

PwC Legal UK

A new corporate transparency regime

PwC Luxembourg

Simplified Private Limited Liability Company (S.à.r.l.-S) (Bill No. 6777)

PwC Legal Vietnam

Changing legal landscape for foreign firms

PwC International Business Reorganisations Network – Monthly Legal Update

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Welcome

Welcome to the second edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for 2015.

The PwC IBR Network provides legal services to assist multinational organisations with their cross-border reorganisations. We focus on post-deal integration, pre-transaction separation and carve outs, single entity projects, and legal entity rationalisation and simplification as well as general business and corporate and commercial structuring.

Each month our global legal network brings you insights and updates on key legal issues and developments relevant to multinational organisations.

We hope that you will find this publication helpful, and we look forward to hearing from you.

In this issue

In our July 2015 issue:

- PwC Legal UK considers the introduction of the Small Business, Enterprise and Employment Act 2015 and a new corporate transparency regime for small companies in the UK;
- PwC Luxembourg highlights the introduction of a new bill into parliament on simplified private limited liability company (S.à r.l.-S); and
- PwC Legal Vietnam looks at the new 2014 Law on Investment and 2014 Law on Enterprises and what it means for foreign firms doing business in Vietnam.

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PwC Legal UK – A new corporate transparency regime in the UK

At a glance

The Small Business, Enterprise and Employment Act 2015 (the **Act**) received Royal Assent on 26 March 2015. The Act introduces many provisions designed to reduce administrative burden for small companies, however it is the provisions to enhance the UK's reputation as a trusted and fair place to do business that has received significant press coverage. In particular, the Act introduces corporate ownership transparency provisions through the creation of a publically available register of beneficial owners that exert significant control over a UK company.

In detail

Many UK companies and individuals will be subject to increased disclosure obligations introduced by the Act. These obligations are considered in detail below

Information on beneficial ownership

All UK companies other than publically trading companies now have a statutory obligation to:

- a keep a register of people with 'significant control' (known as the **PSC Register**) over that company; and
- b make that register public.

In addition to keeping the PSC Register, the information contained within needs to be confirmed to the UK Registry at least once every twelve months. The provisions of the Act do not apply to limited liability partnerships.

The PSC Register will contain information on individuals who ultimately own or control more than 25% of a company's shares or voting rights, or who otherwise exercise control over the company and its management.

The PSC Register must be kept available at the company's registered office. However, private companies can choose to keep PSC Register information on the public register at the UK Registry rather than in a separately maintained PSC Register.

The 25% threshold is determined by reference to an individual (either alone or as one of a number of joint holders of the shares or rights in question) who:

- a directly or indirectly holds 25% of the nominal value of the share capital of a company;
- b directly or indirectly holds 25% of the voting rights in a company;
- c where a company has no share capital, holds a right in more than 25% of the company's capital or profits;
- d directly or indirectly holds the right to appoint or remove a majority of the board of directors of the company;
- e holds the right to exercise or actually exercise significant influence over the company (guidance in relation to this provision is expected to be published in October 2015); or

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- f holds the right to exercise or actually exercise significant influence over any trust or firm which has significant control over the company

Duty to investigate and obtain information

The Act places an obligation on companies to investigate, obtain and update information on registerable persons. An offence is committed by the company and every officer in default (punishable by a fine or imprisonment) if the company fails to take steps or give notice to any individual it knows or causes to believe is a registerable person asking for confirmation.

Obligation to supply information

The Act imposes a proactive disclosure obligation on registerable persons who meet certain criteria to make a notification to the company of their interest (and any changes to it) within a one month period.

Sanctions for failing to comply

The Act sets out various sanctions that can be applied by a company if an individual or legal entity fails to comply with a notice or the Act.

In summary, a failure to comply with any company's enquires will enable a company to place restrictions on those shares/interests and ultimately the company can ask for a Court Order to sell/transfer the relevant interest.

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PwC Luxembourg – Simplified Private Limited Liability Company (S.à.r.l.-S) (Bill No. 6777)

At a glance

On January 2015, the Luxembourg government has introduced a bill into parliament on simplified private limited liability company (S.à r.l.-S), which can be created with a corporate capital of 1 Euro (bill No. 6777). The aim of this bill is to foster entrepreneurship by reducing the set-up costs and incorporation formalities for new businesses.

