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Country	AUSTRALIA
Law Firm	HOLMAN WEBB

When, where and to whom you send emails will now be recorded...

Metadata Retention

On October 13th, the Telecommunications (Interception and Access) Act 1979 (Cth) legislated for the retention of metadata by telecommunications carriers and internet service providers (telcos) for a mandatory period of two years. This data will then be made available to federal, state and territory police, Medicare, Councils in NSW, Worksafe Victoria, the RSPCA, the Tax Office, Australia Post, domestic spy agency ASIO, ASIC and many others when conducting criminal and financial investigations.

What is Metadata

There is no formal legal definition of Metadata. The Attorney General's department has submitted that it is data created 'when online tasks are undertaken and other forms of electronic communication are made'.

In a more user friendly sense that definition would mean that the following would be considered meta:

Where using telephones:

- Telephone numbers
- The time and length of phone calls
- Location of parties making phone calls
- To and from text numbers

When using the internet

- The internet protocol addresses (IP addresses) of computers from which messages are received or sent
- To and from email addresses on emails
- Logs of visitors to chat rooms online
- Status of chat sites – whether they are active and how many people are participating
- Chat aliases or identifiers (the name a person uses in a chat room online)
- Start and finish times of internet sessions
- The location of an individual involved in communications
- The name of the application someone uses online and when, where and for how long used

What is probably not Metadata

- The content of any communications
- The subject matter or subject line of a communication
- What is said in a chatroom or email or text or a social media post
- Attachments to emails such as photos or videos
- Web camera transmissions

- Browsing histories
- The name of a websites a person visits

The New Laws

The scheme has been introduced for law and security purposes, so that law enforcement officials and security agencies can access Metadata without needing to first obtain a warrant. The exception to this is when obtaining information about journalists, in which a 'journalist information warrant' must be granted before Metadata is accessed. Without the need for warrants in most circumstances, there is little to no judicial oversight.

With such a large amount of information now being kept about an individual's private communications, there is a risk that Metadata could be used in other ways, such as by hackers, cyber-criminals or in civil proceedings. In saying this, the Metadata must be stored in an encrypted format and protected against unauthorised access. The *Privacy Act 1988* will apply to all Metadata retained under the scheme.

Given the size of the undertaking, many telcos have now entered into a 'data retention implantation plan', giving them up to 18 months to become compliant.

What's Next?

Alongside the Metadata Retention Scheme, the Joint Committee of Intelligence and Security suggested that a mandatory Data Breach Notification Scheme should be introduced. This scheme would add additional protections to those individuals whose information has been retained in the Metadata Retention Scheme. Under this scheme, in certain circumstances Australians would be notified if there was an unauthorised access to, or disclosure of, their personal information that was being held by a private sector organisation or the Federal Government.

The Federal government supported this recommendation and indicated its intent to introduce a bill for mandatory data breach notification laws later this year. It is believed that this new legislation would amend the *Privacy Act* (Cth). At this stage it is unclear whether the recommendation applies solely to data retention, or if the government intends to adopt is as a broader scheme applying to all entities subject to the Australian privacy principles.

John Wakefield

john.wakefield@holmanwebb.com.au

+61 (02) 9390 8302

Country	AUSTRIA
Law Firm	MAYBACH GÖRG LENNEIS & PARTNER RECHTSANWÄLTE



News on Business Judgement Rule from Austria

Which product should be launched on the market? Should the company extend its business towards the Balkans or the Baltic states? Will strategy A or B lead to the expected success? Unfortunately, in many cases the lack of quality of managing director's or board members' decisions only becomes apparent later. If something goes wrong and the company and/or its shareholders suffer a serious damage, questions about the management's personal liability may arise. As of January 1st, 2016, interesting changes of Austrian company law have come into force regarding the liability of directors or board members for damages resulting from wrongful business decisions.

At first, it is certainly the company itself and consequently the shareholders who have to bear losses resulting from wrong decisions adopted by the management. According to previous Austrian Supreme Court case law on business judgment rules, the management can only be held personally liable if it disregarded any reasonable principles of diligent entrepreneurship. Consequently, Austrian case law already granted a rather wide freedom of action against directors. The Austrian Supreme Court established in a number of decisions on business judgement rule that managing a company includes a wide margin of discretion.

By introducing new provisions reflecting the previous business judgement rule case law of the Supreme Court, i.e. Art 84 para. 1a *Aktiengesetz* (Stock Corporation Act; *AktG*) and Art. 25 para. 1a *GmbH-Gesetz* (Act on Limited Liability Companies; *GmbHG*), the Austrian legislator improved legal security. The newly adopted Art. 84 para. 1a *AktG* and Art. 25 para. 1a *GmbHG* have both the same wording: They establish that managing directors or board members are acting according to the legally required diligence of a prudent businessman if their entrepreneurial decisions are not guided by extrinsic considerations and if they may assume - based upon appropriate information - that they are acting in the best interest of the company. The intention of the legislator was to create a "safe harbour" for directors, i.e. if managing directors or board members comply with the aforementioned legal requirements, their personal liability can be excluded.

It is a particularly interesting fact that the implementation of the business judgement rule into the Limited Liability Company Act (*GmbHG*) and Stock Corporation Act (*AktG*) was part of the amendment of the Criminal Code in 2015. It all started in January 2014, when the Austrian Supreme Court passed one of its most discussed criminal law decisions in the last few years, the so called "Libro decision". Libro is one of Austria's largest retail chains and turned from being a "hot stock" into bankruptcy within a very short period. Two former board members were finally convicted for defalcation because of the distribution of a special dividend causing damage to the company. However, this distribution was previously approved by Libro's shareholders. This conviction was heavily criticised as well-known experts on criminal law agreed that Libro's former board members could only have been blamed for a terrible entrepreneurial decision but

not accused of a criminal offence. Also in the light of the Supreme Court's more generous business judgement rule case law this decision appears to be questionable. This criticism finally led to the above mentioned amendment to the Criminal Code and to the adoption of Art. 84 para. 1a AktG and Art. 25 para. 1a GmbHG.

Konrad Lenneis, Una Campara

k.lenneis@mglp.eu

u.campara@mglp.eu

+43 1 997 1966

Country	BELGIUM
Law Firm	ARDENT ADVOCATEN



VAT exemption expires for legal entities acting as director or liquidator of a company

As of 1st April 2016, legal entities that act as director or liquidator of a company, will no longer have the option to be exempted from VAT. Previously, such legal entities had a choice 1. to submit their actions as director or liquidator of a company to VAT or 2. to apply for a VAT exemption.

