implementation of business activities. The NIB is the proof of registration of

business actors to carry out business activities, and as an identity for business actors in carrying out their business activities.

- MEDIUM RISK ACTIVITIES are further sub-divided. A MEDIUM-LOW RISK BUSINESS ACTIVITY requires an NIB and a STANDARD CERTIFICATION in form of a statement by business actors to fulfill business standards for their activities. Further, MEDIUM-HIGH RISK BUSINESS ACTIVITIES require an NIB and a STANDARD CERTIFICATION in form of a certificate issued by the CENTRAL OR REGIONAL GOVERNMENT based on the results of a compliance verification with applicable business standards. Beyond these requirements, in case medium risk activities require compliance with certain product standards, the Central Government issues a standard product certificate based on the results of the compliance standard verification that business actors must meet before carrying out the product commercialization.
- HIGH RISK BUSINESS requires the NIB and a LICENSE in form of the CENTRAL OR REGIONAL GOVERNMENT'S APPROVAL for the implementation of the envisaged business activities that must be obtained before commencement of operations. If high-risk business activities further require compliance with certain business, industrial or product standards, the aforementioned certificate issuance in line with the compliance standard verification is required as well.

It remains, however, still unclear how this assessment and risk level determination will be conducted by the Government. The implementation and enforcement of this process will be incorporated in the implementing Government Regulations to be issued within three months after the entry-into-force of the Omnibus Law. We will thus have to wait until early February for the implementing legislation, to see how the respective administrative practice will develop.

Simplified licensing requirements

The Omnibus Law provides several rules to simplify the basic requirements for Business Licensing. One is the "suitability of space utilization", which means the suitability of a location for the intended business activity as determined in a detailed spatial plan issued by the Government. The Local Government is obliged to prepare and provide this spatial plan in digital form, which should be easily accessible by the public. The Central Government is moreover obliged to integrate the plan in digital form into the electronic business licensing system.

If business actors have obtained the location permit for their activity - which must be in line with the spatial plan -, then the business actor has to submit an application concerning the suitability to use the space for the envisaged business activities through the electronic business licensing system. After obtaining the confirmation of the suitability of the activity for the respective space utilization, business actors may proceed the business licensing. We understand that the Central Government shall be authorized to cancel all approvals issued by Local Governments which do not comply with the spatial plan. So there seems to remain a certain procedural risk here from our initial impression.

The Central Government is obliged to supervise and provide guidance as to the practical implementation of a business license. If there is a violation of the provisions in a business license, it will be subject to administrative sanctions for the owner of the Business License in the form of warnings, temporary suspension of business activities, imposition of administrative fines, in some cases even imposition of police force, and in extreme cases the revocation of license, certification or approvals.

Conclusion

According to the transition provisions of the Omnibus Law, with the entry into force of the law business licenses or sector permits that have been issued before the entry into force, remain valid until their expiry date. Business Licensing which is currently in the application process needs to be adjusted to the provisions of this law. This might lead to some delays with regard to the lacking implementing legislation, and there is no practice yet as to how authorities will deal with this for the moment.

We will further monitor this legislative development and provide further updates, particularly with regard to the implementing guidelines.

Contact for further information

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

Tax aspects under the Indonesian Omnibus Law

The omnibus law, explained in the above article, also covers tax aspects which are relevant for foreign investors. We see several notable amendments affecting the prevailing Tax Laws, in this article mainly looking from a foreign investor's perspective.

Changes include modifications of the (i) Income Tax Law, (ii) VAT Law, (iii) Law of General Tax Procedures and (iv) Regional Tax Law.

An initial overview on important changes can be seen below:

TAX LAWS IMPACTED	THE PREVIOUS LAW	CHANGES CAPTURED IN THE OMNIBUS LAW
INCOME TAX LAW	Dividend income received from an Indonesia domestic company by: – Corporate recipient holding more than 25 percent shareholding, dividend income is tax exempt – Corporate recipient holding less than 25 percent shareholding, dividend income is subject to income tax – Individual recipient receiving dividend income shall be taxed 10 percent Final income tax	Domestic companies receiving dividend income from an Indonesia domestic company are exempt from income tax regardless the percentage of shareholding. Individual recipient receiving dividend income shall be exempt from income tax, provided that such dividend income is invested within Indonesia.
	Dividend income received from Foreign domicile companies by Indonesian corporate and individual taxpayer is subject to income tax at the prevailing income tax rate.	Dividend income received from Foreign domicile companies by Indonesian corporate and individual taxpayer is exempt from income tax provided that the dividend constitutes more than 30 percent of the after tax income of the investee and such dividend income is invested in Indonesia. Further implementing regulation shall be issued following the Omnibus Law.
	Interest income paid to non-resident is subject to 20 percent withholding tax according to Article 26 of the Income Tax Law	Withholding tax rate of 20 percent which is imposed on interest payment to non-resident can be lowered subject to the implementing Government Regulation.
	DOMESTIC TAX RESIDENTS ARE: – Individual domiciled in Indonesia or residing in Indonesia for more than 183 days or has intention to reside in Indonesia – Corporation which is established or domiciled in Indonesia	DOMESTIC TAX RESIDENTS ARE: – Individuals which can be Indonesia national or foreign national domiciled in Indonesia ; or residing in Indonesia for more than 183 days or has intention to reside in Indonesia – Corporation which is established or domiciled in Indonesia

TAX LAWS IMPACTED	THE PREVIOUS LAW	CHANGES CAPTURED IN THE OMNIBUS LAW
INCOME TAX LAW	All Indonesia residents are subject to income tax for his worldwide income FOREIGN TAX RESIDENTS ARE: – Individuals not residing in Indonesia, or individuals residing in Indonesia less than 183 days, or foreign corporation which conducts business activity through a Permanent Establishment – Individuals not residing in Indonesia, or individuals residing in Indonesia less than 183 days, or foreign corporation which does not conduct business activity through a Permanent Establishment but earn Indonesia source of income	Foreign-national Indonesia tax resident is subject to Indonesia source of income in accordance with the following conditions: – Has specific expertise; and – valid for four years since the effective date of becoming Indonesia tax resident. Subject to Minister of Finance Implementing Regulation FOREIGN TAX RESIDENTS ARE: – Individuals not domiciled in Indonesia – Foreign national residing in Indonesia less than 183 days – Indonesia nationals residing outside Indonesia for more than 183 days and fulfilling the following criteria of: foreign domicile; economic activity; habitual abode; foreign tax resident etc.
VAT LAW		– Relaxation of certain aspect in input-VAT credits – Coal is determined as VAT-able goods
LAW OF GENERAL TAX PROCEDURES		– Imposing re-arrangement of administration sanctions

We also saw some Corporate Income Tax (CIT) rate changes this year, which however were not directly part of the Omnibus Law, though standing in context with it. Reductions have already been introduced in an earlier Law, i.e. Law Number 2/2020 of 16 May 2020. The Law was passed in anticipation of the economic slow-down because of the progressing pandemic situation.

