PwC International Business Reorganisations Network – Monthly Legal Update

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Welcome

Welcome to the eighth 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 August 2016 issue:

- PricewaterhouseCoopers, Société cooperative (Luxembourg) considers recent reforms to Luxembourg company law;
- PricewaterhouseCoopers (Australia) reports on the Federal Government's announcement to introduce two new types of collective investment vehicles in Australia; and
- PricewaterhouseCoopers Belastingadviseurs N.V. (Netherlands) discusses the introduction of new laws requiring companies with more than 50 employees to adopt a whistleblower policy.

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PricewaterhouseCoopers, Société cooperative (Luxembourg) – Luxembourg positively revamps its company law

At a glance

A bill modernizing Luxembourg company law passed the Parliament on 13 July 2016 (the **Reform**). This law innovates the Luxembourg law by reinforcing the attractiveness of the country's corporate framework for multinational companies and investment platforms. Flexibility of the corporate structure is increased through the facilitation of outbound migration, the new regime of conversion into another legal form and the introduction in the law of a simplified liquidation procedure. Key measures also include the recognition of the ability for all companies to issue bonds, including public issuance of bonds for private limited liability companies (**SARL**). The Reform combines the principle of contractual freedom with security for third party, which are the key principles of the Luxembourg company law.

In detail

A flexible corporate structure

Making it easier for companies to relocate abroad

Under the old legislation, Luxembourg limited liability companies could leave Luxembourg (i.e. transfer their registered office and effective place of management abroad) only by a unanimity vote. This requirement was an obstacle for companies with a large number of shareholders. The Reform replaces the unanimity requirement with a qualified-majority vote (representing 2/3 of the share capital in a public limited liability company and 3/4 in a private limited liability company). However, it's possible to require a larger majority, or even unanimity, depending on a company's articles of association.

Transformation into another corporate form

The new transformation regime emanates from contractual freedom, allowing all companies with legal personality to be converted into another corporate form having a legal personality.

A simplified liquidation procedure

Alongside the liquidation standard regime, the Reform introduces a regime of dissolution without liquidation (the so-called "simplified liquidation"). The Reform has the merit to provide both a legal basis to this notarial practice and relevant guarantees to creditors.

Facilitation of financing

Issuance of bonds

As per the reform, all companies are authorized to issue bonds, including convertible bonds. Convertible instruments have always raised concerns in SARL, due to the need for existing members of the company to approve any new member. The Reform allows such agreement to be given in advance and declared irrevocable. This mechanism provides security to investors.

The public issuance of bonds is now also open to SARL. This is an important change as the prohibition of this public issuance used to be a blocker to the choice of this legal form.

Making debt-to-equity conversion easier

So far, the capitalization of a receivable held on a company has been considered as a contribution in kind. As a consequence, this transaction required a contribution-in-kind report issued by an independent auditor in a public limited liability company (**SA**). The value of the contribution is an issue if a company's repayment capacity is reduced due to financial difficulties. The ruling doctrine considers that the receivable can only be contributed at its impaired market value. Therefore, a shareholder wishing to help a company regain a sound financial position suffers a double penalty: firstly, their repayment right falls in ranking (as the receivable is converted into shares); and secondly, the amount of their repayment right drops (from its nominal to its impaired market value).

The Reform solves these issues by providing that the capitalization of a receivable held on a company must be considered as a cash contribution, provided that the receivable is unquestionable, liquid (i.e. valuable in cash) and due.

Diversity of shares

Recognition of tracking shares

The Reform gives a legal basis to a market practice allowing the issue of different categories of shares tracking the return of a company's defined assets or activities. The holders of tracking shares have the same political rights as ordinary shareholders but get a return, which is based on the profits deriving from specific activities or assets of the company.

Shares with different value

The Reform makes it possible for both SA and SARL to issue shares unequal in value. The consequences of this unequal value on the voting rights differ, depending of the legal form.

In a SA, the voting rights will be proportional with the capital represented by the share, unless otherwise provided in the articles of association. In SARL, no exception to the principle "one share - one vote" is foreseen, so each corporate unit will have the same voting rights, regardless of its par value. The way the majority is computed, however, deprives this rule from most of its practical effect.

The Reform also opens the possibility for a SA to issue shares without mentioning their nominal value below the par value of the existing shares of the same category. However, shareholders have to be properly informed of such a transaction.

Non-voting shares liberalization

Restrictions to the issuance of non-voting shares in a SA (i.e. limit of 50% of the share capital and obligation to pay a preferred dividend to the holders of such shares) are abolished. The company's articles of association must set the financial rights attached to such shares.

