PwC International Business Reorganisations Network – Monthly Legal Update

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Welcome

Welcome to the fourth edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for 2017.

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 April 2017 issue:

- TLS Associazione Professionale di Avvocati e Commercialisti (Italy) consdiers new non-financial reporting obligations in Italy;
- PricewaterhouseCoopers LLP (UK) reports on the 'foundation company' vehicle introduced by the Cayman Islands government; and
- PricewaterhouseCoopers AG (Switzerland) discusses the Swissness Initiative.

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TLS Associazione Professionale di Avvocati e Commercialisti (Italy) - Non-financial reporting: a push towards progressive governance and sustainable business

At a glance

New reporting duties for corporate bodies of large public-interest entities (i.e. listed companies, banks, insurance undertakings) entered into force in Italy on January 25, 2017.

Notably, they concern the disclosure of non-financial information on specific areas concerning the environment, social and employee-related matters, respect for human rights, policies of social diversity, anticorruption and bribery matters.

The new rules are included in Legislative Decree no. 254 of 2016 (**Legislative Decree**), which implements Directive 2014/95/EU on disclosure of non-financial and diversity information.

The Legislative Decree aims to promote the business communication also in relation to those non-economic indices that contribute to understand the real value of an enterprise and to ensure transparency on the main risks and impacts deriving from the business operations.

In detail

New reporting duties for corporate bodies of large public interest entities entered into force on January 25, 2017. Notably, they concern the disclosure of specific non-financial information (*i.e.* areas concerning the environment, social and employee-related matters, respect for human rights, anti-corruption and bribery matters) to be submitted to the Companies' Register (**Non-Financial Declaration**) together with the financial statements.

The new rules are included in Legislative Decree no. 254 of 2016 ("Implementation of Directive 2014/95/EU of the European Parliament and of the Council of October 22, 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups"), published in the Official Journal on December 30, 2016 (**Legislative Decree**).

The objective of the European and Italian Legislators was to promote the business communication not only on financial information – which was considered sufficient to express the market value of a company in the past – but also on non-economic indices such as company's social and environmental policies. This Legislative reform also aims to meet the economic operators' growing demand for comprehensive transparency in relation to the impacts and risks deriving from business operations.

Responsible parties and effective date of the obligations

The Legislative Decree is addressed to the large public-interest entities mentioned in Section 16, paragraph 1, of Legislative Decree no. 39, 2010, namely:

a Italian companies issuing transferable securities admitted to trading on Italian and EU regulated markets;

b banks;

c certified Italian insurance undertakings or Italian insurance companies; and

d reinsurance undertakings with registered office in Italy as well as the Italian branches of non-EU reinsurance companies.

Such entities must also meet the following dimensional requirements:

a more than 500 employees on the average during the financial year; and

b on the financial statements closing date, exceed at least one of the following: total balance sheet amount: Euro 20,000,000, or, total net revenues from sales and services: Euro 40,000,000,

(**Large PIEs**).

The new obligations apply from the financial years starting from January 1, 2017. However, the Legislative Decree allows certain exemptions which are described in Section 6.

Content of the Non-Financial Declaration

Section 3 of the Legislative Decree establishes that the Non-Financial Declaration shall include the following information at least, with reference to the areas indicated by the law:

a with regard to environmental matters, the use of water and energy resources by the company (distinguishing between renewable and non-renewable resources), greenhouse gas emissions, the impact of the business activity on the environment and health and safety and disclosure of potential environmental and health risk factors;

b with reference to social and employee-related matters, management methods, including the measures in place for gender equality and implementing the conventions of international and supranational organisations;

c with regard to human rights and diversity policies, the measures adopted by the entity to prevent the violation of these rights and actions for prevention discriminatory behaviours; and

d the description of internal procedures adopted by the company in relation to the anti-corruption and bribery matters.

More in particular, with reference to the above-mentioned areas, Large PIEs are required to provide detailed information on:

a the management and organization model adopted by them in relation to the activities carried out;

b the policies adopted and the goals achieved as well as relevant non-financial performance indicators; and

c the main such risks caused or incurred by the business activity, the services/products provided or the existing business relations, including the supply chains in place and the subcontracting agreements executed by the company, if relevant.

Section 3 of the Legislative Decree states, in addition, as applies to financial statements, the information shall be compared with previous financial years, including references to the items and the amounts included in the financial statements, if appropriate.

Furthermore, for large groups whose "parent company" is a Large PIE, the Non-Financial Declaration shall be drawn up including the information pertinent to the "parent company" and the "subsidiaries" in the consolidation, to ensure understanding of the group's operations, its performance, results and its impact on the market.