The CIT rate changes

The CIT rate changes, as outlined in Law Number 2/2020, are as follows:

1. For the Financial Year 2020 and 2021, the CIT rate will be 22 percent. Qualifying listed companies (which means a minimum of 40 percent of its shares are traded in the Indonesia stock exchange) are entitled to a 3 percent extra reduction, resulting in a 19 percent rate.
2. For Financial years 2022 and onwards, the CIT rate will be 20 percent. Qualifying listed companies are again entitled to a 3 percent lower rate, i.e. 17 percent.

Contact for further information

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

→ Malaysia

Immigration Update West Malaysia – Q4 2020

Although the underlying principal legislation (mainly the Immigration Act 1959/1963 and the Immigration Regulations 1963) governing Malaysian entry, immigration and work permit matters, remain essentially unchanged, a few - seemingly small - changes to the legislation and in particular its application by the competent authorities (the Malaysian Immigration Department and the Expatriate Services Division or ESD), may raise substantial challenges, depending on individual circumstances and requirements, for individuals as well as for employers wishing to hire foreigners.

→ Malaysia

MyFutureJobs Portal

A new advertising requirement in respect of all new Employment Pass and Professional Visit Pass applications or renewals has been introduced. As such, every vacancy for which an employer wishes to hire foreigners, has to be advertised on the MyFutureJobs internet portal for at least 30 days.

This will be actively implemented as of January 2020. The government also plans to introduce an exemption of this requirement for key personnel, such as company directors. The plan to actively involve representatives of SOCSO (one of Malaysia's public social security boards) in the interview process is currently shelved.

→ Malaysia

Employment Pass Processing through MIDA

The manual processing of Employment Passes through MIDA (Malaysian Investment Development Authority) has been discontinued. This was particularly relevant for Representative and Regional Offices approved by MIDA.

Going forward, an online registration with the ESD is required, as Employment Passes are only processed through the existing online based system. Practically, this may lead to delays due to the additional registration being required and also due to the fact that this new process is not yet well known to ESD officers.

→ Malaysia

New Appointment System

Due to the current Covid-19 pandemic, no walk-in appointments are available with ESD; all appointments have to be scheduled through an online system. Depending on the desired service request (endorsement of visa sticker; special pass application; shortening of pass etc.) delays of up to four weeks are frequent due to the non-availability of appointments.

→ Malaysia

Malaysia My Second Home (MM2H)

The MM2H program offered foreigners meeting certain non-Malaysian income or net-worth requirements a right to reside in Malaysia without being locally employed. The MM2H program is currently suspended, with review pending; new application are not accepted, pending applications are not processed or returned.

The government has announced that the MM2H program will be replaced, but neither timelines nor details are currently clear.

→ Malaysia

MYEntry

As of March 2020, Malaysia has effectively closed its borders to all foreigners, with the exception of certain long term pass holders and their dependents. All additional permits and applications in connection with the entry and exit of such foreigners, together with arrangements related to the Reciprocal Green Lane arrangements with Singapore, are currently exclusively processed through the MYEntry online portal.

It is worthwhile noting that the entry from and citizens of so called "banned countries" (currently countries with overall more than 150,000 covid-19 cases) may be permitted on a case-by-case basis, subject to a 14 days' mandatory quarantine.

Foreigners wishing to exit Malaysia and then return (currently only "emergency cases" and certain business related reasons permitted) require an Exit and Entry Pass, which allows them to return to Malaysia within 60 days, subject to a 14 days' quarantine. Most newly issued passes to foreigners currently based abroad also require an additional Entry Pass.

Please note that attempts to enter the country without the additionally required passes have resulted in the permanent black listing of individuals by the Malaysian Immigration Department.

Contact for further information

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

→ Malaysia

Malaysia´ s 2021 Budget Announced

The Malaysian Government presented the 2021 Budget in Parliament on 6 November 2021, which focuses on investing in the public healthcare system, helping the most vulnerable groups adversely affected by the pandemic, and stimulating economic activities to drive growth and recovery in 2021.

Key tax proposals introduced in the Budget 2021

- Further tax deduction for employment of SENIOR CITIZENS, EX-CONVICTS, PAROLEES, SUPERVISED PERSONS and EX-DRUG DEPENDENTS is to be extended to YA2025 for a monthly remuneration not exceeding RM4,000;
- A reduced income tax rate of 0 percent to 10 percent for the first 10 years, and 10 percent for the next 10 years for MANUFACTURERS

OF PHARMACEUTICAL PRODUCTS INCLUDING VACCINES;

- 10 percent income tax rate for a period of 5 + 5 years for GLOBAL TRADING CENTRE for applications received by MIDA from 1 January 2021 to 31 December 2022;
- PRINCIPAL HUB INCENTIVE to be extended for another 2 years, and conditions relating to the number of high value workers, key posts and annual operational expenditure for the extended 5 year period be relaxed;
- Tax incentives for companies RELOCATING their operations in Malaysia is expanded from manufacturing sectors to selected SERVICES sector including companies adapting IR4.0 and digitalization technology with investment that contributes to a significant multiplier effect. For new companies this will be 0 percent – 10 percent income tax rate for up to 10 years; and 10 percent income tax rate up to 10 years for existing companies with new services segment;
- Existing RELOCATION INCENTIVES for MANUFACTURING sector is to be extended for 1 year for applications made until 31 December 2022;
- Tax incentives for MRO activities for AEROSPACE, building and repair of SHIPS, BIONEXUS status company, and ECONOMIC CORRIDOR developments is to be extended until year 2022;
- 100 percent tax exemption for EXPORT OF PRIVATE HEALTHCARE SERVICES is extended until YA2022;
- Tax incentive for COMMERCIALIZATION of research & development ("R&D") findings is to be reintroduced for non-resource based R&D; and expanded to include private higher education institutions, effective from 7 November 2020 until 31 December 2025;
- Tax exemption on GRANTS for GREEN SUSTAINABLE and RESPONSIBLE INVESTMENT ("SRI") is expanded to all SRI sukuk and bonds for applications received from 1 January 2021 to 31 December 2025;
- Tax incentive for companies undertaking the manufacturing of INDUSTRALIZED BUILDING SYSTEM ("IBS") components to be extended for another 5 years until 31 December 2025;
- REDUCTION of 1 percent on individual income tax rate for RESIDENT individuals with chargeable income between RM50,001 and RM70,000 effective from year of assessment ("YA") 2021;
- 15 percent individual income tax flat rate for 5 consecutive years (limited to 5 individuals) for NON-MALAYSIAN citizens in companies with RELOCATION INCENTIVES;
- Income tax exemption for COMPENSATION FOR LOSS OF EMPLOYMENT will be increased from RM10,000 to RM20,000 for each full year of service for YA 2020 and YA 2021;
- Income tax relief for MEDICAL EXPENSES for serious diseases for self, spouse and children is increased from RM6,000 to RM8,000 from YA2021;
- Income tax relief for MEDICAL TREATMENT, SPECIAL NEEDS AND CARER expenses incurred for PARENTS is increased from RM5,000 to RM8,000 from YA2021;
- Tax relief on LIFESTYLE EXPENSES is increased from RM2,500 to RM3,000 from YA2021;
- The sales value threshold for the value-added activities carried out in an FIZ and LMW is increased from 10 percent to 40 percent of the total annual sales value;
- Imposition of 10 percent ad-valorem EXCISE DUTY for all types or ELECTRONIC AND NON-ELECTRONIC SMOKING DEVICES including vape. Liquid or gel for vape or other smoking devices will be imposed with excise duty at RM 0.40 per milliliter;
- Imposition of SALES TAX and IMPORT DUTY on CIGARETTES AND TOBACCO PRODUCTS in all DUTY FREE ISLANDS AND ANY FREE ZONES;
- Imposition of TOURISM TAX be extended to accommodation premises booked through online platform providers with effect from 1 July 2021;
- Authorized Economic Operator (AEO) facility to be broadened to include approved logistics service providers and warehouse operators; 100 percent stamp duty exemption on instrument of transfer and loan agreement for the purchase of FIRST RESIDENTIAL PROPERTY to be extended for another 5 years until 31 December 2025; and value of property increased to RM 500,000.