The option for 'director-legal entities' to apply for a VAT exemption was construed by the Belgian Administration as a favour because natural persons acting as director or liquidator of company benefit from a VAT exemption. The reason for this is that natural persons do not act on an independent basis but rather as an organ of the company. Legal entities however can only act on an independent basis.

Under some European pressure and following a recommendation of the European Commission, the Belgian Administration decided to end this favourable treatment for legal entities acting as director or liquidator of a company.

This new arrangement will have the most effect on 'director-legal entities' in the financial and insurance sector. All legal entities with a mandate as a director or liquidator in a company will now have to charge 21% VAT on their remuneration. As far as insurance companies, real estate companies, social security related companies (e.g. retirement homes) are concerned, this is merely an extra cost of 21% since these companies have no or only limited rights to deduct VAT.

Due to the protests that came from these sectors, the applicable date of this amendment has already been postponed twice. The application of this arrangement was originally intended to take effect on 1st January 2015. However, it was postponed for one year due to practical difficulties. Recently, it was announced again that because of remaining administrative problems, the entry into force will be postponed a second time, now to 1st April 2016.

Money Laundering Regulation of the Financial Services and Markets Authority (FSMA) now also applicable to "grantors of credit" and 'independent financial planners'.

As of 30th November 2015 the money laundering regulations of the FSMA will also be applicable to grantors of credit and 'independent financial planners'. This money laundering regulation contains a series of strict rules concerning identification of clients, beneficiaries and companies, and imposes on their recipients a strict client acceptance policy, a supervisory system to track suspicious transactions and the obligation to appoint a compliance officer.

Among the recipients of these rules will now also be 'grantors of credit' referring to all natural persons or legal entities who grant credit as part of their economic activities and 'independent

financial planners' whether they are natural persons or legal entities and regardless of whether financial planning is their main activity or additional to other activities.

Belgium launches the Micro-company

From 1st January 2016 Belgium introduced a new and even smaller company for tax purposes: the Micro company.

The creation of the micro company was inspired by the EU Regulation 2013/34/EU acknowledging the central role of SMEs in the economy of the EU and aiming to improve the approach to entrepreneurship and the 'think small first'-principle.

With the creation of the micro company, Belgium aims to reduce the administrative burden and to improve the business environment for SMEs. Companies who fall within the scope determined by the EU Regulation (a) a max. balance total of €350.000, b) a max. net turnover of €700.000 and c) a staff of max. 10) will be allowed to submit a 'micro-financial statement' with very minimal details and will benefit from several tax advantages. Even companies that exceed only one of these restrictions will be granted the aforementioned "micro"-status. In practice, more than 83,5% of the Belgian companies will benefit from this rule which will create an overall benefit of 20 million euro for these companies.

Filip Duwaerts

f.duwaerts@ardent.be

+32 34 582 633

Country	BRAZIL
Law Firm	BRAGA & MORENO CONSULTORES E ADVOGADOS



New Brazilian Rules on Foreign Income Taxation May Require Changes in Corporate Structures

In 2015, Brazilian Federal Law 12.973/14 introduced new rules for taxation of profits earned abroad by subsidiaries and affiliates of Brazilian companies.

Broadly speaking, Brazilian-based companies must include on their income-tax returns all profits generated by its controlled and affiliated companies located abroad at the end of each and every fiscal year. A right to offset taxes levied on income outside Brazil is granted, subject to certain conditions. The same rules apply to CSLL, a Brazilian social contribution on profits with the same basis as the Corporate Income Tax.

According to such a new regime, even when a foreign company is controlled through an investment chain – i.e., two or more layers of holding companies in different countries – the Brazilian controlling company shall not be entitled to offset existing profits and losses amongst those entities. Instead, it shall consider the results of every single foreign investment separately.

This change in taxation rules may affect corporate structures that use Brazil as a platform to invest in other Latin American countries.

Given the fact that the Law granted a temporary tax credit of 9% on foreign income until the year 2022 – whose purpose is to offset the CSLL charge – a big increase in the tax burden for a large portion of the controlling companies is not expected in the short term.

However, such benefit is not applicable to controlled or affiliated companies based on tax havens – countries with no tax or with a tax burden lower than 20%. Brazilian tax authorities have defined a list of countries considered tax havens, which also includes tax-exempted entities, such as the limited liability companies (LLCs) incorporated in Delaware, USA, the Entidad de Tenencia de Valores Extranjeros in Spain, and holding companies incorporated in the Netherlands with no relevant economic activities in such country.

In any case, corporate structures that use Brazil as a platform to invest in other countries now require a new analysis to take account of the tax burden the new law may create. One option is to seek, as a possible firewall, new structures using the benefits existing in International Tax Treaties that Brazil has signed with other countries. Although this alternative may not guarantee the maintenance of the tax burden at its current level, or the Tax Authorities may not accept such a structure, it will give the opportunity of discussing the matter in the courts.

Francisco Papellás Filho

contato@bragamoreno.com.br

Tel: (11) 3038.5222

Country	BULGARIA
Law Firm	PETROVA AND PARTNERS

New Accountancy Act

As a Christmas gift the business community in Bulgaria has received a completely new Accountancy Act, which entered into force as of 1st of January 2016. The main purpose for adopting the new act is transposing the requirements of the Directive 2013/34/EU and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development.

With regard to foreign investors and international businesses the new Accountancy Act contains some provisions that aim practically to reduce the administrative burden and costs, such as exemption of mandatory translation into Bulgarian of accounting documents, received in a foreign language. Due to the new regulation the small enterprises will enjoy a reduction of the information they need to provide with the annual accounting reports and an exemption from mandatory financial audit for most of them.

In accordance with the new requirements, the enterprises are grouped in categories depending on the material assets, incomes from sales and number of staff. Consequently, the applicable accounting rules, contents of the annual financial reports and mandatory audit requirements differ based on the category and the scale of the enterprise rather than the legal form, as was the case under the old legal framework.

Entirely new requirements concerning the enterprises operating in the field of extraction of oil, gas and minerals and the timber industry have been established. These enterprises must disclose information on their business projects, as well as the amounts paid to state and municipal institutions. In addition for payments above €100,000 the said enterprises have to provide a detailed breakdown, which indicates payments for licenses, bonuses, taxes etc. Large companies have to provide a separate "Report on payments to governments" as a part of the annual financial reports.

A new deadline for publishing the annual financial reports has been set out for joint stock companies and it is 30th July each year.

Absolute Limitation Period for Public Debts

The amendment of the Tax Insurance Procedure Code (TIPC) in force from 1st of January 2016 provides for ex officio application of absolute limitation period for public debts of citizens and companies. The absolute limitation period expires after a 10-year period, estimated as of 1st of January of the year following the year in which the debt was due, regardless of any suspension or interruption. However, this rule will not apply to public debts that are deferred or rescheduled, or the execution has been suspended at a debtor's request. Until now an explicit request of the debtor to write off the debt due to expired limitation period was needed.