What if the responsible entities had or have no policies addressing the areas mentioned in the Legislative Decree? In this case, they shall still be required to draft the Non-Financial Declaration and submit it to the Companies' Register, stating their option to omit the information and indicating the reasons in a clear and comprehensible way.

Lastly, the aforementioned rules also apply to the entities that compile a Non-Financial Declaration on a voluntary basis. In this case, the voluntary Non-Financial Declaration shall be prepared to take into account company's dimensions, in terms of number of employees, financial statements information, existence or non-existence of cross-border activities, to correctly illustrate the business, performance, as well as the related outcomes and impact.

The controls on the Non-Financial Declarations are carried out by Consob (the public authority responsible for regulating Italian financial markets). Pursuant to Section 9 of the Legislative Decree, Consob shall issue a regulation covering, *inter alia*, the terms and the procedures applicable to its controls, following its consultation with the Bank of Italy and IVASS (the Italian Institute for the Supervision of Insurance) regarding the areas under their responsibility.

Relevant corporate bodies, contents and disclosure

The law requires the Directors of Large PIEs and the parent companies of Large PIEs (*i.e.*, entities that meet the above-mentioned requirements on a consolidated basis) to compile a Non-Financial Declaration.

Said Directors shall ensure that the Non-Financial Declaration is drafted and published as required by the Legislative Decree.

Similarly, specific duties are incumbent upon the Board of Statutory Auditors and the Auditing Firm.

Regarding the former, the Law requires that as part of the functions attributed to it by the regulation, the Board of Statutory Auditors shall monitor observance of the new rules, reporting on them to the Shareholders' meeting through the annual report accompanying the financial statements.

Regarding the Auditing Firm, it shall:

a verify that the Directors have drafted the Non-Financial Declaration; and

b compile a specific statement – different from the report required by Section 14 of the Legislative Decree no. 39, of 2010 – attesting to the compliance of the information provided and that the reporting procedures required by the Legislative Decree were followed.

Directors shall submit the Non-Financial Declaration to the above bodies together with the draft financial statements, so as to allow them to discharge their related duties.

The Non-Financial Declaration can be included in the management report, within a specifically indicated section– or, alternatively, as a separate report; in this latter case, it shall be submitted to the Companies' Register together with the annual financial statements and published on the company's website.

Sanctions

Section 8 of the Legislative Decree provides that Consob will levy a fine upon the Directors, Board of Statutory Auditors and Auditing Firm. The amount of this fine will depends on the provisions that were breached.

Directors who do not file the Non-Financial Declaration with the Chamber of Commerce within the deadline provided for the filing of financial statements, shall be subject to a penalty ranging from Euro 20,000.00 to Euro 100,000.00 (subject to a reduction of 1/3 if filing takes place thirty days after the deadline). This same fine shall also be levied if the statement issued by the Auditing Firm is not attached, or if the Non-Financial Declaration does not comply with the provisions of the Legislative Decree (provided this does not constitute an administrative violation). If the Non-Financial Declaration includes untrue facts or facts that the Legislative Decree has indicated as being subject to disclosure are omitted the applicable fine will range from Euro 50,000.00 to Euro 150,000.00.

A fine from Euro 20,000.00 to Euro 100,000.00 is applicable to the Board of Statutory Auditors if it fails to report any non-compliance of the Non-Financial Declaration to the Shareholders' meeting. The disclosure of untruthful facts or omission of significant information shall carry a fine ranging from Euro 50,000.00 to Euro 150,000.00.

A fine ranging from Euro 20,000.00 to Euro 50,000.00 is applicable to the Auditing Firm in the event of failure to verify compilation of the Non-Financial Declaration, while a fine ranging from Euro 20,000.00 to Euro 100,000.00 shall be applied for omission of the specific statement certifying the compliance of the Declaration.

The legislative reform undoubtedly puts new obligations in place but should also allow the "more virtuous" companies and groups to gain short, medium and long-term benefits from this disclosure – as provided for by the Legislator – which will have a positive impact on the company's reputation, ensure a generally higher level of market approval while increasing the trust of foreign investors, who always have an increased interest in collecting information regarding the governance of their potential target investments favoring those with higher levels of risk management and transparency.

Overview

The non-financial information must now be included in a specific declaration to be drafted and filed at the Companies' Register, by the Directors of the company, together with the annual financial statements (Non-Financial Declaration).

In addition, while the Board of Statutory Auditors shall monitor that the rules provided for by Legislative Decree have been duly respected, the Auditing Firm shall:

a verify that the Directors have drafted the Non-Financial Declaration; and

b compile a specific statement attesting to the compliance of the Declaration with the law provisions.

The new obligations apply from the financial years starting from January 1, 2017.

