PwC International Business Reorganisations Network – Monthly Legal Update

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Welcome

Welcome to the tenth edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for 2016.

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 October 2016 issue:

- PricewaterhouseCoopers Legal LLP (UK) considers the implications of Brexit on company law, in particular retaining flexibility for multinationals;
- PricewaterhouseCoopers (Australia) reports on draft legislation being introduced to implement reforms to Australia's competition laws; and
- PricewaterhouseCoopers, Société cooperative analyses the decision in the Hellas Case regarding the nature of Convertible Private Equity Certificates under Luxembourg law.

Contact us

For your global contact and more information on PwC's IBR services, please contact:

Richard Edmundson

Partner and Head of International Business Reorganisations, London

+44 (0) 20 7212 1512

richard.j.edmundson@pwclegal.co.uk

PricewaterhouseCoopers Legal LLP (UK) – Company law and Brexit: Retaining flexibility for multinationals

At a glance

The legal climate and culture of enterprise in the United Kingdom (**UK**) have always been central to the appeal of the UK as a hub for international business. Although Brexit raises uncertainty and some challenges to companies incorporated within the UK, careful strategic planning can mitigate any risks arising and the use of cross-border mergers and SEs can ensure that companies can retain greater flexibility to respond to alternative scenarios for Brexit.

In detail

Following the UK's vote to leave the European Union (**EU**) and the Prime Minister's indication that there will not be another referendum, the UK now enters a period of negotiation. The exact terms of the departure of the UK from the EU and its new position internationally will be negotiated over at least the next two years, with some commentators noting this could last much longer. Businesses will need to operate within a climate of uncertainty for the foreseeable future and should consider how UK Corporate law may help manage risks and provide opportunities throughout this period.

Continuity and change

Many of the benefits of operating within the UK will continue despite the plans to leave the EU and London will continue to be a key centre for global business. Although there will be no immediate changes in the law as a result of the referendum, there will be significant changes in due course and all businesses should be strategically planning for the alternative scenarios.

For any groups with legal entities incorporated in the UK, part of this planning is likely to involve carefully reviewing which group entities they have within the UK and identifying whether this is the best structure going forward. It may be that it will be preferable for some entities to be integrated and shell companies dissolved, for other companies it may include assessing the UK as the most appropriate base for their business.

Cross-border mergers – Retaining flexibility

Multinational groups are increasingly making use of the cross-border merger procedure available under the *Companies (Cross-Border Mergers) Regulations 2007* to integrate entities in the UK with entities in other countries within the European Economic Area (**EEA**).

Over the past five years, the cross-border merger procedure has become popular as a way of enabling companies to act nimbly and move operations across European borders. The procedure allows one or more transferor companies to merge with and into a transferee company registered in a different EEA state.

The effect of the cross-border merger is that all assets and liabilities of the transferor companies transfer to the transferee company by operation of law, without the need for specific assignment and novation processes with third parties, and the transferor companies are automatically dissolved. This can enable companies to transfer operations into or out of the UK with relative ease.

As part of the strategic planning for Brexit, some multinationals may plan the transfer of operations from another European jurisdiction into the UK or vice versa. The cross-border merger process remains unchanged by the referendum, although changes may occur as a result of the final agreed terms of Brexit. Until the formal date of any Brexit, cross-border mergers are a viable option to transfer operations between the UK and another European country.

A cross-border merger will generally take between four and five months to complete and this timing should be considered as part of any contingency planning. If the UK remains within the EEA following Brexit, then the cross-border merger procedure should remain unchanged as it currently applies to all countries within the EEA and not just within the EU.

If the UK will not remain within the EEA, then additional legislation will be required both in the UK and in other European states to allow cross-border mergers to continue and this is likely to be an impediment to the smooth operation of this procedure. To ensure certainty, all cross-border mergers should be completed prior to any exit date in the event that the UK leaves the EEA.

Societas Europeae – Continuing business in Europe

Some groups that have wanted to ensure that a company in the UK appear truly European with the ability to move freely within Europe have chosen to form a *Societas Europaea* (**SE**) entity. An SE is a European public company which may have its registered address in any EEA state. For an SE with registered address in the UK, it is subject to the European SE regulations and those adopted into UK law with any non-prescribed matters being governed by English law applying to PLCs. An SE is able to transfer its registered address between European countries within the EEA and, following any transfer, is no longer subject to the local laws in respect of PLCs in the previous host country.