Malaysia proposes additional incentives and amendments in Finance Bill 2020

The Malaysian Ministry of Finance has proposed additional tax amendments in the Finance Bill 2020 ("the Bill"). The Bill which has recently been presented in Parliament

for the first reading, seeks to amend certain provisions of the Income Tax Act 1967, the Real Property Gains Tax Act 1976, the Labuan Business Activity Tax Act 1990, the Stamp Act 1949, and other relevant legislation.

1. Income Tax Act 1967

- A qualifying person undertaking a qualifying activity, i.e. any high technology activity in the manufacturing and services sector or any other activity which would benefit the economy of Malaysia, approved by the Ministry of Finance, will be entitled to a concessionary income tax rate of not more than 20 percent;
- Special Reinvestment Allowance ("RA") will be made available for manufacturing and certain agricultural projects where the 15 year RA period has already expired, from YA 2020 to 2022;
- The restriction on deductible expenses for payments made to Labuan entities will be extended to Labuan entities that do not meet the substantial business activity requirements under Section 2b(1)(a) of the Labuan Business Activity Tax Act 1990;
- Additional conditions must be met for claiming special deductions / double deductions for R&D expenditure;
- Effective YA 2021, a definition of "plant" will be included in the Income Tax Act 1967, i.e. a plant for capital allowance purposes will be defined as "an apparatus used by a person for carrying on their business but does not include a building, an intangible asset, or any asset used and that functions as a place within which a business is carried on";
- For transfer pricing purposes, the Director General of Income Tax will be given the power to disregard any structure adopted by a person in entering into a transaction if (i) the economic substance of that transaction differs from its form; or (ii) the form and substance of that transaction are the same but the arrangement made in relation to the transaction, viewed in totality, differs from those which would have been adopted by independent persons behaving in a commercially rational manner;
- A 5 percent surcharge on the increase in income or the reduction of deduction or loss, as the case may be, will be introduced for transfer pricing adjustments made by the Inland Revenue Board. In addition, taxpayers that fail to provide contemporaneous transfer pricing documentation will be fined between MYR 20,000 and MYR 100,000, or imprisoned for up to 6 months if prosecuted.

2. Real Property Gains Tax Act 1976

- Taxpayers may authorize a tax agent, advocate or solicitor to file their RPGT returns electronically;
- The RPGT rate for companies will apply to societies registered under the Societies Act 1966.

3. Labuan Business Activity Tax Act 1990

- Effective YA 2020, "chargeable profits" of a Labuan entity is defined as "the net profits reflected in the audited accounts in respect of such Labuan business activity of the Labuan entity for the basis period for that YA";
- Labuan entities carrying on Labuan non-trading activities will be required to comply with the control and management requirement (in additional to the substantial activity requirement) in order to avail preferential tax treatments.

4. Stamp Act 1949

   A digital stamp on a duplicate and counterpart of an instrument will be deemed a valid stamp showing that the full and proper duty has been paid on the original instrument.

Contact for further information

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

→ Malaysia

Choosing an Accounting Standard for your entity in Malaysia

Although Malaysian accounting practices rarely pose a challenge to multinational companies, as the Malaysian Financial Reporting Standards (MFRS) quite closely follow the International Financial Reporting Standards (IFRS), sometimes the question arises, if it is more beneficial for a private company of a certain size to utilize MFRS or the Malaysian Private Entities Reporting Standard (MPERS).

MPERS is created based on the International Financial Reporting Standard for Small and Medium-sized Entities issued by the International Accounting Standards Board (IASB), and has similarities to the German Generally Accepted Accounting Principles (German GAAP), while the MFRS is mostly equivalent to the International Accounting Standards (IAS) or International Financial Reporting Standards (IFRS).

As the name suggests, MPERS is available to private entities and is supposed to offer a less complex accounting environment. As is quite often the case, one size does not fit all, as some companies may still prefer to utilize MFRS. In addition to the desire to limit accounting complexities, many Malaysian companies which are foreign-owned, choose one of the standards available in order to align their accounting, as far as possible, to the standards of its holding company to minimize consolidation efforts.

The table below highlights a few differences in accounting treatments between MFRS and MPERS focusing on recognition, measurement, presentation and disclosure on revenue.

	MPERS REVENUE RELATED SECTIONS	MFRS 15 REVENUE FROM CONTRACTS WITH CUSTOMERS
RECOGNITION	SECTION 2 – CONCEPTS AND PERVASIVE PRINCIPLES Income and expense is a direct result from the recognizing and measuring of assets and liabilities, where the following criteria have to be satisfied: – It is probable that future economic benefit associated with the item will flow to the entity; and – The value can be measured reliably.	Recognition would need to be determined by the following five steps: 1. Identifying the contract, e.g. rights and payment terms; 2. Combination of contracts, e.g. the consideration payable under one contract is dependent on the outcome of another contact, meaning that both have to read together; 3. Contract modifications, e.g. changes in price; 4. Identifying performance obligations, e.g. delivering goods or services separately or bundled; 5. Satisfaction of performance obligations and recognition of revenue, e.g. at a point in time or over time or by measuring progress using output or input methods;
MEASUREMENT	SECTION 2 – CONCEPTS AND PERVASIVE PRINCIPLES Measurement of the initial recognition is at historical cost unless specifically required otherwise.	While determining the price of goods or services; it also has to be assumed that the contract will not be cancelled, renewed or modified, and consideration of any variable estimates, financing components, non-cash or any consideration payable to customers etc. have to be taken into account.

