

NJORD Estonia: The life of e-residents just got more complicated

On 15th of January 2018, Commercial Code amendments regarding juridical persons and their availability requirements came into force.

Before, the Commercial Code said, that if the residence of at least half of the members of the management board of a private limited company, a public limited company or a branch are not in Estonia, in another Member State of the European Economic Area or in the Swiss Confederation, the private limited company, the public limited company or the foreign company shall appoint the contact person, whose address is in Estonia and who has a right to receive documents on behalf of the company. That means, that an owner and the only member of the board of an Estonian business, could operate in Estonia freely if they had residency e.g in Malta, Romania or Portugal.

The previous regulation was especially beneficial to e-residents of Estonia, who only had to mark any of the countries of European Economic Area as their place of residency in the application submitted to the Estonian Commercial Register, and every formal obstacle for registering a business is surpassed, although it's obvious that the company's connection to Estonia might become practically non-existent in that case. The State had to come up with a way to ensure that others, such as the State itself or the company's creditors, had an actual chance of contacting the company.

The new amendment introduces the term *contact person*. That means, that **if the management board or a substitute body, is located in any foreign country, the company must appoint a contact person, who must have an Estonian address and who has the right to receive procedural documents and the declarations of intent addressed to the company.** According to applicable law, to ensure the contact person's reliability, only persons with higher qualification professions such as: notaries, notary offices, attorneys, law firms, sworn auditors, auditing companies, tax representatives of non-residents within the meaning of the Taxation Act or providers of trust and company services within the meaning of the Money Laundering and Terrorist Financing Prevention Act's section 8. As an exception, it's possible to appoint company's board members, shareholders, stockholders or procurators if their place of residence is Estonia. In that case, the address of the contact person will be considered as the company's address and when delivering the documents to the contact person, it will be considered to be delivered to the company as well.

A contact person is a passive representative of the company. It means, that their only task is to accept documents addressed to the company by third parties. He/she does not have the authority nor rights to make declarations of intent. The contact person cannot be held responsible by the third parties by whom the documents were sent. However, if the contact person violates the contract between themselves and the company, they can be held responsible by the company.

Undoubtedly the amendment will make establishing businesses in Estonia a bit more complex for e-residents. At the same time, the amendments make business activity more transparent. The legislator hopes that the new regulation makes operating businesses more flexible and creates new possibilities for communicating with e-residents.

We must point out, that the amendment also concerns the companies registered in Estonia already. If the juridical person, whose board is not located in Estonia, doesn't appoint a contact person, the register gives them a deadline for appointing one, which can't be shorter than one month nor longer than three months. If the contact person isn't appointed by the given deadline, the company or foreign company's branch will be deleted from the Commercial Register.

Only time will tell how the new regulation will be realised. Problems may occur if the preliminary contact person will only be willing to fill the position temporarily or until they are being paid to do so. We can assume that problems regarding termination of related contracts will become common. What poses a more serious problem is the fact that with enforcing the new regulation, Estonia essentially allowed to run an Estonian company from abroad. Foreign countries, who follow the location theory might not acknowledge a company that is being run from abroad as an Estonian company.

From 1st of September 2018 (incl) every company must publish their information about their ultimate beneficial owners (UBO).

The fact that all companies registered in Estonia must publish their UBOs in the Commercial Registry should be considered as one of the main amendments of legislation in 2017. This is required in the Money Laundering and Terrorist Financing Prevention Act. Although it doesn't directly relate to e-residents, this amendment is also thought to improve the transparency of juridical persons.

When it comes to companies, UBOs are considered to be physical persons, who directly or indirectly own the company. Direct ownership means that the physical person has more than 25% of the participation or ownership rights. Indirect ownership is when more than 25% of the participation or ownership rights are owned by another company, which is controlled by the physical person – the UBO. The company shouldn't have any problems with fulfilling this requirement if the ownership is clear and simple. But if the ownership reaches foreign countries, identifying information about UBOs might become tricky.

If identifying the UBOs has been unsuccessful after trying all possible methods, the company has to mark a member of the higher governing body as the UBO. In addition, the company must document and preserve all the information about the actions taken in order to identify the UBO. Failing to comply with the new requirements may result in a fine of up to 300 fine units for a physical person and up to 400 000 fine units for juridical persons. It's unclear how much effort a company with a complex ownership structure has to make before they can say that the UBO couldn't be identified. We'll see how the new requirements will be implemented and how the implementation will be supervised once the new law enters into force.



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