In terms of contingency planning, groups with any existing SEs may look at the options available for transferring its registered address into or outside of the UK, this process typically takes around three months. Also, when forming new companies in the UK, prior to the agreement of formal terms of Brexit, if retaining the ability to transfer freely within Europe is important, this may be preferable to setting up a standard public company. The status of SE entities will remain unchanged prior to any final Brexit date and should continue if the UK remains within the EEA. In the event that the UK leaves the EEA, the ability of an SE to transfer its registered address into or outside of the UK would become uncertain and existing SEs may look at converting to a UK public limited company.

a Businesses with companies incorporated in the UK should review these entities in light of their strategic planning for alternative Brexit scenarios.

b Up until the formal date of Brexit (expected to be at least two years away), it will be possible to merge UK companies with companies registered in other countries within the European Economic Area by way of cross-border merger and for SE entities with registered address in the UK to transfer to other EEA states or vice versa.

c If the UK remains within the EEA, the rules on cross-border mergers and SE migrations should not change. If the UK leaves the EEA then further legislation would be required in the UK and in Europe to clarify the status of company transfers by way of cross-border mergers and to confirm the status of SE entities.

d If a transfer of corporate operations outside of the UK forms part of the contingency planning, it is recommended to carefully plan the execution and timing in advance so this any such transfer can move quickly.

PricewaterhouseCoopers Legal LLP (UK)

Company law and Brexit: Retaining flexibility for multinationals

PricewaterhouseCoopers (Australia)

Draft legislation to implement Harper Review reforms to Australia's Competition Laws

PricewaterhouseCoopers, Société cooperative (Luxembourg)

Hellas Case, 23 December 2015

Who to contact

For more information, please contact:

Richard Edmundson

Partner and Head of International Business Reorganisations, London

+44 (0) 20 7212 1512

richard.j.edmundson@pwclegal.co.uk

John Amberton

Partner, London

+44 (0) 20 7212 4328

john.amberton@pwclegal.co.uk

PricewaterhouseCoopers (Australia) – Draft legislation to implement Harper Review reforms to Australia's Competition Laws

At a glance

Federal Treasury recently released an Exposure Draft of the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016* (**Exposure Draft legislation**), giving effect to the Australian Government's response to the Competition Policy Review (**Harper Review**).

The Exposure Draft legislation includes significant amendments to the *Competition and Consumer Act 2010* (**CCA**) in line with the majority of the Harper Review recommendations. Submissions on the Exposure Draft legislation closed on Friday, 30 September 2016.

Additionally, the Australian Competition and Consumer Commission (**ACCC**) recently released draft guidelines on the misuse of market power and concerted practices prohibitions. Submissions on these guidelines closed on Monday, 3 October 2016.

In detail

On 24 November 2015, the Australian Government released its response to the Harper Review and supported in full or in principle 39 of the Harper Review's 56 recommendations and a further 5 recommendations in part. The Government also noted or remained open to the remaining 12 recommendations, following further review and consultation.

On 16 March 2016, the Government agreed to implement the Harper Review's recommended changes to the misuse of market power law.

The Government is now considering submissions on the Exposure Draft legislation. It is the next stage to giving effect to the most substantive Harper Review recommendations relating to Australia's competition laws, with the broader competition law simplification plan to follow in a future legislative package.

Submissions on the Exposure Draft legislation closed on Friday, 30 September 2016.

The Exposure Draft legislation includes the following significant amendments to the CCA.

Misuse of Market Power

The Exposure Draft legislation strengthens the prohibition of misuse of market power by corporations and is intended to more effectively target anti-competitive conduct by corporations with a substantial degree of market power.

Key features of the proposed amendments include:

a the removal of the 'take advantage' requirement in s46 and the introduction of an 'effects' test (i.e. the conduct must have the purpose, effect or likely effect of substantially lessening competition in a market);

b certain pro-competitive and anti-competitive factors must be taken into account when considering whether a substantial lessening of competition has occurred;

c the removal of the specific prohibitions on predatory pricing and other practices; and

d market participants can seek exemption from s46 by applying to the ACCC for authorisation.

The ACCC have also released for consultation a framework for guidance on s46 which includes examples of the type of conduct that may or may not contravene the amended provision.

Definition of 'competition'

The Exposure Draft legislation extends the definition of 'competition' to include competition from goods and services that are imported or capable of being imported.

The express inclusion of goods and services that are 'capable of' being imported is not qualified to require consideration of only those goods and services that could be economically imported into Australia. However, the Explanatory Memorandum clarifies that only credible threats of import competition should be relevant to the competition analysis. This change seeks to ensure any competition analysis would consistently takes into account any goods or services that affect markets in Australia, regardless of their origin.