	MPERS REVENUE RELATED SECTIONS	MFRS 15 REVENUE FROM CONTRACTS WITH CUSTOMERS
PRESENTATION	SECTION 3 – FINANCIAL STATEMENT PRESENTATION The income recognized has to be presented in a fair manner based on the recognition criteria and the effects of transactions and events on the statement of financial performance and cash flow of the entity.	Contractual assets or contractual liabilities are presented in the statement of financial position when a contract is created, depending on the entity's performance of the obligations in a contract and the terms of customer's payments, e.g. a contract was formed to purchase goods and these will only be delivered, if an advance payment of 30 percent is first received. The advance payment would be recorded as a contractual liability until the goods (obligation) are delivered. Receivables are recorded only when the right to consideration is unconditional.
DISCLOSURE	SECTION 3 – FINANCIAL STATEMENT PRESENTATION Disclosure is necessary when the presentation is not sufficient to allow users to understand the effect of certain transactions.	Revenue recognized from a contract with customers and any impairment losses are divided into categories as to how they are affected by economic factors. It is also required to disclose contract balances recognized in the relevant period, the opening and closing balances, performance obligations on the contract, transaction prices on the remaining obligations, and the significant judgements that were applied when determining the performance obligations and transaction price.

Contact for further information

Cherryl Lim
T +60 3 2276 7739
cherryl.lim@roedl.com

→ Myanmar

Second edition of e-Governance Master Pan

With the second edition of the e-Governance Master Plan for the period 2021 – 2025, the Ministry of Transport and Communication aims at further structuring and supporting the transition of major public and administrative functions, such as income tax management, e-payments, census data and aid management amongst others.

Under the first e-Governance Plan (2016 – 2020), a national government portal and management system not only for citizen IDs and civil service as well as for human resources has been established, but administrative functions like tax filings, company registrations, trademark registrations and trade licenses have as well been transitioned online.

The new plan includes an upgrade to a cloud based system with an integrated data center where fee payments and e-payments in general will be further extended, and passenger reservations and multimodal transport will as well be coordinated online.

As per January 2021, the newly upgraded TradeNet 2.0 system, an online trade platform under which traders will be able to apply online for import and export licenses, is expected to be fully implemented. The system will store information provided throughout the application process for further renewal processes, import/export registration certificates as well as licenses will be issued online, which will lead to a significant increase in efficiency.

Furthermore, a voluntary e-commerce businesses registration platform has been implemented by the Ministry of Commerce. As part of the requirements, online shops must obtain the approval of all relevant departments for services and goods offered. The purpose of the registration is to inspire more confidence and to enhance consumer protection in e-commerce and online shopping.

In the current covid-19 pandemic, payments under the Economic Relief Plan were made online to vulnerable households and garment workers as well as loan payments to affected businesses and farmers.

→ Myanmar

The new Myanmar Economic Recovery and Reform Plan

The second recovery plan, MYANMAR ECONOMIC RECOVERY AND REFORM PLAN (MERRP), to ease the impact of the covid-19 pandemic, is currently being drafted, and the government aims at reforming and developing the agricultural sector for the export of more high quality agricultural, livestock and fishery products.

In line with MERRP, the domestic logistic infrastructure and storage facilities are scheduled to be improved, as well as land rights of farmers clarified and contract farming accelerated.

→ Myanmar

Myanmar Tourism Rules

Myanmar Tourism Rules were finalized on 17 November 2020 complementing the Myanmar Tourism Law which came into effect in September 2018.

→ Myanmar

Trademark Registrations

Since October 2020, trademark registrations effected under the old system with the Office for the Registration of Deeds may be re-registered under the new Intellectual Property Department online filing system and the Trademark Law 2019.

Under the current grace period for previously registered trademarks, the registration of new trademarks is not possible.
This soft opening phase is expected to last at least until the 1st of April 2021.

Contact for further information

Lutz Koch
T +95 1 9345 242
lutz.koch@roedl.com

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

→ Philippines

Bayanihan Act II

Recover as ONE - Tax Incentives

Bayanihan stems from the word “Bayan” (Filipino for nation, town or community), but there is also a deeper meaning to it. The term does likewise stand for the unwavering spirit of communal unity, joint efforts and cooperation to achieve a common goal.

The Bayanihan Spirit may be traced back to a Filipino tradition where an entire village would support their neighbors upon relocating their homes by the villagers literally carrying the entire house and all the belongings on their backs to the new location. A cultural strength which, together with the famous Filipino resilience, carried the Filipino people through the hardships of 2020, caused inter alia by a volcano eruption, covid-19 and a number of natural disasters, all within one year.

The term Bayanihan also designates the acts passed by the Congress of the Philippines consolidating the measures of the Philippine fight against covid-19 (Bayanihan Act I – Heal as ONE passed on 24 March 2020) and the recovery from its consequences (Bayanihan Act II – Recover as ONE – passed on 20 August 2020).

The latter provides for various tax incentives to accelerate the recovery of the Philippine economy, such as:

- EXEMPTION FROM DOCUMENTARY STAMP TAX (DST) on various forms of extension or restructuring of certain loan agreements and other financial instruments falling due, or any part thereof, on or before 31 December 2020;
- EXTENSION OF CARRY-OVER OF NET OPERATING LOSS (NOLCO) for losses occurred in 2020 and 2021 from 3 to 5 years as deduction from gross income in the immediately following taxable years- assuming that the business or enterprise is not disqualified from claiming the deduction;
- TAX EXEMPTIONS ON VARIOUS DONATIONS, such as IT equipment to public schools, including its exemption of import duties and taxes. Furthermore, such donations may qualify for deduction from gross income in the amount of the contribution/donation – subject to limitations;
- EXEMPTION OF IMPORT DUTIES, TAXES AND OTHER CHARGES FOR THE MANUFACTURING OR IMPORT OF CRITICAL HEALTHCARE EQUIPMENT, supplies or essential goods determined by BIR. RR No. 28-2020 provides for a list of goods that are exempt from value-added tax, excise tax and other fees;
- EXTENSION FOR PERIOD TO FILE VAT REFUND: BIR RR 27-2020 provides further details on the filing periods and requirements;
- REPEAL OF TAX ON INITIAL PUBLIC OFFERING OF SHARES OF STOCKS imposed by Section 127(B) of the NIRC for the effective period of the Bayanihan Act II;
- VARIOUS INCOME TAX EXEMPTIONS on retirement benefits from a BIR accredited retirement plan, as well as various forms of Hazard Pay or other qualifying remuneration paid to health workers. For further details please refer to BIR RR No. 29-2020.