As a part of the entire administrative service the National Revenue Agency (NRA) is obliged to provide certificates for the presence or absence of any and all debts, including to local administrations and municipalities.

It should be noted that the scope of responsible persons for concealing of facts and circumstances related to due taxes and social security instalments has been expanded and includes the procurators, commercial agents and proxies in addition to the management bodies.

This year NRA is due to reduce its mailing expenses as its obligation for sending invitations for voluntary payment to debtors was repealed.

Vesselina Petrova

petrova@pplf-bg.com

+359 2 417 7121

Country	CHINA
Law Firm	GVW GRAF VON WESTPHALEN



Company Establishment: The New “3 in 1” Certificate

In contrast to the situation in most Western jurisdictions the establishment of a foreign invested enterprise in the People’s Republic of China requires government approval and registration and is subject to various document requirements and restrictions. To simplify the registration procedure, companies in China are now no longer required to apply for several separate certificates from different authorities, but instead only for one business license which in the future combines most of these various certificates.

In detail, this registration reform provides that the previously separate business license, tax registration certificate and organizational code certificate of legal entities, including foreign-invested companies and representative offices, are combined into one integrated business license issued by the local AIC. An established company must apply for such new business license and return the relevant certificates to the competent authorities. However, there is a transitional rule available for existing companies, allowing them to hold and use the previous certificates during a transition period which is until 31 December 2017 in Shanghai or 31 December 2020 in Beijing. Should a company apply for any change to their registration details with the AIC before that date, e.g. any amendment of its articles of association, then the AIC will collect and replace the previous certificates and issue the new business license automatically.

The practice varies from location to location in China and should be clarified with the local authorities in advance. For example, in Zhejiang (bordered by the Jiangsu province and Shanghai to the north) the “Three into One” reform has been upgraded to a “Five into One” reform, which additionally includes the social security registration certificate and statistics registration certificate in the new business license. In Shanghai and Guangzhou, however, the statistic registration certificate has even been abolished. Generally speaking, only one unified social credit code will be issued in the new business license in China.

While the aforementioned registration reform simplifies the establishment process in the future, its impact on the duration of the company establishment procedure is not to be overrated. Thus, establishing a company in China remains complex and, subject to the company’s legal structure, usually takes between three and six months.

Dr. Oliver Maaz, Patrick Heid

o.maaz@sh.gvw.com; p.heid@sh.gvw.com

+86 21 6322313

Country	CYPRUS
Law Firm	NEOCLEOUS



Amendment of the Partnerships and Business Names Law

Law 144(I) of 2015 amends the Partnerships and Business Names Law, Cap. 116, to introduce the concept of partnerships limited by shares (commonly referred to as LLPs) to the Cyprus legal order. LLPs and their equivalents are widely used in other jurisdictions, particularly for investment holding purposes.

A partnership limited by shares is similar to the conventional limited partnership which could (and still may) be formed under the Partnerships and Business Names Law. There must be at least one general partner, with unlimited liability for the debts and obligations of the partnership, and one or more limited partners. The liability of the limited partners is restricted to the amount unpaid on the shares they hold in the partnership, in the same way as shareholders in a limited company. As in a conventional limited partnership, only general partners may participate in the management and the operations of the partnership, and be authorised to bind the partnership; limited partners may not.

Like all other partnerships, partnerships limited by shares have no separate legal personality and are transparent for tax purposes, with tax being assessed on the partners.

The amending law also increases the limit on the total number of partners in any type of partnership to 100.

Elias Neocleous

eliasn@neocleous.com

+357 25 110109

Procedures for delisting of securities

The Cyprus Securities and Exchange Commission ("CySEC") has issued a Directive setting out the procedures to be followed for the delisting of securities from the Cyprus Stock Exchange ("CSE") on application by the investee. It applies to investee companies the shares of which have been traded on a regulated market for three consecutive years or longer.

Applications for delisting must be in writing and must include:

- the name of the issuing company;
- details of the securities to which the application relates;
- history and explanation of the reasons for making the application;
- the date from which it is proposed to apply the delisting;
- where applicable, a copy of the resolution of the general meeting approving the delisting, together with a copy of the explanatory memorandum that is required to be submitted to such a meeting; and

- where applicable, details of arrangements for dealing with the holders of securities who did not vote in favour of deletion.

CySEC may request any further information it deems necessary.

An application may be withdrawn by written notice to CySEC at any time before CySEC reaches its decision on it.

CySEC is required to make its decision within a month of receiving the application and any further information it may have requested. Any approval is subject to:

- implementation of the arrangements for dealing with dissenting holders of securities; and
- settlement of all fees and charges payable to the CSE and to CySEC.

The delisting of its securities does not relieve the issuer of its obligation to repay any debts to the CSE and CySEC.

Elias Neocleous

eliasn@neocleous.com

+357 25 110109

New tax incentives

In July 2015 the Cyprus government submitted a package of proposed amendments to tax laws to parliament, aimed at stimulating economic activity, attracting inward direct investment, and simplifying the tax regime in order to make it more attractive, fair and effective and aligning it with recent developments in EU legislation and case law. Consideration of certain proposals was deferred due to time constraints, but the following important changes took effect from 16 July 2015.

Notional Interest Deduction for new equity capital

In order to level the playing field between debt and equity finance a notional interest deduction ("NID") is now available in respect of new equity capital (paid-up share capital and share premium) introduced into companies and permanent establishments of foreign companies after 1 January 2015 for the purpose of financing business assets. The NID will be allowed as a deduction against taxable profit, calculated by applying a reference rate to the new equity. The reference rate is the higher of the ten-year government bond yield of Cyprus or the country in which the assets funded by the new equity are utilized, in each case plus three percentage points. The bond yield rates to be used are as at December 31 of the year preceding the year of assessment.

New equity may be contributed either in cash or in the form of other assets, in which event the NID will be based on the market value of the assets agreed with the tax authorities. No NID is available in respect of capitalization of reserves, revaluation of assets or for companies benefiting from the reorganization exemptions included in the tax laws, and NID may be refused if the tax authorities deem that the transaction concerned has no economic or business purpose.

The NID is limited to 80 percent of the taxable profit before deducting the NID, and no NID will be allowed in the event of losses. Unutilized NID cannot be carried forward to be offset against future years' profits.

Introduction of a "non-domiciled" regime for investment income

Up to and including 15 July 2015, both Cyprus-resident individuals and Cyprus-resident companies were liable to pay Special Defence Contribution, commonly referred to as SDC tax, on dividends, passive interest and rents received, at rates of 17 percent, 30 percent and 3 percent (applied to 75 percent of the rent) respectively. Dividends and passive interest (but not rents or active interest) are exempt from personal or corporate income tax.