Any violation of their respective obligations will levy a fine upon the Directors, Board of Statutory Auditors and Auditing Firm of the large public-interest entity to an average sum between Euro 20,000 and 100,000, applied by Consob (the public authority responsible for regulating Italian financial markets).

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PricewaterhouseCoopers LLP (UK) – The introduction of a new corporate vehicle in the Cayman Islands

At a glance

The Cayman Islands government has taken the innovative step of introducing a new corporate vehicle into their collection of structuring vehicles. The new vehicle, known as the "Foundation Company", offers a flexible structure with a wide range of uses, such as an SPV in a finance transaction, succession planning or a mechanism in private trust company structures.

Although the Foundation Company will function like a civil law foundation, it is governed by existing Cayman company law (**Companies Law 2016**), except as provided for in the legislation. This means that a Foundation Company will share many of its features with regular exempted Cayman companies; this has the benefit of a considerable body of case law which can be relied upon and retains familiarity to private client and commercial practitioners. This simplification dispenses with the need for advisors and the industry to deal with the complex and bespoke foundations legislation.

The Foundation Company is anticipated to attract businesses to Cayman over other offshore financial centres and will encourage activity to be conducted locally.

In detail

Formation and constitution

A Foundation Company is created either by:

a converting a current Cayman exempted company; or

b creating an entirely new Foundation Company from scratch.

In either case the Registrar of Companies has to issue a declaration that the entity is a Foundation Company.

A Foundation Company is a body corporate and has a separate legal personality; the company can hold property and is able to sue or be sued.

A Foundation Company's constitution consists of a memorandum and articles of association. There is a "Model Constitution" provided in the new legislation. The company's object must be lawful but need not be beneficial to other persons (e.g. it can be a holding company).

A Foundation Company only has a duty to carry out its objects if the memorandum expressly declares and designates a person to enforce that duty. In the event that a Foundation Company is obligated to carry out its objects, the company, trustees or personal representatives are able to apply to the Grand Court for an opinion, advice or directions.

If the Foundation Company's objects are to be carried out mainly outside the Cayman Islands, an application may be made to register the company as an exempt company, meaning the company is eligible for a tax exemption undertaking.

Governance

The Foundation Company is managed by a board of directors. It is important to note that there are no residency requirements for a person to be a director. A Foundation Company must also have a company secretary (a "Qualified Person", permitted or licensed under law to provide company management services in Cayman). The Qualified Person requirement is anticipated to provide business and revenue to Cayman.

There are strict rules on gratuitous assets or assets provided in consideration of share issues. The company secretary is required to record activities and enquiries made in relation to the above. Failure to comply with this obligation is punishable by criminal sanction.

If the constitution provides, any member or supervisor is able to make or consent to alterations to the memorandum. Governance roles such as duties, rights and powers can fulfilled by members, directors, officers, supervisors, founders or others, provided this is permitted in the constitution. This freedom illustrates the flexibility of this new corporate vehicle.

Under Cayman company law, registers must be maintained containing details of directors, members and charges. A Foundation Company is also required to keep a register of supervisors. Failure to comply with this requirement results in criminal sanction. Records are also required to be kept for anti-money laundering purposes and a minute book is to be kept. Note that on the written request of an interested person the directors of the Foundation Company must provide information, explanations, accounts and records in relation to the company's affairs.

Distinguishing features

A Foundation Company must be limited by shares or guarantee, however it is not necessary that there is a share capital.

A Foundation Company is not required to have shareholders and beneficiaries and lack thereof will not affect the company's existence, capacity or powers provided that the company continues to have one or more "supervisors". Supervisors are persons other than members empowered by the constitution to attend and vote at general meetings. Notably, a Foundation Company that ceases to have members will not be able to later admit members or issue shares, unless this is stipulated in its constitution.

A beneficiary to a Foundation Company does not have statutory powers or rights in relation to the Foundation Company which includes those relating to its management or assets. A beneficiary is not treated as an "interested person". However, beneficiaries can be given duties, powers or rights if this is provided for in the constitution.

- Importantly, the payment of dividends or other distributions of profits or assets to members is prohibited and this is to be stated in the Foundation Company's memorandum.

The Legislation

The Foundation Companies Bill 2016 was passed by Legislative Assembly on Monday 27th March. The legislation will come into force within the following weeks.

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PricewaterhouseCoopers AG (Switzerland) – Swissness Initiative

At a glance

Switzerland introduced a new legal framework, the so called "Swissness Initiative", which became effective in January 2017. The Swissness Initiative regulates the use of terms such as "Switzerland" or "Swiss", as well as the use of the Swiss cross* and the Swiss coat of arms** in connection with goods and services.