Voting power

Suspension of voting rights

The Reform allows shareholders in SA and SARL to give up all or part of their voting rights, either temporarily or permanently. This technique may be useful for breaching the proportionality between the voting and economic rights attached to shares. This renunciation is of a personal nature. The shares recover their full voting rights if they're transferred.

The Reform also introduces provisions empowering the board of directors/management to suspend the voting rights of a defaulting shareholder. This type of sanction is mainly used in private equity structures.

Change of qualified majority rules in SARL

Currently, any amendment to a SARL's articles of association is subject to a double-majority test: the amendment must be adopted by a numerical majority of members, representing at least 3/4 of the corporate capital. The Reform abolishes the first majority test (numerical majority).

Conclusion

Existing companies will have two years as of the entry into force to amend their articles of association and comply with the Reform. In the meantime, they will remain subject to the old legislation. A review of the articles of association will be necessary to ensure their compliance with the new legal provisions. A statutory update will be needed should the existing articles conflict the Reform.

To become a law, the Reform must:

a be enacted by the Grand-Duke; and then

b published.

The entry into force occurs three days after the publication.

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PricewaterhouseCoopers (Australia) – New collective investment vehicles announced in Australia's Federal Budget 2016/17

At a glance

As part of its ten year enterprise tax plan announced in last week's Federal Budget, the Federal Government has committed to the introduction of a new tax and regulatory framework for two new types of collective investment vehicles (**CIVs**) – a corporate CIV and limited partnership CIV. The introduction of these two new vehicles brings Australia more closely into the line with a number of other jurisdictions where these types of vehicles are a fairly common structure for collective investment.

While the formal design and tax treatment of the CIVs is still to be determined in consultation with industry, the new CIV regime is a step in the right direction towards increasing the global competitiveness of Australia's funds management industry, particularly given its alignment with the anticipated commencement of schemes compliant with the Asia Region Funds Passport (the **Passport**) in 2017.

In detail

Overview of the new CIVs

The Federal Government's 2016/17 budget papers provide for the introduction of two new vehicles to allow investors to pool their funds and have them managed by a professional funds manager. A corporate CIV will be introduced for income years starting on or after 1 July 2017, to be followed by a limited partnership CIV for income years starting on or after 1 July 2018.

The new CIVs will be required to meet the same eligibility requirements as managed investment trusts (**MITs**), such as being widely held and engaging in primarily passive investment. While MITs are currently the most common form of CIV used in Australia, they are less prevalent in many overseas financial centres and as a result are often avoided by foreign investors who lack understanding of their tax and regulatory framework or may perceive trust structures as an investment vehicle being higher on the risk spectrum.

The introduction of both corporate and limited partnership CIVs, being more common types of investment vehicles that foreign investors generally understand and are more familiar with, removes a natural barrier for foreign investment and increases the attractiveness of inbound investment in Australian managed funds. While this is an obvious motive behind introduction of the new CIVs, it is intended that they not be limited to attracting capital from only foreign investors.

Alignment with commencement of the Passport

Introduction of the new CIV regime from 1 July 2017 is intended to align with commencement of the Passport, with the recently signed Passport Memorandum of Cooperation (**MOC**) between Australia, Japan, Korea and New Zealand expecting to result in the first Passport-compliant schemes being offered by participating economies in 2017.

The Passport is an international initiative that seeks to create a common framework to reduce regulatory inconsistency and overlap faced by collective investment scheme operators offering schemes in multiple jurisdictions. This facilitates the cross-border offering of eligible collective investment schemes while ensuring investor protection in participating jurisdictions. For further information on the Passport, please refer to our publication *Asian Passports, the coming of age*.

Introduction of the new CIVs will inherently improve the effectiveness of the Passport from an Australian perspective by allowing Australian fund managers to offer a broader range of CIVs, particularly those that foreign investors may be more familiar with. With USD 4.5 trillion assets under management as at June 2015, the Asian Region is an important growth area for funds management and one that Australian funds can get better exposure to following commencement of the new CIV regime in conjunction with the Passport.

Expected form and tax treatment

The formal design of the new CIVs has not yet been determined and is expected to require detailed consultation between Treasury and industry to develop, particularly in light of current corporations and partnership laws. The draft Passport rules also require detailed consideration and possible amendment to ensure the new CIVs are not excluded from the concept of a 'collective investment scheme'.