With effect from 16 July 2015 individuals who are not domiciled in Cyprus for the year of assessment concerned are exempt from liability to SDC tax. Coupled with the income tax exemptions applying to such income, this provides individuals who are resident but not domiciled in Cyprus with complete exemption from any form of Cyprus tax on dividends and passive interest, regardless of source. Companies are not affected by the change.

For the purposes of determining liability to SDC tax, the principles set out in the Wills and Succession Law regarding domicile, which follow the principles of English common law, apply. In summary, an individual acquires a domicile of origin at birth. It is generally the same as the domicile of the father at the time of birth, and in exceptional cases that of the mother. A domicile of origin may be replaced by a domicile of choice if in actual fact an individual permanently establishes himself or herself in another country with the intention of living there permanently and dying there.

SDC tax anti-avoidance

The SDC Amendment Law also introduces a new anti-avoidance measure to deal with a common scheme used to reduce or postpone the payment of SDC tax. It inserts a new article into the SDC Law enabling the tax authorities to disregard the interposition of a company without any real business or economic purpose between an individual and a company making profits, if this has been done with the principal objective of reducing or deferring the payment of SDC tax.

Exemption from capital gains tax

Capital gains tax in Cyprus is charged only on disposals of immovable property situated in Cyprus and disposals of shares in unlisted companies to the extent that their value derives from such property. In order to stimulate the real estate market a further exemption is available for property acquired between 16 July 2015 and 31 December 2016, provided that the property was acquired on an arm's length basis and not under the foreclosure provisions of the Transfer and Mortgage of Immovable Properties Law. Any gain on the disposal of the property will be exempt from capital gains tax, irrespective of the date of disposal.

As an added incentive, the normal transfer fee payable to the Department of Lands and Surveys on acquisition of such property will be discounted to 50 percent of the standard rate until 31 December 2016. Alternatively, if VAT is payable on the purchase of the property, no transfer fee is payable at all, provided that the sale agreement is deposited with the Land Registry by 31 December 2016.

Completion of amendments to the tax laws

In December the Cyprus government completed its tax reform programme with the enactment of the remaining measures it had initially proposed in July 2015. The latest amendments, which took effect on 31 December, include:

- New provisions to simplify taxation of offshore hydrocarbon activities.
- Alignment with the latest amendments to the EU Parent-Subsidiary Directive.
- Extension of group relief to overseas companies.
- Changes to arm's length adjustments.
- Tax neutrality of foreign exchange gains and losses.
- Limitation of losses carried forward on IP activities.
- Anti-abuse provisions for corporate reorganizations.
- Extension of income tax exemptions for new individual taxpayers.
- Changes to capital gains tax relating to shares in companies holding real estate in Cyprus.

Philippos Aristotelous

aristotelous@neocleous.com

+357 25 110138.

Country	DENMARK
Law Firm	KELLER ADVOKATFIRMA



Denmark to increase transparency in the ownership of companies

In a move to impede the use of tax havens and financial secrecy, the Danish Parliament is preparing to pass amendments to current legislation which will mandate the establishment of a central register of beneficial owners of legal entities to be maintained and made publicly available by The Danish Business Authority.

In addition to implementing the fourth anti-money laundering directive, the proposal also follows through on a political agreement between the government and opposition reached at the end of 2014 to limit the use of tax havens by Danish businesses.

The Danish Companies Act currently mandates the registration of all ownership or voting rights exceeding 5 percent of the total ownership or voting rights of a company, including parent companies with a controlling interest defined in a broad sense in subsidiary companies.

The responsibility for reporting and updating information on ownership currently lies with the owner, as the company itself is only required to record, compile and forward information received to The Danish Business Authority.

Among the most significant changes are the requirements to identify a natural person as the ultimate owner, whether the ownership is direct or indirect. Beneficial ownership is defined in accordance with directive (EU) 2015/849 as an ownership interest of 25% or more.

Additionally, the proposal defines ownership as ownership and/or control of the abovementioned ownership interest. If a person through an agreement with one or several owners is able to exert control over a significant ownership interest, they must be registered alongside the owners.

The responsibility for obtaining and maintaining current and accurate information regarding beneficial ownership is placed on the legal entities themselves, which marks a shift in comparison to current legislation. Legislators have shifted away from this existing principle in the interest of aligning the proposed legislation with the provisions of the directive.

While article 30 of the directive does not require member states to publicize the registered information, Danish lawmakers have elected to make the information publicly available to the furthest extent possible under national law and the directive, excluding only highly sensitive information such as national identification numbers. This decision is based on the political agreement previously mentioned, according to which information in the register will also be directly available to the Danish tax authorities, as they prepare for the establishment of an automatic information exchange program with tax authorities across borders.

The Danish Parliament is expected to commence their review and debate of the proposal on January 15th, 2016. The proposal does not at the present time mention specific dates on which

registration becomes mandatory, as this will depend on the time allotted for adaptation of the Danish Business Authority's technical framework.

There is no indication that the register will contain information on ownership interests prior to the law's entry into force. Natural persons, which would be considered beneficial owners according to the definition as set forth by the proposal, therefore have the option to wholly or partly relinquish their ownership in advance of the initial registration.

The proposed changes do not apply to branches of foreign companies registered in Denmark, but any subsidiary of a foreign company registered as a Danish private or public limited company or commercial foundation etc. would have to submit to the new requirements. While there are a number of exceptions to this rule, the most significant one is the exemption of legal entities whose shares are traded on regulated markets and which are therefore already required to disclose ownership information in accordance with EU regulations or other international legislation.

As far as natural persons go, any foreign national with a significant ownership interest in Danish companies may be subject to registration.

Flemming Keller Hendriksen

fk@kellerlaw.dk

+45 46 38 02 58

Country	FRANCE
Law Firm	BERNARDS



Warranty agreements and sub-purchasers (Cour de cassation, October 20, 2015)

After purchasing the shares of a target company, the purchaser may dispose of all or part of the shares purchased to a sub-purchaser.

The question then arises as to whether the sub-purchaser who suffers any loss in connection with such purchase is entitled to warranty protection against the initial vendor?

If the initial sale agreement expressly provides that the warranties shall inure for the benefit of the purchaser's successors in title to the shares, it is usually considered that the initial vendor's liability shall remain unaltered and valid. The sub-purchaser shall be entitled to warranty protection from the original vendor.

If the initial sale agreement stipulates expressly that the assignment of the warranties is not permitted, the original vendor's liability cannot be increased if the purchaser disposes of all or part of the shares. In such a case, the warranties cannot be treated as assets capable of being sold by the purchaser.