Cartel Conduct

The Exposure Draft legislation makes a number of amendments to simplify the cartel conduct provisions and to better target these provisions as anti-competitive conduct.

The cartel provisions would:

a consistent with the treatment of cartel conduct in comparable overseas jurisdictions, be confined to cartel conduct affecting competition in Australian markets; and

b apply between actual or likely competitors.

To encourage pro-competitive economic activity and to reflect the reality of business, the exemptions to cartel conduct for joint ventures would be broadened to apply to:

a arrangements or understandings (in addition to contracts);

b joint ventures for the production, supply or acquisition of good and services; and

c cartel provisions that are reasonably necessary for undertaking a joint venture.

The exemption for vertical trading restrictions would also be broadened to apply to various types of vertical trading restrictions, rather than only to exclusive dealing restrictions.

The 'output restriction' purpose condition would be broadened to address any gap resulting from the repeal of the separate prohibition on exclusionary provisions.

Third line forcing

Third line forcing will no longer be prohibited per se, but would be subject to a competition test and only prohibited where it has the purpose, effect or likely effect of substantially lessening competition.

Resale price maintenance

The Exposure Draft legislation:

a will allow a corporation or person to notify the ACCC of resale price maintenance conduct, in addition to seeking authorisation from the ACCC for resale price maintenance conduct; and

b amend the CCA to provide that actions between related bodies corporate will not be caught as resale price maintenance.

National Access Regime

The Exposure Draft legislation amends the National Access Regime to ensure that it better addresses the economic problem of an enduring lack of effective competition in markets for nationally significant infrastructure services. The three primary changes include:

a amending and clarifying the declaration criteria that must be used by the Council and designated Minister;

b amending the default position, whereby if a Minister does not respond to a declaration recommendation by the Council within 60 days, the Minister will be deemed to have made a decision in accordance with the recommendation; and

c amending and clarifying the scope of a determination made by the Commission to 'extend' a facility in an access dispute.

Authorisation processes

The Exposure Draft legislation amends and simplifies the various authorisation processes in the CCA to:

a consolidate the various authorisation provisions, including the formal clearance process (which has never been used) into a single authorisation process;

b for merger authorisation, the ACCC will be the decision maker at first instance. The ACCC's determination on mergers will be reviewable by the Tribunal on appeal;

c grant the ACCC a 'class exemption' power for conduct or categories of conduct if it is unlikely to raise competition concerns or is likely to generate net public benefits;

d allow the ACCC to impose conditions on notifications for collective bargaining; and

e grant the ACCC a power to issue a 'stop notice' requiring collective boycott conduct to cease.

Price signalling and concerted practices

Under the Exposure Draft legislation:

a the price signalling provisions will be repealed. The anti-competitive disclosure of pricing and other information will be dealt with under the more general prohibitions in the CCA; and

b section 45 will be extended to prohibit a person from engaging in a concerted practice with one or more other persons that has the purpose, effect or likely effect of substantially lessening competition. The amendment aims to capture coordinated practices which may not involve any understanding between competitors.

The ACCC have also released for consultation a framework for guidance on the prohibition of concerted practices.

Power to obtain information, documents and evidence

Under the Exposure Draft legislation, the ACCC's power to obtain information, documents and evidence pursuant to a section 155 notice is extended to cover investigations of alleged contraventions of court enforceable undertakings. The aim is to assist in protecting the integrity of undertakings as part of the broader compliance and enforcement framework.

The Exposure Draft legislation also introduces a defence to section 155(5) if a person refuses or fails to comply with a notice to produce documents if the person has undertaken a reasonable search for those documents.

The maximum penalty for non-compliance with a section 155 notice is also increased from $3,600 or 12 months imprisonment to $18,000 or 2 years imprisonment.

ACCC consultations on draft frameworks for misuse of market power and concerted practices guidelines

The ACCC has also released for comment its draft guidelines on the frameworks for its:

a misuse of market power guidelines; and

b concerted practices guidelines,

both of which are available online.

The ACCC invited feedback on these frameworks which it will take into account in preparing and publishing the guidelines if and when the CCA is amended.

The Department of Communications and the Arts is also seeking comment on what, if anything, needs to change in the telecommunications-specific anti-competitive conduct laws in Part XIB in light of the proposed amendments to s46. A copy of the discussion paper can be accessed online.