It is worth noting that the current statutory regime for publicly offered investments in Australia does not provide for the operation of certain alternative forms of collective investment vehicles that are common in overseas jurisdictions such as UCITS (Undertaking for Collective Investment in Transferable Securities) funds that currently operate under the EU directive. A UCITS investment structure cannot be registered as a managed investment scheme under the *Corporations Act 2001* (Cth) (**Act**), as the UCITS structure does not include the equivalent of the single responsible entity. Additionally, the UCITS Directive constitutes a prescriptive regulatory regime, where structural requirements for a UCITS are embedded in a law for a UCITS. Essentially, the managed investment scheme and current corporations regime for public offers in the Act does not contain equivalent requirements.

Similar to the existing MIT structure, it is expected that both the corporate and limited partnership CIVs' will have flow through status for tax purposes, meaning investors will generally be taxed as if they had invested directly. However, the specific tax attributes of the new CIVs will also need to be determined in consultation with industry, specifically with respect to the application of Australia's withholding tax rules to the CIVs.

Practical outcome for Australia's funds management industry

As noted above, introduction of the new CIV regime should enhance access by the Australian funds industry to foreign markets and allow more product choice by enabling Australian fund managers to offer a broader range of CIVs and thereby eliminate a natural barrier for inbound investment into Australia. In line with the broad intention of the Federal Government's *ten year enterprise tax plan*, this is expected to increase the global competitiveness of Australia's fund management industry and lead to the realisation of greater commercial success of the Passport from an Australian perspective.

In addition to increasing competitiveness of the Australian funds industry, the new CIV regime also provides an opportunity for Australia to pursue and lead innovation in the financial sector. In response to the Financial System Inquiry conducted in late 2013, the Federal Government cited the Passport as one of three opportunities for innovation in the financial sector. The Assistant Treasurer's announcement of signing of the MOC also noted the Passport as one of the latest innovative measure in funds management. While the new CIVs provide a crucial means by which Australia can realise success of the Passport, it is expected that new ways of connecting the users and savers of capital will emerge beyond the current MITs and proposed CIVs. This presents an opportunity for Australia to lead innovation in funds management; by not only striving to meet global competition but pushing the boundaries to redefine what CIVs of the future might look like.

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Luxembourg positively revamps its company law

PricewaterhouseCoopers (Australia)
New collective investment vehicles announced in Australia's Federal Budget 2016/17

PricewaterhouseCoopers Belastingadviseurs N.V. (Netherlands)
Whistleblower policy mandatory for companies with more than 50 employees

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PricewaterhouseCoopers Belastingadviseurs N.V. (Netherlands) – Whistleblower policy mandatory for companies with more than 50 employees

At a glance

On 1 July 2016, new whistleblower legislation came into force in the Netherlands. The House for Whistleblowers (*Wet Huis voor klokkenluiders*) (**Act**) requires companies with more than 50 employees to implement a whistleblower policy giving guidelines on how to act when "suspected misconduct" is reported within the company. The Act also introduces an external institution for advice and/or investigation in the event of suspected misconduct, called the House for Whistleblowers.

In detail

Objectives

The Act aims at making it easier to report suspected misconduct and increase protection for whistleblowers.

Whistleblower policy

If a business employs more than 50 employees, then the obligation to implement a whistleblower policy applies to that business.

The whistleblower policy needs to address at least the following subjects:

a what qualifies as "suspected misconduct";

b where suspected misconduct can be reported in the organisation;

c how a report of suspected misconduct will be handled, and confidentiality;

d the possibility for the reporting person to consult an external advisor; and

e the circumstances under which the suspicion may be reported externally.

The works council has a right of consent with regard to the whistleblower policy.

When adopted, the policy should be made available for the employees electronically (e.g. through the intranet of the company) or in hardcopy.

House of Whistleblowers

The Act introduces a House for Whistleblowers, where employees can turn to for advice. Employees can also request the House for Whistleblowers to perform an investigation into the suspected misconduct. In principle, an employee needs to report suspected misconduct internally first. Only if the internal report is not handled adequately, the employee can turn to the House for Whistleblowers for advice and assistance.

Recommendation

We recommend that companies with more than 50 employees implement an internal whistleblower policy as soon as possible to prevent– in the absence of an internal policy – employees reporting suspected misconduct externally (e.g. directly to the House for Whistleblowers).

We can assist with designing and drafting a whistleblower policy which takes into account the specific circumstances of your company. In this regard, it is worth mentioning that we have opened a whistleblower hotline, which – in the context of a whistleblower policy –can be offered to your employees as an independent and external point to report suspected misconduct.

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