If the initial sale agreement does not provide special provisions, it may happen in certain circumstances that the liability of the initial vendor may remain in force, considering that the purchaser has acquired the warranties for the benefit of its successors.

In a recent decision of the *Cour de cassation* (Cass. com. October 20, 2015, n° 14-17.896), the highest court in the French judiciary organization has enforced a new solution within the scope of warranties given by a purchaser to its sub-purchaser in the absence of special provisions in the sale agreement with the initial vendor. For the *Cour de cassation*, if the sale of shares between the vendor and the purchaser is entered into on an *intuitu personae* basis (the purchaser being an essential term of the agreement), then the benefit of the warranties given by the vendor to the purchaser cannot be assigned to its successors.

Macron Act changes a large range of corporate aspects (August 7, 2015)

The law for growth, activity and equality opportunities (the so-called "Macron Act") was published in the *Journal officiel* on August 7th, 2015. This law aims at making France more competitive and business-friendly. This effects a number of aspects of corporate law which are summarized as follows:

1. A more flexible regime of free shares and BSPCE

The new law improves the legal regime for granting free share plans. The minimum duration of the acquisition period is now 1 year instead of 2 years. The aggregate duration of the acquisition period and lock-up period cannot be less than 2 years. After 2 years, there is no longer a share sale restriction period. For free share plans for the benefit of all employees, the maximum amount of free shares that can be granted now represents up to 30 % of the share capital. The employer's social security contribution rate has been reduced and the employee's social security contribution rate no longer applies.

BSPCE (stock warrants) may be allotted to employees and officers of a subsidiary, provided that 75 % of share capital or voting rights of such subsidiary is held by the issuing company.

2. Creation of a new form of investment corporate body

A new form of company has been created for large investors to facilitate foreign participation in private equity. This new investment tool is called free partnership company (*Société de libre partenariat*).

3. Employees information obligation has been reviewed

The new regime is only applicable to the sale of a business as a going concern or of any participation of more than 50 % of shares. Therefore, the new law excludes any other form of transfer (donation, contribution, exchange...) and simplifies significantly the methods for informing the employees. However, the main change lies in the modification of the sanction in case of its violation: there is now a civil fine instead of the cancellation of the sale.

Bernard Berdou

bberdou@bernardsfirm.com

33 (0) 1 53 53 82 82

Country	IRELAND
Law Firm	EUGENE F. COLLINS



Pre-incorporation contracts

The Royal Mail Estates Ltd v Teesdale (a firm) and another [2015] EWHC 1890 (Ch) case highlights the perils associated with pre-incorporation contracts. The treatment of pre-incorporation contracts under the Irish Companies Act 2014 is similar to their treatment under the equivalent legislation in England and Wales and the case is of persuasive authority in this jurisdiction.

There are times when business opportunities cannot wait. Pre-incorporation contracts allow company promoters and/or agents to enter into contracts where time does not permit the formation of a company beforehand.

The Irish Companies Act 2014 allows pre-incorporation contracts to be approved by a company post-incorporation. Until that time, individual(s) who sign a pre-incorporation contract on behalf of a company are personally bound by it and entitled to the benefit of it unless there is an express agreement to the contrary.

Royal Mail Estates Case

The Royal Mail Estates case focuses on the obligations of signatories to a pre-incorporation contract.

A firm of solicitors had signed a contract for the sale of a property on behalf of the buyer which was a company that, unknown to the parties, had not yet been incorporated. The vendor, Royal Mail Estates Ltd, sought to enforce the contract against the solicitors on the basis of the English and Welsh law in relation to pre-incorporation contracts contained in the Companies Act 1985 (which is similar to the law in Ireland).

The solicitors argued that there was a provision in the contract for sale that constituted an agreement contrary to the proposition that the solicitors were personally liable for the purposes of the Companies Act 1985. The relevant provision stated that "The benefit of this contract is personal to the buyer" (i.e. the company). The Court had to decide whether the solicitors could rely on this provision constituting an "agreement to the contrary".

The Court held that an "agreement to the contrary" could only be established where there is an agreement between the parties by which they intended to exclude the effect of the relevant section of the Companies Act 1985. There was no such agreement between the solicitors and the buyers. Accordingly, the Court concluded that the firm of solicitors were not entitled to rely on the relevant provision in the contract for sale amounting to an "agreement to the contrary".

It is always advisable that agents/subscribers seek legal advice in advance of entering into a pre-incorporation contract to ensure that their liability under the contract is excluded to the fullest extent permissible by law.

John Darmody

JDarmody@EFC.ie

+353 1 202 6400

Guarantee Companies. Is It Possible To Appoint Executive Directors?

A company limited by guarantee and not having a share capital (CLG) is a form of company used by many organisations; charities, management companies, mutual organisations and sporting organisations. These CLGs are managed in the same way as other companies, namely by a board of directors. Other than CLGs who operate under a charitable tax exemption, there has been no prohibition on these types of companies from having executive directors, and in fact very many have executives on their boards of directors.

With the commencement of the new Companies Act 2014, there is now a question over whether in fact CLGs may appoint executive directors.

Previously a provision in the standard type Table A or C articles was adopted by most companies to expressly give them the power to appoint a director to any other office or place of profit under the company (other than auditor) in conjunction with his or her office of director for such period and on such terms as to remuneration and otherwise as the directors of the company may determine. This provision was then relied upon by companies to override the equitable principle that would otherwise apply to a director by reason of their fiduciary duties.

That standard type Table A Article is now incorporated in the Companies Act 2014 as Section 162. However, S162 is disapplied in the Act (Section 1172) in respect of CLGs raising the question whether by virtue of such disapplication a CLG can appoint executive directors. One school of thought is that the intention of the disapplication is to remove the right of a CLG to have executive directors. This may well have merit in aligning with the requirement for very many CLGs who wish to obtain charitable tax exempt status, that they do not appoint executives to the Board. However, accepting that view, one also has to have regard to the provisions of Section 159 of the Act giving power to appoint a managing director (howsoever described) and this has not been disapplied for CLGs suggesting that even if the disapplication of Section 162 of the Act means that CLGs cannot have or adopt such a power, it might still rely on Section 159 of the Act in respect of a managing director – this ambiguity is not helpful, of course, and it is somewhat illogical to suggest that a managing director/chief executive officer can be appointed to the Board, but not, for example, a chief financial officer/finance director or a Chief operations officer.

The alternative view, and one which we hold, and have Senior Counsel's opinion concurring with our view, is that the disapplication of Section 162 of the Act simply removes the statutory power, but as there is nothing in the Act expressly prohibiting executive directors of CLGs, it is open to a CLG to decide to include a power in the terms of Section 162 of the Act or any variation thereof it so chooses, into its Constitution.