→ Philippines

Stricter BIR TP Guidelines

In 2013, the Philippine Bureau of Internal Revenue issued Revenue Regulation 02-2013, providing the initial applicable guidelines on related party transactions. The regulation explicitly required taxpayers to maintain and keep adequate TP documentation. However, aside from the general requirement for disclosure of related party transactions in the financial statements under the Philippine Accounting Standards, the taxpayer only had to submit TP documentation for taxation purposes upon request. Furthermore, the applicable regulations were not strictly enforced, particularly with regard to smaller and medium sized enterprises.

Following last year's release of the BIR Revenue Audit Memorandum Order No. 01-2019 outlining standard TP related audit procedures, the latest BIR issuances, namely Revenue Regulation 19-2020 and Revenue Memorandum Circular 76-2020, are meant to stricter enforce the already applicable TP rules, considerably changing the Philippine TP landscape.

In particular, to complement the financial reporting disclosures for the current and following financial years, taxpayers are required to disclose their related party transactions in their Annual Income Tax Returns by attaching BIR FORM NO 1709 (Information Return on Related Party Transactions). Among the supporting documents, the taxpayer is required to provide proper TP documentation.

For enterprises that have their current TP documentation in place, the new TP related attachments to their Income Tax Return should be more of a formality. For all other companies, we strongly recommend to address this compliance matter with high priority. For any questions, please feel free to contact us.

Contact for further Information

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

→ Singapore

Apostille soon to be introduced

Cross-border transactions and activities often require public documents issued by the authorities – a process which can be cumbersome, costly and time consuming. Such process will be simplified in 2021, upon Singapore becoming a Contracting Party to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents (the "APOSTILLE CONVENTION").

The Apostille Bill was submitted for First Reading in Parliament on 5 October 2020. Once the Bill has been passed, Singapore's obligations under the Apostille Convention will take domestic effect.

The Apostille Convention abolishes the requirement of legalization and facilitates the use of public documents abroad through the use of a simplified one-step process.

There are currently 119 Contracting Parties to the Apostille Convention, including most European countries. A list of all Contracting Parties can be found here:
https://www.hcch.net/en/instruments/conventions/status-table/?cid=41

Currently, in Singapore, to authenticate a document for recognition overseas, a legalization is required. It is a multi-stage process whereby a document must first be notarized, go through the Singapore Academy of Law ("SAL"), the Ministry of Foreign Affairs ("MFA") and finally the embassy of the respective country.

The SAL will become the Competent Authority responsible for issuing certificates (i.e. apostilles) that certify the origin of official documents produced by Singapore.

Once Singapore becomes a Contracting Party to the Apostille Convention, all other Contracting Parties will be required to waive the legalization requirement for public documents issued by Singapore authorities, and will be required to accept the apostilles issued by the Singapore Academy of Law. Equally, Singapore authorities will be required to accept apostilles in place of legalization for incoming foreign public documents from Contracting Parties.

The reforms will not only streamline and modernize the process for authenticating public documents for recognition across jurisdictions; it will also save time and costs for those who seek to use Singapore-issued public documents in other Contracting Parties.

Note that by January 2021, the legalization function of outgoing public documents issued in Singapore and intended for use in states with legalization requirements will be transferred from MFA to SAL.

Although Singapore has been late to adopt the Apostille Convention, Singapore now has the opportunity to be a leader in the digitalization of the apostille process (i.e. the issuance of e-apostilles, the operation of e-registers of apostilles that can be accessed online by recipients so that they can verify the e-apostille that they have received). The adoption of the Apostille Convention also sends a signal to the international community that Singapore is committed to remain open and connected to the world for business.

Contact for further information

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

→ Thailand

Coronavirus

Emergency Decree extension

On 19 November 2020, the government has announced to extend the state of emergency until at least 15 January 2020. Under the state of emergency, the government has wide-reaching authority to issue orders to protect public health. Thus, we deem it likely that Thailand's borders will remain closed. Only certain groups of people (for example, Thai repatriations, foreigners holding a work permit) are permitted to enter Thailand under certain circumstances (such as having a certificate of entry issued by a Thai embassy or consulate, having a negative test for covid-19 not older than 72 hours prior to departure, having sufficient insurance for covid-19, having a booked hotel quarantine in Thailand. etc.)

Proposed reduction of hotel quarantine to 10 days

The government considers shortening the required hotel quarantine from currently 14 days to 10 days. Under the current rules, travelers are required to apply for alternative state quarantine with hotels upon arrival in Thailand.

Hotels have to be certified for the process. Critics of the current policies have pointed out that ten days of quarantine are sufficient for safety purposes and that shortening the quarantine would incentivize further travel to Thailand.

Notification by the Department of Business Development - covid-19 relief measures

The DBD has canceled a policy enacted in March 2020, according to which fines for delayed annual general meetings were waived if the covid-19 situation caused the delay. Thus, now the general rules apply again: a company has to hold an AGM within four months since the end of the fiscal year, and submit an updated list of shareholders within 14 days of the AGM. Finally, financial statements have to be filed within one month of approval by the AGM.

Companies having the fiscal year before or on 31 July 2020 should ensure that all documents are submitted timely to avoid late filing penalties.

Notification by the Revenue Department – covid-19 relief measures

In March 2020, the government granted tax relief for Covid-19 impact, including reductions of withholding tax on payments in Thailand for services, hire of work, certain commission payments as well as professional fees from 3 to 1.5 percent. With Departmental Regulation promulgated in the Government Gazette dated 1 October 2020, the rate has been increased from 1.5 to 2 percent.

Companies need to adjust the internal processes for these payments to ensure compliance with the new withholding tax rates.

→ Thailand

Trade

Regional Comprehensive Economic Partnership

On 15 November 2020, Thailand signed the RCEP creating a massive free trade zone between China, ASEAN, South Korea, Japan, Australia and New Zealand. For more information on the background and structure of the RCEP, please refer to our INTERNATIONAL TRADE SECTION above.

For Thailand, the signing should be particularly relevant for the trade in goods. It is estimated that Thailand will reduce import duties on about 90 percent of goods (originating in RCEP member states). Vice versa, Thailand as export destination will enjoy the benefits of exporting goods to the member states at lower import duties, which will boost Thailand's economy.

For the trade in services, the implications of RCEP are expected to be less relevant. While certain services such as repair of aircraft, railway, research and development as well as tax and real estate advisory are subject to liberalization under the RCEP, a number of non-tariff trade barriers (such as language requirements, certification standards, etc.) will likely prevent greater practical implications. Note that certain services have already been liberalized under ASEAN agreements with limited meaningful impact.
It remains to be seen how other investment liberalizations will be implemented. While the RCEP includes permission for 100 percent foreign-owned investment in manufacturing entities in certain areas (for example, automotive), such activities are mostly already exempted under Thailand's current Foreign Business Act.