* The Swiss cross:

** The Swiss coat of arms:

In particular, the new regulation addresses the following topics:

a the use of indications of origin for products and services;

b the registration and the use of geographical trademarks; and

c the use of the Swiss cross and the Swiss coat of arms on products and package.

Companies affected by the Swissness Initiative should examine their compliance with the new regulation and take action if required.

In detail

Introduction

According to the Swiss Federal Institute of Intellectual Property, market studies show that consumers are prepared to pay a premium of up to 20% for typical Swiss products and natural products and up to 50% for luxury goods labelled Swiss, Swiss Made, Made in Switzerland and the like. Studies conducted by Swiss universities show that more than 60% of the interviewees would pay more than twice the price for comestibles produced in Switzerland. These figures show that indications of origin on products and for services have become both a sales argument for vendors and a key factor in the decision making process of consumers, particularly in an increasingly globalized world.

To prevent abuse and a dilution of Switzerland's brand value and reputation, lawmakers have introduced the so called **Swissness Initiative**, which is designed to prevent free riders from taking advantage of a consumer's willingness to pay for Swissness. It entails a revision of the Federal Trade Mark Protection Act (**TmPA**), the Coat of Arms Protection Act (**CAPA**) and several ordinances. The aim of this article is to provide an overview of the most important legislative amendments, which have entered into effect on 1 January 2017.

1. Indication of Origin

1.1 Legal Requirements

The Swissness Initiative introduced a set of rules regarding indication of origin. The applicable rules depend on the nature of goods.

a Industrial Products

Industrial products are deemed to origin from the place where 60% of its production costs, including costs for manufacturing, research and development and quality control incur. Moreover, the production stage which determines the main characteristics of a product must occur at this place. However, an indication of origin may be limited to a single production stage or activity, e.g. "*Engineered in Switzerland*" or "*Swiss Research*" if the respective activity is carried out in its entirety at the specified location.

b Comestibles

For natural products, the place of harvest, extraction or, with regard to meat and fish, the place where an animal has spent the predominant part of its life, the place where animals were kept or reared or the place where the haunting or fishing was carried out, may be indicated as place of origin.

In the case of processed food, at least 80% of the weight of the raw materials used must originate from the place referred to as origin and the processing stage that gives the product its essential characteristics (e.g. turning milk into cheese) must be carried out there. However, there are a number of exceptions in place regarding the origin of raw materials. For milk and dairy products, 100% of the raw material must come from the place of origin. On the other hand, raw materials which cannot be produced in Switzerland due to natural conditions or which are not available in sufficient quantities (e.g. cocoa) are only partially or not at all taken into account for the calculation of the weight of raw materials requirements.

c Services

In order to be allowed to use an indication of origin for services, the service provider needs to be headquartered *and* administered in the place referred to. Mere domicile companies will not be sufficient to fulfil this requirement.

1.2 Use of Indications of Origin

If these requirements are met, the use of the Swiss brand is open free of charge and without registration or permission by the authorities. However, the indication of origin must not be misleading and additional requirements such as compliance with manufacturing or processing principles or quality requirements that are customary or prescribed in the place of origin must be adhered to. If challenged, the user of an indication of origin has the burden of proof that the indication is correct.

2. Registration of Geographical Trademarks

The Swissness Initiative also provides for the registration of indications of source as so-called geographical trademarks, such as "*Emmentaler*" for cheese or "*Genève*" for watches. Registrations may be requested by associations that have assumed the role of protecting the respective designation of origin or, under certain conditions, by Swiss cantons, foreign authorities or organisations of an economic sector. The applicant must file regulations governing the use of the geographical trademark with the Swiss Federal Institute of Intellectual Property. Once registered, any person fulfilling the requirements of the regulations may use the geographical trademark free of charge. Based on the Swiss registration, applicants may seek international protection for the trademark through the Madrid System.

3. Use of the Swiss Cross and Coat of Arms

Current law technically prohibits the placement of the Swiss cross or coat of arms on products or package for business purposes. However, this prohibition is currently not enforced as countless products labelled with the Swiss cross can be found in reality. Therefore, the revised Federal Coat of Arms Protection Act now allows usage of the Swiss cross as a declaration of origin not only for services, which is already allowed as of today, but also for goods. Of course, the legal requirements regarding indications of origin as laid out above have to be met. The use of the Swiss coat of arms remains reserved for the Swiss Confederation.

Conclusion

The Swissness Initiative establishes detailed requirements for indications of origin and significantly simplifies the protection of geographical trademarks, particularly abroad. Regulation regarding the use of the Swiss cross on products and package has been adapted to current practice. Companies currently using indications of origin or trademarks relating to Switzerland or marking their products or package with the Swiss cross should examine their compliance with the Swissness Initiative and take action if required.

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