This logic would equally apply to any other provision of the Act disapplied which is not otherwise prohibited or overridden in the Act.

It should be noted, of course, that a Court has yet to be asked to give any guidance on this matter and, therefore, it is not possible to say with absolute certainty that our view would be upheld by a Court. However, and in light of Counsel's opinion on the point, we believe our interpretation of the point is the one more likely to be upheld.

Eileen Grace

jcompton@efc.ie

+353 1 202 6400

Country	ITALY
Law Firm	STUDIO LEGALE AFFERNI CRISPO



Shares with multiple voting rights under Italian law

The Italian legislator, by Act No. 116 of 11 August 2014, has amended the “one share – one vote” principle set forth by art. 2351 of the Italian Civil Code: this means that also under Italian law the prohibition to issue shares carrying multiple votes has now been repealed. Therefore, a company’s by-laws may nowadays provide for shares carrying multiple voting rights resolving upon specific matters and the occurrence of particular conditions. No more than three votes each may be carried thereby.

These shares represent a special class of shares pursuant to art. 2348 of the Italian Civil Code and therefore preserve such a peculiar feature also in case of transfer.

The issuance for multiple voting shares will affect the quorum for the deliberations of shareholders’ meeting and may further affect the rules regarding the governance and control of companies in Italy.

The rationale behind the move of the Italian legislator lies in the objective to encourage money flows (equity injections) into companies allowing the majority group to maintain its position. It will be easier and easier, in fact, to entrust the control of the company with a minority who would nonetheless benefit from the increased “weight” of their shares deriving from the specific class of shares held.

By the same piece of legislation art. 127 quinquies and art. 127 sexies of the Italian Act on financial brokerage (“Testo unico delle disposizioni in materia di intermediazione finanziaria”) have also been amended, with the consequence that listed companies may now introduce “shares with augmented vote” carrying no more than two votes for each share held by the same subject for a period of at least 24 months.

The law provides that these shares, unlike the multiple-vote shares, do not represent a special class of shares according to art. 2348 of the Italian Civil Code.

Art. 127 septies excludes listed companies from issuing multiple vote shares; however, if such shares are issued before the listing they may “survive” even afterwards.

Hence, they will preserve such a feature also in case of bonus capital increase and merger or de-merger of the company.

Lorenzo Schiano di Pepe

lorenzschianodipepe@slac.it

+39 010 885635

Country	NETHERLANDS
Law Firm	BIERMAN ADVOCATEN LLP



District Court Amsterdam 28 October 2015, ECLI:NL:RBAMS:2015:7495 (shareholders Landis Group N.V. vs directors)

Referring to a former judgment regarding the directors Kuiken and Bus of the formerly listed company Landis Group N.V. the district court of Amsterdam held that a misrepresentation of the situation of the company was given by the financial statements and annual reports for the years 1999 and 2000 and the interim report in 2001. The court held the former directors liable to the affected investors for the damage they suffered as a result. The court based its decision on article 2: 139 Dutch Civil Code. This article reads: "If the financial condition of the Corporation has been misrepresented in the annual accounts or in the interim figures as published by the Corporation or in the annual report, then the Directors are jointly and severally liable towards third persons for the damage which they have suffered as a result thereof. A Director who proves that such misrepresentation is not attributable to him, is not liable."

As article 2:139 DCC is rarely used the decision is worth analysing. The decision to include shareholders in the range of parties protected is a welcome interpretation which was already defended in the literature regarding this article.

In the Netherlands a claim of shareholders is generally rejected as indirect damage, the court held that exchange losses due to misleading representation have to be considered as direct damage since the company's equity remained unchanged by the misleading representation.

It is interesting how the court held that the shareholders were misled. With its decision the court tied in with the objective test rule formulated in prospectus liability cases. The court used the imaginary "reference investor" introduced in a prospectus liability case (the World Online decision of the Dutch Court of Cassation of 7 November 2009): "the well-informed, observant and circumspect investor the notice is addressed to or whom it reaches ". The court considers that the financial reporting of a listed company like Landis is also meant to enable the reference investor "to form a balanced picture of the profitability and future prospects of that company and its investment decision, all this set against the current share price". The non-negligible false information meant that the Landis investor was deprived of the opportunity "to make an informed investment decision" on which the court concluded that there was deception in the sense of Art. 2: 139 DCC.

For the causal link between the misrepresentation and the damage the court could fall back on earlier decisions in which it was held that Investors do not need to prove that they actually have consulted and assessed the misleading reporting before they took their investment decision.

If this decision is upheld on appeal, the investors will finally have a gateway to claim their damages. In terms of the value of any claim, this remains to be established and the investors will have to prove the relationship between their investment decision and the financially harmful consequences they have suffered.

Theo Teeuwen
teeuwen@bierman.nl
+31 344 677 188

Country	LUXEMBOURG
Law Firm	PIERRE THIELEN AVOCATS



PIERRE THIELEN AVOCATS

Being able to create a company in one day: the near future reality in Luxembourg

Luxembourg is about to take a big step towards making it very easy for entrepreneurs to start a new business, reducing costs, as well as simplifying administrative procedures and moving application documents online.

An initiative called the “1-1-1 Company” was launched by the Luxembourg Chamber of Commerce which proposed a corporate legal structure known as a SARL S “société à responsabilité limitée simplifiée” (simplified limited liability company).

Under the bill 6777, one person can form a new company in one day with one Euro of capitalization (1-1-1).

Under current law, companies must put €12,500 into a capital reserve account and have a “notary act” (a specialised solicitor draft articles of incorporation) before the entrepreneur can place their firm on Luxembourg’s company register.

With the proposed law, this would be optional and a simple private deed can be used for the company register.

The main planned characteristics are:

- **Denomination:** SARLS
- **Corporate capital:** Minimum EUR 1
- **Incorporation:** Under private deed
- **Estimate incorporation fees:** 100€
- **Corporate purpose:** Activities submitted to business authorization delivered by the Ministry of Middle Classes on proof of knowledge (commercial/industrial activities or some liberal professions)
- **Members:** one or several natural persons only
- **Creditors’ protection:** at least 5% of the net profits to be allocated to a non-distributable annual legal reserve until the total amount of the reserve reach the corporate capital amount of EUR 12,394.68.

Except for these specific provisions, the S.à r.l.-S. will be governed by the existing rules applicable to the classic private limited liability company.

At the end of November 2015, the Council of State expressed its positive opinion on the project already validated by the council of government in July 2015.