Additionally, signatories are required to protect intellectual property under various agreements and protocols, which should further boost Thailand's efforts to implement effective IP protections.

It remains to be seen how the RCEP will impact the practical aspects of investing in Thailand. However, from our point of view, European politicians should take notice. If the EU is not willing to sign an FTA with Thailand, other strong players will gladly exploit this opening for their purposes and further cement their standing in the ever more relevant investment region ASEAN,

Thai Board of Investment – Reorganization

The Thai Board of Investment is a government agency tasked with encouraging investment in Thailand. On 5 October 2020, the BOI announced reorganization measures to increase efficiency during the application process.

→ Thailand

Taxes

Transfer Pricing

Companies having transactions with affiliates and income of at least THB 200 million during the accounting period may file overdue Disclosure Forms online with the Revenue Department. Payment of any fine can also be effected online.
The submission deadline is 31 December 2020. All companies impacted by Thailand's transfer pricing regulations should check if required Disclosure Forms have been filed properly, and otherwise remedy the issue within 31 December 2020.

Additional deduction under Royal Decree No 710

The Ministry of Finance has announced tax incentives for the improvement of the industrial capacity of Thailand. Purchasers of machinery for automation and software for machinery in automation systems may deduct investments at a maximum of 200 percent, provided the investment has been made between 1 January 2019 and 31 December 2020, and the conditions for the deductions are met. Amongst others, the purchased assets have to be new (unused) and need certification by the Revenue Department.

Companies that have acquired automation items (machinery and software) should check if additional deductions are permissible during the mentioned period.

Contact for further information

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

→ Vietnam

New law on investment

RIGID: Dual conditions on business applied to investors

As a general rule, the New LOI adopts a clearly defined mechanism of dual conditions for investors, irrespective of their nationality, when carrying out investment activities in Vietnam.

Market-access conditions for foreign investors

Under the New LOI, the law emphasizes the same treatment to be granted to foreign investors and domestic investors when they enter into Vietnam market in the same sectors. There is no discrimination between local investors and foreign investors, aside from some specific exceptions in which the government of Vietnam reserves the right to compose a list of businesses restricted to market entry for foreign investors ("List of Businesses Restricted to Market Entry").

By adopting a "negative list" approach, the New LOI provides that the Government lists sectors/businesses for which Vietnam imposes restrictions and conditions to foreign investors to participate in the domestic market. This means that all sectors not covered by the negative list are considered as liberalized by default and open for

foreign investors. In this respect, the New LOI utilizes the "negative list" techniques which are similar to those opted for in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in services and investment.

Compared to the current LOI, this approach of the New LOI is significantly different from the "positive list" scheduling approach of the Schedule of Specific WTO Commitments in Services of Vietnam (the "Schedule") to determine the level of openness of the market for foreign investors. Under the Schedule, only the sectors for which Vietnam opens its market to foreign investors are specified, while the remaining sectors will solely rely on the discretion of competent authorities. Vast investment projects of foreign investors operating in sector(s) not prescribed in the Schedule have showed that the registration procedures will have to involve seeking the assessment of relevant authorities in most cases - which are usually impeded by various bureaucracies to determine eligible investors for market access, not to mention the high degree of flexibility or even the misuse of the discretion of Vietnamese agencies in handling similar issues by different approaches on case-by-case basis or influenced by lobby policies.

A far-reaching benefit from the adoption of a "*negative list*" approach in providing market-access conditions under the New LOI is therefore the reduction in barriers to licensing procedures (in the phases of establishment of subsidiaries and M&A activities in Vietnam), where restrictions or limitations on investment imposed to foreign investors are more transparent and predictable. To some extent, by choosing the "*negative list*" legislation technique, Vietnam can honor their commitment to the non-discrimination of foreign investors in investment policy to establish a level playing field, while still maintaining a trade protection policy for sensitive sectors.

Investment-business conditions

Investment-business conditions are those applied after the market access and prior to the commencement of business in sectors that are subject to the list of conditional businesses specified in Annex IV of the New LOI. There are 227 conditional businesses in total in accordance with Annex IV. Aside from our update on the list of conditional investment-business in the Legal Update of May 2020, two (02) more businesses have been added to this list (*Auxiliary activities related to insurances; Trading of pure water*), while there are ten (10) businesses (*HIV testing services; Cell and Tissue Banking; Cryopreservation of Embryos and Oocytes in Human Assisted Reproduction; Testing of microorganisms causing infectious diseases; Vaccination; Opioid substitution therapy; Surrogacy services; Sale of foods under the administration of the Ministry of Health; Medical equipment classification services; Medical equipment testing services; Sale of biological preparations from waste treatment*) which have been eliminated from the list.

The New LOI also sets forth compulsory contents of the regulations about investment-business conditions, namely: subject matters and sphere of application, method of application, contents of conditions, application dossier and administrative orders and procedures, competent authorities, validity of license/certificate/confirmation.

Forms of Investment

There is no change in forms of investment activities between the current LOI and the New LOI, except for the change in the substantive contents of each investment form, and the separation of provisions for investments in public private partnerships from the New LOI into a new legal instrument (Law on Public Private Partnership No. 39/2019/QH14).

Setting up new economic organization

For the first time, the requirements for setting up an investment project and obtaining an investment (registration) certificate have been lowered for foreign investors in the establishment of innovative startups being SMEs and innovative start-up investment funds under the New LOI, except for deviating requests by the investors.

M&A

Prior to implementing an M&A transaction, depending on the case, the investor may need to obtain an M&A approval from the Vietnamese authority. The New LOI made notable changes to this M&A approval requirements. To be specific, the New LOI does not require any M&A approval in case the M&A transaction does not lead to an increase in foreign ownership ratio in the economic organization doing business, subject to market entry conditions applicable to foreign investors.

In addition, it is required to get an M&A approval in case the M&A transaction results in an increase of foreign ownership ratio in the company to more than 50 per cent, and in case the foreign ownership ratio had already exceeded 50 per cent.

Besides the aforementioned cases, the New LOI supplements two new categories requiring M&A approval: (i) safeguard of national security and defense in accordance with the New LOI, and

(ii) conditions of acquisition of land located in areas deemed vital to national security (e.g. islands and in border and coastal communes, wards and towns).

Resident foreign direct investment enterprises (FDI enterprises)

Notably, there is a change in the criterion of foreign ownership ratio in FDI enterprises for identifying and determining the investment conditions and procedures under the New LOI. Accordingly, the foreign ownership threshold as a criterion to treat a resident FDI enterprise as a foreign investor has been reduced from a 51 per cent ratio under the current LOI to a more than 50 per cent ratio under the New LOI.