In detail

The S.à r.l.-S is designed as a variant of the private limited liability company (S.à r.l.), which will be subject to the rules governing the S.à r.l., except on defined points, as listed below.

	<i>S.à.r.l</i>	<i>S.à.r.l.-S</i>
<i>Incorporation</i>	Notarial deed	Private or notarial deed
<i>Corporate capital</i>	Minimum EUR 12,394.68	Minimum EUR 1 Maximum EUR 12,394.67
<i>Members</i>	Individuals or legal entities	Individuals, who may only be a partner in one S.à.r.l.-S
<i>Managers</i>	Individuals or legal entities	Individuals
<i>Corporate object</i>	Shall be of a lawful nature	Shall be of a lawful nature and shall cover activities requiring a business license
<i>Legal reserve</i>	Allocation of 5% of the net profits to the legal reserve until the legal reserve reaches 10% of the corporate capital	Allocation of 5% of the net profits to the legal reserve until the legal reserve reaches EUR 12,394.67

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Simplified incorporation formalities

Individuals would have the choice of incorporating a S.à r.l.-S under a private or a notarial deed. So far, incorporation under a private deed has been associated with a publication by extract of the deed. This would not be the case for a S.à r.l.-S, whose incorporation deed would have to be published in full.

Symbolic corporate capital of EUR 1

The corporate capital of a S.à r.l.-S should range between EUR 1 and EUR 12,394.67, to be contributed in cash or in kind. The maximum corporate capital reflects the view that the S.à r.l.-S should be a transitional vehicle pending the conversion into a standard S.à r.l.

Allocations to the legal reserve out of the annual net profits until the legal reserve reaches the minimum capital for a standard S.à r.l. is supporting the convergence path from S.à r.l.-S to S.à r.l.

Reduced scope

A vehicle for individuals

S.à r.l.-S is designed for individuals willing to start businesses, which by their nature require a small amount of capital.

Only individuals could be members of a S.à r.l.-S and only of one S.à r.l.-S (except in the case of a transfer of corporate units following the death of a member). Non-compliance with this rule would be punished by a joint liability of the individual with respect to the commitments of additional S.à r.l.-S he would become member of.

Besides, only individuals could be appointed managers of a S.à r.l.-S.

A vehicle for commercial activities

S.à r.l.-S shall be restricted to commercial, craft, industrial activities, as well as certain liberal professions, requiring a business permit. Obtaining a business permit goes with:

- a the obligation to have premises in Luxembourg suitable for carrying-on the activity depending on its nature and the business model (i.e. no letterbox companies); and
- b perform day-to-day management tasks in Luxembourg on a permanent basis.

Unavoidable incorporation costs for S.à r.l.-S would fall below EUR 200, which is very attractive for young entrepreneurs. This type of vehicle has been successful in other countries, even if it gives no guarantee to creditors. Access to this Luxembourg new vehicle is however very restrictive.

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PwC Legal Vietnam – Changing legal landscape for foreign firms

At a glance

On July 1, 2015, the new 2014 Law on Investment and 2014 Law on Enterprises will take effect and replace the 2005 Law on Investment and Law on Enterprises –Vietnam’s current investment and company legislation which has been in place for nine years.

The new 2014 Law on Investment and 2014 Law on Enterprises will, to a certain extent, transform the legislative landscape in Vietnam. The laws were passed with the aim of improving the ease of doing business in Vietnam and have implications for foreign firms doing business in Vietnam.

In detail

At present, it is difficult to say with certainty what constitutes a foreign invested enterprise under Vietnamese laws. Some legislation currently in effect suggests that any amount of foreign ownership constitutes a foreign invested company. Meanwhile, other legislation, also currently in use, is taken by many to mean that an enterprise with a threshold of 49 per cent and upwards constitutes a foreign invested enterprise (**FIEs**).

Why it is important to know what constitutes an FIE

Many articles and discussion papers have been written by lawyers on this topic. These articles have been written because knowing where this threshold lies, and knowing when a company established in Vietnam becomes an FIE, determines many things - for example, the applicable licensing procedures, the type of licence, the ability to carry out business in certain sectors, whether the company has an obligation to have its annual financial statements audited, and so on.

For example, there are a number of business sectors which are only open to Vietnamese investors and in which the operation of FIEs is restricted. If FIEs cannot carry out business or the amount of foreign ownership is capped in such sectors, it is obviously very important to know exactly at what point the company becomes classified as an FIE.