Peggy Goossens

etude@pierrethielen.lu

+352 44 62 411

Country	POLAND
Law Firm	WBW WEREMCZUK BOBEL & WSPÓLNICY



New bankruptcy rules and a proxy's liability for the company obligations

From January 1, 2016 another amendment of the Bankruptcy and Rehabilitation Act came into force. It has been made clear in the justification of the Bill, that the purpose of this amendment is primarily the revision of inefficient and critically assessed provisions, including the provisions related to the circle of people responsible for the management of the company and thus responsible for the company's debt. This time, the regulations are to expand the circle of people responsible for the delayed filing for bankruptcy by inclusion of the companies' proxies.

The basic assumptions before the amendment

According to the previous version of the Bankruptcy and Rehabilitation Act, the responsibility for filing for bankruptcy within the statutory term rested with the entity's "authorised representatives". According to the court practice the responsibility was taken solely by members of the Management Boards and members of partnerships. Additionally, the fact that the creditor was obliged to prove the guilt of the above mentioned representatives and also to prove the amount of the damage suffered by the creditor, caused many disadvantages on the creditor's side. On the other hand, the provisions related to the term for filing for bankruptcy in connection with the interpretation of the term "insolvency" was an unfavourable regulation for the members of the Management Boards and members of partnerships. At strict interpretation of the state of insolvency, fully acceptable and applicable by the courts, the debtor had only 14 days for filing for bankruptcy.

Legal status after the amendment

The Article 20 item 2 of the Act effective as of January 1, 2016 states that "everyone that, on the basis of the Act, articles of association or statute is authorised to conduct of the debtor's affairs and to represent it, solely or jointly" shall be responsible for filing for bankruptcy. Therefore, though still indirectly – the legislator expended the circle of entities responsible for filing for bankruptcy by inclusion of the companies' proxies.

The legislature also decided to change the date of the filing for bankruptcy. Under current law the debtor is required to submit the application not later than within thirty days after the day on which the basis for the bankruptcy occurred. In addition, currently, there is a presumption that a state insolvency exists, if the arrear payments exceed the period of three months or the debtor's liabilities exceed the value of debtor's assets over a period of two years.

The legislator decided to preserve the interests of creditors also by introducing certain presumptions. First, by putting creditors in a favourable position by assuming that the person obliged to file for bankruptcy is at fault for the failure to apply. So far, the creditors were the party bearing the burden of proof in this regard.

What is more, the presumption also concerns the value of damage. According to the new regulations, it should equal the outstanding claim. To undermine this amount, a person eligible to file for bankruptcy will have to present appropriate evidence.

Undoubtedly, new regulations will change the position of the proxies. On the one hand, the amendment aims at enlarging the circle of persons responsible for company management and ensuring more clarity in the responsibility chain within persons managing economic operators. On the other hand, the change is rather controversial because equal responsibility for failure to file for bankruptcy is allocated to proxies, Board and partnership members, while the former hold disproportionately modest company control measures in comparison with the Board members as well as partnership members.

An interesting aspect of the responsibility of proxies in practice will also be the base of avoiding responsibility. What seems to be problematic is the clear identification of what standard proxies will have to keep to avoid liability - will they always have to monitor the finances of the entity they represent (especially taking into consideration the limited control measures the proxies have)? Eventually the court practice should bring an answer to this uncertainty for interpretation in the near future. From today's prospects what seems to be the most apt solution to this issue is to study the current situation of the debtor and the company every time a proxy is appointed.

Asma Chehade

asma.chehade@wbwlegal.pl

+48 618 510 700

Country	SCOTLAND (UK)
Law Firm	BONACCORD



Modernisation of Document Execution and Delivery

Considerable changes have been made in how documents may be executed and delivered over the last six months.

As of 1st July 2015 it has been possible to execute documents in counterpart which has simplified the completion of multiparty deals. The same legislation also provides that it is acceptable to deliver documents electronically ie you are permitted to scan and email a document that has been signed and witnessed in pen and ink

The rules on electronic signatures have also been clarified. While the courts have been obliged by regulations based on EU law to accept electronic signatures for some time and more recently electronic documents of various sorts have also been granted equivalent status to traditional documents those transactions that Scots law requires to be in writing such as transfers of land have continued to require pen and ink. Now that has changed and a special sort of advanced electronic signature is now acceptable. It is unlikely that the average client will have access to such a signature but many solicitors now have these specially registered signatures which could be used on behalf of a client under say an appropriate power of attorney. With the current technology the document shows as electronically signed if read electronically but there is no evidence of the signature when printed off so we anticipate that this new facility will be quite limited in take up and will generally be backed up by traditionally signed copies.

The law in England regarding the above matters remains uncertain so care should be taken with respect to cross border transactions.

Patricia Barclay
patricia@bonaccord.eu
 +44 131 202 6527

Country	SPAIN
Law Firm	CECA MAGÁN ABOGADOS



Executives remuneration spanish companis act

A recent amendment of the Spanish Companies Act has modified the executive's remuneration of directors and employees with executive functions.

In relation to directors' remuneration we must distinguish two different situations: i) remuneration received for the performance of the functions inherent to their position as directors, and; ii) remuneration received in the performance of executive functions.

1. Directors' remuneration.

Bylaws must establish whether the directors may be remunerated for their position. If so, it must also set out the nature of the remuneration which the directors may earn. Every type of remuneration must be registered in the bylaws, including any indemnity payments.

2. Directors 'remuneration with executive functions.

If a director is appointed as Managing Director or under another title with executive functions (Executive Chairman, General Director and others), the Board of directors must approve his contract by two thirds of the voting rights. The approval must be made without the presence of the director affected and shall include, in detail, all the items of remuneration to be earned by the executive director in the performance of the executive functions. In addition, the contract must be attached to the minutes of such Board of directors' meeting, but does not need to be registered with any public registry.

Companies and executives need to review their contractual and corporate situation as many executives will have a mercantile rather than an employment relationship with full impact on tax deductions and indemnity rights from both the executive and the company.

Termination of the exemption regime for losses computation

In 2015 the Spanish Government decided not extend the effects of a 2008 Act, which allowed companies under technical bankruptcy or in a capital reduction situation not take into account for legal purposes the losses incurred in certain accounting items.

1. Effects of the 2008 Act.

In particular, the Act (which has been extended up to the 2014 tax year) allowed companies which had suffered impairment losses, losses for real state investments or stock and losses for loans and unpaid credits with an equity under two thirds (private limited company) or under the 50% of the share capital (private limited company and limited liability company), being left out of legal consequences derived from the Spanish Companies: i) increase or reduction of the share capital; ii) shareholders contributions; iii) directors responsibility.

2. Consequences for the non extension effects of the 2008 Act.

If a company has not been able to balance its net worth figures at the closing of the 2015 tax year directors are obliged within two months to call a shareholders meeting to capitalize the company or otherwise to declare the dissolution or the bankruptcy of the company. In addition to the above, if the shareholders do not balance its net worth figures, the directors will be forced to take immediate action to avoid joint liability for the social obligations after the financial year-end.