Due to such change, in the near future when the New LOI comes into effect, all FDI enterprises with a foreign ownership ratio of more than 50 per cent will be subjected to investment conditions and procedures applicable to current foreign investors.

Investment Incentives

The New LOI simultaneously supplements forms of investment incentives and objects entitled to investment incentives.

Forms of investment incentives

The New LOI regulates one new form of investment incentive which is the accelerated depreciation and increase in the amount of deductible expenses when calculating taxable income. This results in 4 forms of investment incentives to investors.

Objects entitled to investment incentives

The government of Vietnam remains supportive in high-technology, renewable energy, IT , education industries, etc. same as current regulations to attract more foreign investment. Nevertheless, certain strict conditions have been added to projects with a capital scale from VND 6,000 billion such as conditions on revenue and number of employees. The investment projects for the construction of commercial residential housing have been eliminated from the incentive list of the New LOI.
In addition, in an effort to support startups, SMEs in Vietnam as well as the enterprises in environmental protection industry, the government has already put in place incentives for these, hoping to provide better conditions for a strong and sustainable development in near future.

Rödl & Partner Vietnam accompanies and assists clients of all kinds in their business activities in Vietnam.

→ Vietnam

Remarkable legal issues in the Law on Enterprise 2020

Right at the beginning of 2021, a series of important legal documents have come into effect. One of the essential documents that should be brought to attention is the Law on Enterprises No. 59/2020/QH14, enacted by the National Assembly of Vietnam on June 17, 2020 (the "NEW LOE"), and replacing the Law on Enterprises 2014 (the "CURRENT LOE") as of January 1, 2021. The new LOE promises to constitute a more streamlined, less bureaucratic and less burdensome legal framework.

In this legal update, we would like to highlight the remarkable changes in the new LOE.

Key Issues

Notifiable changes applying to all kind of companies

i. Clearly allocating the duties of legal representatives in companies

The Legal Representative represents the company in exercising its rights and performing its obligations arising out of the transactions of the company.

As provided in the current LOE, in case a company has more than one legal representative, the company charter must clearly allocate the individual duties of each legal representative and define the specified number of managerial positions, rights and obligations of a legal representative. However, the law is still silent on how the provisions of the law may be applied in case the company charter does not allocate the duties between the legal representatives.

Since each legal representative is authorized to conclude a specified transaction,

which makes it difficult for a third party to determine the authority of a legal representative in the company, the new LOE addresses this issue by stipulating that in case the charter does not define the allocation of duties between the legal representatives, each of the legal representatives shall fully represent the company and take joint responsibility for any damages to the company as prescribed by civil laws and other relevant laws.

ii. Providing a more flexible capital contribution time limit

The current LOE stringently requires the Charter Capital to be fully paid within 90 days from the day of ERC issuance, with this rule applying to all kinds of assets to be contributed. If the capital to be contributed are assets or property, this provision encounters many practical obstacles since administrative procedures upon transferring ownership may take months, or even years in some cases.
However, according to the new LOE, the time limit for capital contribution is changed. The 90-day threshold remains, but the time requirement for transporting or importing assets contributed as capital, and for conducting administrative procedures for the conversion of ownership is excluded. This is a reasonable adjustment which creates more favorable conditions for investors in the company.

iii. Amendment to the regulation on digital signatures and company stamps

Although e-transaction is widely applied in the activities of the State agencies as well as in civil transactions, business, commerce and other sectors prescribed by law, digital signatures are yet to be officially recognized in practice by the relevant authorities, except for some limited cases such as public documents, tax declaration, customs declaration and social insurance. The new LOE addresses such concerns by clarifying that companies may now use the digital signatures with the same legal validity as the traditional stamp.

Worthy of note, in accordance with the Vietnam laws, the digital signatures must be created by the public digital signatures certification organizations, or must obtain a license to use foreign digital certification in Vietnam issued by a competent authority (the Ministry of Information Technology and Communications).

One other fundamental change refers to the traditional company stamps. Under the current LOE, a company is required to announce a company stamp sample to the business registration agency before using. Such procedure is no longer required in the new LOE. The company has the full authority to decide about the type, quantity, form and contents of the company stamp, and shall be self-responsible for using the company stamp. The management and retention of the company stamp shall be implemented in line with the company charter.

iv. Expansion of the scope of the related person in the company

“Related person” means any individual or organization directly or indirectly related to a company. The definition of “related person” is an important legal issue, since most of the contracts and transactions of a company with related persons must obtain the approval of the Members’ Council or the President of the company, the Director or General Director and Controllers, General Meeting of Shareholders (the “GMS”) or the Board of Management (the “BOM”) on case by case basis.
The new LOE has expanded the scope of definition for the related person, including “father-in-law, mother-in-law, son-in-law, daughter-in-law” as persons with family relationship; and added “legal representative, Controller(s)” as affiliated persons. This change brings substantially greater transparency to the management of the company.

Legislative changes applying to the limited liability company (“LLC”)

i. Adjustment of the organizational and managerial structure of single-member Limited Liability Companies

According to the new LOE, the single-member limited liability company (the “SINGLE-MEMBER LLC”) owned by the organization can opt for one of the following organizational and managerial structures:

a. President of the company, Director or General Director;
b. Members' Council, Director, or General Director.

This means, the controller is no longer required for the single-member LLC owned by the organization, while this position has been part of the requirements under the current LOE.

Furthermore, the single-member LLC company must have at least one (1) legal representative holding the position of the Chairman of the Members' Council or the President of the Company or the Director or General Director. In case the Company Charter does not indicate such provision, the Chairman of the Members' Council or the President of the Company shall be legal representative of the Company.

ii. New regulation on Multiple-Member Limited Liability Company

The organizational and managerial structure of a multiple-member LLC under the current LOE comprises Members' Council, Chairman of Member's Council, Director or General Director. If the multiple-member LLC has more than eleven (11) members, it is required to have the Controllers or Board of Controllers. Such obligation is no longer required under the new LOE, except for multiple-member LLCs being a State-owned company or any subsidiary of a State-owned company. Otherwise, the company may decide to adopt the Controller or Board of Controllers based on their own decision.

iii. Clarified regulation on the issuance of bonds of Limited Liability Companies

The current LOE only provided a vague provision to limit the right of the LLC to issue shares. It has also been silent as to the rights of the LLC in the issuance of bonds. Until 2018, in a guidance decree on the issuance of corporate bonds, the right of the LLC to issue corporate bonds has been generally recognized. The new LOE reaffirms that an LLC is allowed to issue bonds, while it may not issue shares unless it is converted into a JSC.

Furthermore, the new LOE also provides a detailed sequence as well as procedures for the private placement of bonds, and the assignment of privately placed bonds. The new LOE also lists the additional conditions linked to the private placement of bonds, such as fully satisfying the conditions on financial safety ratios and prudential ratios during operation, having the audited annual financial statements for the year immediately preceding the year of issuance.