Similarly, this question arises in M&A transactions. Domestically owned Vietnamese companies commonly have a long list of business activities they are licensed to engage in under their business registration certificates. When a foreign investor buys into such a domestic company, the question often arises whether or not the company can continue to carry out all its various business lines, or whether some of them might be subject to restrictions in terms of foreign ownership. If some of the target company’s business lines are subject to foreign ownership limitations, the foreign investor’s ownership of the target company will be limited to the lowest applicable cap.

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Finally, there is also a major difference in terms of the licensing process an application for foreign investment in Vietnam currently needs to undergo if the investment is in a “conditional” sector (also if the investment is very large). Currently, an application by a foreign investor for a conditional sector investment must undergo evaluation, as opposed to just registration. This evaluation includes a rather long and bureaucratic process during which a potentially large number of local, provincial, and governmental stakeholders (which include, for example, various ministries, departments of planning and investment, and people’s committees) vet and opine on the application and its merits.

Legislative changes from July 1, 2015

July 1, 2015 will see a major legislative change in Vietnam. The 2005 Law on Investment and Law on Enterprises – the current cornerstone of Vietnam’s investment and company legislation – will be replaced in their entirety after nine years in force.

The new 2014 Law on Investment and 2014 Law on Enterprises which take effect on that date will, to a certain extent, transform the legislative landscape in Vietnam. They were passed with the aim of improving the ease of doing business in Vietnam, and they touch upon the question of what constitutes an FIE.

FIEs and early reference to a 51 per cent threshold

The new laws were re-drafted a number of times before they were finally passed. Some of the early drafts of the Law on Investment indicated a 51 per cent ownership threshold for foreign investors, which caused - perhaps misguided - anticipation that a company with foreign ownership below this level would have not been considered an FIE.

However, in subsequent drafts this reference to a 51 per cent threshold was removed from the definition of foreign investor, and moved to Article 23 of the Law on Investment.

Definition of FIEs post July 1, 2015

The new Law on Investment adopts new terminology. Instead of referring to an “enterprise with foreign owned capital”, as in the 2005 Law on Investment, the new 2014 Law on Investment introduces the term “economic organisation with foreign investment capital”.

Therefore, from July 1, 2015 onwards, a foreign investor will be any company established outside Vietnam; and an economic organisation with foreign investment capital will be an economic entity established in Vietnam with a foreign member or shareholder.

Questions as to whether the new definitions can entirely substitute for the old definitions, which are employed in many other regulations and legislation, have been raised and remain open.

Although the current draft decree guiding the new Law on Investment does not develop the definition of “economic organisation with foreign investment capital” any further, it does rather interestingly state that an “enterprise with foreign invested capital” only means enterprises established prior to July 1, 2015, when the new Law on Investment takes effect.

Usage of tiered company ownership structures post July 1, 2015

The 2014 Law on Investment does something else new too. For the first time it provides regulations on tiered company ownership structures in Vietnam - i.e., situations where a company established in Vietnam establishes another company in Vietnam (which may in turn establish a further company), again in Vietnam. Article 23 of the new Law on Investment will regulate the ability to engage in conditional sector business activities through a tiered ownership structure.

Because of the way Article 23 is drafted, there appears to be a possibility to utilise tiered ownership structures with layers of Vietnam-based subsidiaries to increase access to sectors in which foreign ownership is limited.

For example, a strict reading of Article 23 of the new Law on Investment suggests that a second or third tier subsidiary would not be considered an “economic organisation with foreign investment capital”, even where there is substantial foreign ownership further up the structure.

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Only time will tell whether this possibility is mainly theoretical, or whether it will actually provide foreign investors the opportunity - by structuring their investments under a tiered ownership structure in Vietnam - to invest and operate in sectors which would otherwise have been limited to domestic investment.

More clarity expected in forthcoming decrees

The provisions in the new Law on Investment dealing with the above matters raise a number of questions.

A number of decrees are currently being drafted to guide these two new laws, and the first of these are expected to be issued later this month.

The draft decrees are likely to receive heavy scrutiny from various stakeholders and business groups, and their contents should be expected to change, perhaps considerably, before they are issued.

With the effective date of the new Law on Investment and the new Law on Enterprises nearing, one thing is for sure - this will certainly not be the last article discussing what constitutes an FIE and what its implications will be for foreign investors.

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