The Takeaway

The proposed amendments in the Exposure Draft legislation represent some of the most significant amendments to the competition laws in Australia in the last 20 years. It is important that businesses that operate in Australia are aware of, and adequately prepare for, the changing legal landscape.

Who to contact

For more information, please contact:

Tony O'Malley

Partner, Sydney

+61 (2) 8266 3015

tony.omalley@pwc.com

Murray Deakin

Partner, Sydney

+61 (2) 8266 2448

murray.deakin@pwc.com

PricewaterhouseCoopers, Société cooperative – Hellas Case, 23 December 2015

At a glance

In a well-motivated judgment rendered on 23 December 2015, the Luxembourg Commercial Court (*Jugment commercial* XV N°1648/2015 pronounced on 23 December 2015), in a lawsuit – between Hellas Telecommunications (Luxembourg) II S.C.A. (**Hellas II**) (amongst others), its general partner, Hellas Telecommunications s.à.r.l. (**Hellas**) and its limited partner, Hellas Telecommunications I s.à.r.l (**Hellas I**) – was brought to qualify the nature of the Convertible Private Equity Certificate(s) (**CPEC(s)**) under Luxembourg law.

In detail

Between June 2005 and January 2006, Hellas II issued CPECs, from time to time, to Hellas I. Hellas I issued CPECs for the same amount to Hellas. Hellas, in turn, issued CPECs for the same amount to its investors, being two private equity funds (**Investors**).

Despite several bids that they rejected, the Investors decided to delay a proposed divestment and proceed to a debt refinancing within the group. In this framework, Hellas II notably issued several bonds to new investors, for an amount of more than EUR 1,3 billion (**Bonds**). It was then decided to redeem CPECS up the chain for a total redemption price of EUR 978.659.712, financed by proceeds received from Hellas II subsidiaries and for the main part through the issue of the Bonds.

This redemption price was based on the market value of the Tim Hellas group, as determined by an auditor (not PwC), and on the terms and conditions of the CPECs, which stated that their redemption price was indeed based on market values.

The Investors then sold, on 6 February 2007, the top company, Hellas, which indirectly held the equity interest of the Tim Hellas group, including Hellas I and Hellas II, to a new investor.

On 25 August 2009, Hellas II's centre of main interest (**COMI**) was shifted to the UK. Further to a decision of the High Court of Justice, Chancery Division, Companies Court of London, Hellas II was put into forced liquidation on 1 December 2011, due to its insolvent situation.

The liquidators of Hellas II commenced proceedings against, amongst others, Hellas and Hellas I to challenge the redemption of the CPECs as made to the detriment of, notably, the Bond holders.

The primary argument they brought was that the CPECs should, in their view, qualify as share capital (or at least) as "equity" from a Luxembourg company law standpoint, due notably to the use of the term "equity" in their name and to their possible accounting treatment as equity under International Financial Reporting Standards (but not under Luxembourg Generally Accepted Accounting Principles).

By doing so, they intended to demonstrate that CPECs could only be redeemed if the issuer's accounts present a sufficient amount of available reserves or share premium. (i.e. they intended to apply to the CPECs the capital maintenance rules that apply to shares – notably, the articles 72(1) and 167 of the law of 10 August 1915 on commercial companies, as amended).

Since the accounts of Hellas II did not show a sufficient amount of available reserves and/or premium, the liquidators considered that Hellas had breached the capital maintenance rules, applicable to shares, and that the redemption of the CPECs should be declared null and void.

In July 2015, the Luxembourg tax authority (*Décision directoriale* (bureau d'imposition 6) n°C21188 dated 14 January 2016) further decided to issue rectifying tax assessments claiming for the levying, on the redemption price of the CPECs, of the withholding tax applying to dividend distributions (*Tribunal administratif du Grand-Duché de Luxembourg ordonnance* N°37535 pronounced on 29 February 2016).

The Luxembourg Commercial Court did not follow the position of the liquidators and confirmed that the CPECs qualify as debt from a Luxembourg legal standpoint. The Court further declared that the redemption at market value was contractually correct, since it was in line with the terms and conditions of the CPECs. The liquidators of Hellas II have filed an appeal against these decisions of the Court.

As for the tax authority position, it has not been confirmed by a judgement on its merits yet.

Who to contact

For more information, please contact:

Jean-Yves Lhommel
Partner, Luxembourg
+352 49 48 48 3012
jean-yves.lhommel@lu.pwc.com

Prune Callot
Senior Manager, Luxembourg
+352 49 48 48 5356
prune.callot@lu.pwc.com

www.pwc.com