Legislative changes applying to the joint stock company ("JSC")

i. Regulated procedure to offer private shares

The current LOE provided that a JSC has to notify the offering of shares to the business registration agency within five (5) working days from the date of the decision to privately offer shares. This provision has been repealed, which means in case a JSC plans to offer new shares, such company is no longer obliged to notify the business registration agency for private share placement. This amendment is welcome to reduce paperwork.

However, more restrictive conditions have been promulgated for non-public JSCs. For instance, the placement may not be made via mass media, is restricted to less than one hundred addressees, excluding institutional securities investors, or is only placed with institutional securities investors.

Besides, the new LOE also stipulates pre-emptive rights for subscribing for the new shares to be granted to existing shareholders. Only after shareholders and transferees of priority rights for a subscription do not subscribe, the remaining shares shall be sold to other third parties, save for the case of merger or consolidation.

ii. Enhanced protection for Minority Shareholders in Joint Stock Companies

Firstly, under the new LOE, a shareholder or a group of shareholders holding five (5) or more percent (which is significantly lower than the previous threshold of ten (10) percent under the current LOE) of the total ordinary shares is entitled to access, consult and extract from the essential corporate documents (except for data relating to commercial secrets or business secrets) of the company, to request to convene a GMS in particular cases or to implement the legitimacy surveillance right of the minority shareholders according to the laws.

iii. Repealed obligatory minimum period for holding shares for shareholders or groups of shareholders

Firstly, the new LOE repealed the obligatory minimum period for minority shareholders to hold shares. Under the current LOE, minority shareholders needed to hold their shares for six (6) consecutive months to exercise their rights; a requirement exclusively addressed to minority shareholders. However, there is no such requirement for the minority shareholders in the new LOE.

Secondly, as provided in the new LOE, the shareholder or group of shareholders holding at least one (1) percent of total shares is entitled to immediately (previously, a minimum term of six (6) consecutive months needed to be observed) initiate the legal action for a refund of benefits or a payment of compensation.

Thirdly, in case a resolution or decision of the BOM is unlawful or contrary to the resolutions of the GMS or company, thereby causing loss to the company, a shareholder of the company has the right to take recourse to a court to suspend the implementation of or to rescind such resolution or decision right away, while according to the current LOE, a shareholder has only been entitled to exercise their rights if they had been holding their shares for at least one year.

iv. New regulations to protect the Preference Shareholders in Joint Stock Companies

The provisions of the new LOE aim at protecting the rights of the Preference Shareholders by defining a new regulation on the threshold for a resolution of the GMS, which is less favorable for the Preference Shareholders, to be approved. Accordingly, a resolution of the GMS which results in an adverse change of rights and obligations of a Preference Shareholder, may only be passed in the following cases: (a) if it is agreed by the attending Preference Shareholders of the same type owning 75 or more percent of the total amount of preference shares of such type or (b) if it is agreed by the Preference Shareholders of the same type owning 75 or more percent of the total amount of preference shares of such type, if such resolution is passed by written survey.

v. Amended term of office for the Independent Member in the JSC

A JSC may have one of the two following organizational structures: (i) GMS, BOM, Board of Controllers (only required in some cases) and General Director; or (ii) GMS, BOM and GD. The latter case requires at least 20 percent of the BOM members to be Independent Members, and must have an Audit Committee affiliated to the BOM. Contrary to the current LOE, the new LOE limits the term of office of Independent Members to two (2) consecutive terms of office, while the term of office for the BOM remains the same, i.e., unlimited terms. This new regulation may increase transparency in the management of the JSC during its business operations.

To conclude

The new LOE gradually corrects the revealed shortcomings of the current LOE, promising a positive impetus for the legal framework in Vietnam.

Rödl & Partner Vietnam accompanies and assists clients of all kinds in their business activities in Vietnam.

Contact for further information

Stefan Ewers
T +84 28 7307 2788
stefan.ewers@roedl.com

→ Digital ASEAN Forum 2021

ASEAN Insights – Staying safe but getting close

The ongoing pandemic may keep us from offering face-to-face events, but it will not keep us from providing valuable support and insights for your business ventures in the ASEAN region – during and beyond the crisis.

Join our webinars and get yourself updated on opportunities, challenges and the most important aspects in dealing with partially quite volatile regulatory environments in times of covid-19.

SAVE THE DATES:

As we will unfortunately not yet be able to resume our physical ASEAN Forum in 2021, we decided to set up a webinar series instead.

Our versatile and experienced in-house experts will join forces with some highly qualified guest speakers in order to provide you with top-level expertise on some of the most promising and/or challenging issues of these unprecedented times. Further information on the agenda and speakers will soon be provided in a separate invitation email. All sessions will be free of charge with limited seats available:

FOREIGN DIRECT INVESTMENT

BREAKING NEW GROUND
Seizing Investment Opportunities in Thailand´ s Eastern Economic Corridor, Myanmar´ s Thilawa SEZ and the Philippine PEZA

13 January 2021 | 10.00 – 11.30 am CET

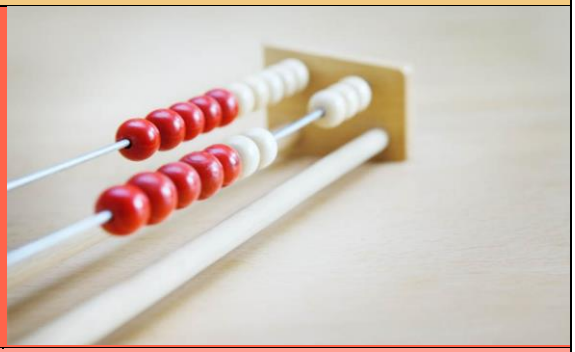
DATA PROTECTION

BURDENSOME RULES OR COMPETITIVE ADVANTAGE?
GDPR is the model many jurisdictions follow: Latest developments and their impact on your business

20 January 2021 | 10.00 – 11.30 am CET

LIKE SALT & PEPPER: SUPPLY CHAIN & TRANSFER PRICING

How to optimize and align your Supply Chain Management and Transfer Pricing



27 January 2021 | 10.00 – 11.30 am CET

COMPLIANCE IN SEA SECURING BUSINESS Opportunities and Challenges in a Down-to-Earth Practical Approach	
3 February 2021	10.00 – 11.30 am CET
ASIA 2025: THE GLOBAL POWERHOUSE? PANEL DISCUSSION Seizing opportunities and mastering challenges in one of the world´s most versatile markets	
10 February 2021	10.00 – 11.30 am CET

LOOKING FORWARD TO WELCOME YOU ABOARD!

Contact for further information

Bettina Herzog
T +49 221 94 9909 340
bettina.herzog@roedl.com

www.roedl.com/asean

Imprint

ASEAN Newsletter | Q4 2020

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