Miguel Ángel Rodríguez-Sahagún

mrodriguez@cecamagan.com

+34 91 345 48 25

Country	UK
Law Firm	MUNDAYS LLP

MUNDAYS.

The small business, enterprise and employment act 2015

Legislation was passed in 2015 that includes a number of important implications for the management of UK businesses, and how they file certain pieces of information. The Small Business, Enterprise and Employment Act 2015 (the “Act”) includes measures which aim to make the ownership of UK companies more transparent and to increase trust in the UK as a place to do business.

Whilst some of these changes have already come into force, there are a number of significant changes on the horizon, which clients with a UK company need to be aware of and may require them to change some of its existing procedures.

Important timelines

In force since May 2015

- The creation of bearer shares is now prohibited. Any bearer shares in existence need to be surrendered and exchanged for registered shares in accordance with a specific procedure by 26 February 2016.
- The general duties of directors, codified in section 172 of the Companies Act 2006, now also apply to shadow directors. The definition of shadow director will be amended and clarified to improve accountability.

October 2015

- **Procedure for appointing directors** - On appointment of a new director, the company will confirm that the new director has consented to act and Companies House will write to directors to inform them that their appointment has been placed on the public register and to explain their statutory duties.
- **Suppression of part of director’s date of birth from Companies House records** - The day of the director’s date of birth will not be placed on the public register at Companies House.
- **Accelerated strike off** - It will become quicker for Companies House to arrange for a company not carrying on business or in operation to be struck off the public register.

December 2015

- **Director disputes** - a director will have the opportunity to object and have his/her name removed from the public register if a mistake has been made. It may be advisable for companies to obtain written consent from any new director before processing their appointment at Companies House.
- **Registered office disputes** - A new process will be introduced to remedy cases where a company is using an address for its registered office but is not authorised to do so.

April 2016

- **Register of Persons with Significant Control – the “PSC Register”** - Perhaps one of the most significant new changes introduced by the Act will be the new requirement for companies to compile a register of persons with significant control over the company and to make that register public.

A person will be considered to have significant control over a company if they fall into any of the following categories: they hold, either directly or indirectly, more than 25% of the company’s shares or voting rights; or they exercise either directly or indirectly the right to appoint or remove a majority of the board of directors.

The obligation on companies to keep the register is expected to take effect from April 2016. The new register must be available for inspection, usually at the company’s registered office, but from June 2016 private companies will also have the choice to keep this register at Companies House where it would be placed on the public record.

A “statement of initial significant control” will also be included with any application to Companies House to incorporate a new company.

June 2016

- **Replacement of Annual Return with Annual Confirmation Statement** - Companies will file a confirmation statement containing any changes that have occurred in the last twelve months to the registered office address, registers of directors, company secretaries and persons with significant control, the company’s share capital and business activity.
- **Changes to Statement of Capital** - The requirement to include the amount paid up and unpaid on each share on a statement of capital will be removed. The aggregate amount unpaid on the total number of issued shares will be provided instead.
- **Changes to Statutory Registers** - Companies will be able to choose to keep certain information on the central public register at Companies House, instead of needing to maintain their own separate statutory registers. Companies will need to consider whether they wish to take advantage of this new procedure and will need to obtain approval from their shareholders in order to do so.

October 2016

Prohibition on corporate directors – All directors will be required to be natural persons and the appointment of corporate directors will be prohibited. It is proposed that there will be certain exceptions to this new rule, for example it may be possible for a company to be a corporate director if all of the directors of that company are natural persons.

This new legislation will have an impact on all UK companies who will need to consider the changes and take action to implement the new procedures.

David Irving

david.irving@mundays.co.uk

44 (0) 1932 590 577

Country	UNITED STATES OF AMERICA
Law Firm	DUNNINGTON, BARTHOLOW & MILLER LLP

DUNNINGTON
BARTHOLOW & MILLER LLP

Choosing a business entity: tax considerations

This article provides a brief overview of U.S. income tax considerations of four classic forms of U.S. business entities: (i) partnership (general partnership, limited partnership or limited liability partnership), (ii) “C” corporation, (iii) “S” corporation, and (iv) limited liability company.

Partnership: A general partnership, limited partnership or limited liability partnership (unless it is a publicly traded partnership) is generally treated for tax purposes as a conduit through which net income is allocated among its partners in the manner agreed to by the partners, subject to restrictions to assure that the allocation has “substantial economic effect”. Such income is included on each partner’s federal, state and local income tax returns and subjected to tax at the individual’s income tax rate. Any losses generated from an active business partnership by an active partner may also be deducted for individual tax purposes to the extent of the partner’s tax basis in his partnership interest.

“C” Corporation: Unlike a partnership, a “C” corporation is not treated as a conduit for its shareholders. It is taxed at the entity level. Distributions to shareholders are then taxed again at the individual shareholder level as dividends. Losses of the corporation are deductible only at the corporate level.

The U.S. corporate tax rate quickly climbs to 35% (39% for substantial corporate net income). States and localities also impose significant corporate taxes which can increase the effective corporate tax rate to nearly 50%. If revenue is small, it may be possible to only have one level of tax (on the individual) by paying out sufficient compensation to the owners/officers to effectively eliminate the company’s net taxable income. However, to be deductible, the compensation paid must be “reasonable”.

“S” Corporation: If “S” corporation status is timely elected, the entity is treated for tax purposes as a pass-through entity similar to a partnership. However, unlike a partnership, net income, gains, losses, etc. are passed through to the shareholders generally in proportion to their ownership interest on a per-share, per-day basis. The shareholders report this income or loss (subject to limitations) on their federal, state and local personal income tax returns. Income allocated to shareholders is not treated as self-employment income, nor is it subject to self-employment tax (however, if services are performed by the shareholder, the IRS requires that reasonable compensation must be paid and subjected to Social Security taxes).

Limited liability companies: The limited liability company (“LLC”) is a pass-through entity like a partnership (unless an entity classification election is made to have it treated as a corporation). A single member LLC is treated as a sole proprietorship for federal tax purposes. A two-or-more member LLC is treated as a partnership.

Like a partnership but unlike an “S” corporation, an LLC also has flexibility, within limits, in allocating profits and losses amongst its members (i.e. allocations of income, gain, loss, expenses, etc. still require “substantial economic effect”).

Self-employment taxes apply to the income of members who work for or manage the operations of the LLC. Members who are not active (i.e. do not provide services or make decisions for the LLC) may be exempt from self-employment taxes.

Joseph Michaels IV

jmichaels@dunnington.com

+1.212.682.8811