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PwC International Business Reorganisations Network – Monthly Legal Update

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Welcome

Welcome to the sixth 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 June 2016 issue:

- PricewaterhouseCoopers (Australia) reports on the announcement that tax conditions will formally be applied to the clearance of foreign investment proposals in Australia;
- PricewaterhouseCoopers Limited (Nigeria) considers the impact of a recent judicial decision regarding international payments made under certain contracts; and
- PricewaterhouseCoopers Tax & Legal, Sarl (Cameroon) discusses the introduction of new legislation that obligates commercial companies to update their Articles of Association.

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PricewaterhouseCoopers (Australia) – Tax conditions – clarifying requirements for foreign investment

At a glance

On 22 February 2016, the Australian Government announced that tax conditions will formally be applied to the clearance of foreign investment proposals which present a possible risk to Australia's revenue base, aimed at ensuring foreign investors are compliant with Australian tax laws.

The conditions are intended to formalise and extend the consideration of tax issues in the assessment of Australia's national interest, the key criterion in the foreign investment clearance process, and show a convergence of debate relating to foreign investment regulation and the base erosion and profit shifting (BEPS) agenda.

As part of the Federal Budget handed down on 3 May 2016, the Treasurer released a revised set of conditions, incorporating the feedback it received during the consultation process. It has also been indicated that the guidance note relating to the conditions will be finalised and released shortly to provide additional information on the conditions.

In this article we look at some of the changes made by the Treasury in producing the revised set of conditions.

In detail

Conditions to apply until a termination event

The revised set of conditions clarifies that if any tax conditions are imposed on an applicant, such conditions will continue to apply only until a 'termination event' occurs. A termination event is defined as an event where the applicant ceases to:

a hold the interest;

b control the entity or business; or

c carry on the business that was the subject of the notification imposing the tax conditions.

Although this provides a clear term for the application of the conditions, prospective applicants may be disappointed that the conditions will continue to apply for as long as they continue to be interested in the relevant action, potentially years after it took place.

New conditions to advise of actions and termination events

Two new conditions have been included in the revised set of conditions. These conditions oblige applicants to advise the Foreign Investment Review Board (**FIRB**) within 60 days of:

a taking an action; and/or

b a termination event (please refer to the discussion of this term, above),

notifying FIRB that such action/termination event (as applicable) has occurred.

The requirement to notify that an action has been taken will likely be uncontroversial. However, the additional requirement to notify FIRB of a termination event places an obligation on applicants to continually be mindful of any changes to the structure of an investment, which may be a more onerous requirement to comply with, requiring applicants to have proper reporting systems in place and regularly monitoring those systems.

'Associates' replaced with 'entities in its control group'

The original draft of the tax conditions included conditions requiring applicants to ensure that their 'associates' complied with certain conditions. 'Associate' had the meaning given in section 318 of the *Income Tax Assessment Act 1936*. The practical implication of this was that the reach of certain conditions was extended to a significant degree, capturing, for instance, any entity that may benefit under a trust, as well as partnerships, joint ventures and other arrangements between unrelated third parties. This raised concerns that the scope of the tax conditions may have shifted away from the national interest in respect of a particular investment proposal, to extraneous matters arising from the relationship between third parties which is unrelated to the proposed action.

The revised set of conditions attempts to lessen the impact of the requirement imposed on applicants to ensure compliance by their 'associates' by removing the reference to 'associates' and replacing it with 'entities in its control group'. The definition of this term is limited to entities that:

a control the applicant;

b are also controlled by an entity that controls the applicant; or

c is controlled by the applicant, with 'control' having the meaning given to that term in the *Corporations Act 2001* (Cth).

Provision of information to the Australian Taxation Office

The revised set of conditions clarify the scope of any documents or information to be provided to the ATO and confirm the position that an applicant is only required to provide such documents or information *that is required* to be provided to the ATO in accordance with taxation laws, rather than any documents or information that ATO *may request*. In other words, the revised conditions attempt to clarify that the ATO does not intend to go on a 'fishing expedition' and only information required to be provided to the ATO pursuant to Australia's taxation laws in relation to the action in question is required to be provided.

Removal of express conditions relating to transfer pricing and anti-avoidance rules

The original draft of the tax conditions included conditions requiring applicants (and/or their 'associates') to notify the ATO if they (or their 'associates') entered into any material arrangement in connection with an action to which the transfer pricing rules in Division 815-B of the *Income Tax Assessment Act 1997* or the anti-avoidance rules in Part IVA of the *Income Tax Assessment Act 1936* may potentially apply.

These conditions have been removed in the revised set of tax conditions which may apply to investment proposals that pose a possible tax risk to Australia's revenue base. However, they will continue to apply to those investment proposals where a particular tax risk has been identified and FIRB has determined to impose the condition requiring the applicant to engage in good faith with the ATO to resolve any tax issues in relation to an action. This condition now includes in its footnote that this may include reporting requested information on transactions relating to the transfer pricing or anti avoidance rules. Therefore although the notification requirement has been removed, information with regard to transactions relating to the transfer pricing or anti avoidance rules can still be requested by FIRB.

Conditions clarified

The revised set of conditions amends several of the original conditions to provide further clarity with regard to their application and how to achieve compliance. For example, the previous condition that applicants must generally comply with Australia's taxation laws now includes the clarification that an applicant does not breach this condition if it has taken reasonable care to comply with the relevant taxation laws and has a reasonably arguable position.

These points of clarification will be a welcome addition to prospective applicants and advisers alike.

Guidance note

As stated above, the Treasury has indicated that a guidance note will be released to provide additional information on the conditions shortly.

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PricewaterhouseCoopers Limited (Nigeria) – Intra group contracts, NOTAP Registration certificates and international payments – the common denominator

At a glance

Under the National Office for Technology Acquisition and Promotion Act (**Act**), contracts relating to the use of trademarks, patented inventions; supply of technical expertise, basic or detailed engineering, plant and machinery; and the provision of operating staff, managerial assistance and training of personnel must be registered with the National Office for Technology Acquisition and Promotion (**NOTAP**) before any international payment can be made under such contracts.

A recent decision of the Federal High Court of Nigeria (**Court**) held that international payments, whether in local or foreign currency, cannot be made unless the contract is approved by NOTAP (as such contract is illegal, null and void). Although the Applicant in this case raised sixteen issues for the Court's determination, this article is focused on the Court's interpretation of the Act and the effect of non-registration of a qualifying contract.

In detail

Facts

The Nigerian subsidiary of an international Bank (**Applicant**) commenced proceedings in the Court against the Financial Reporting Council of Nigeria (**1st Respondent**) and NOTAP (**2nd Respondent**).

The 1st Respondent received a petition from minority shareholders of the Applicant and, thereafter, commenced investigation into the affairs of the Applicant. The investigation was focused on the Applicant's audited financial statements for 2013 and 2014, in particular the provisions/accruals made by the Applicant in favour of its parent company in relation to franchise, support service and software licence fees. The licence fees related to banking software, which was purchased abroad and customized in Nigeria to reflect Nigeria's regulatory requirements. The Applicant resold the software to its foreign parent company and in turn entered into a license agreement to use the same software.

During the 1st Respondent's investigation, it found that the Applicant entered into a Sale, Purchase and Assignment Agreement (**Assignment**) with its parent in respect of the bank application software. Under the Assignment, the Applicant ceded all its rights to the software to its parent and agreed to pay an annual licence fee for the use of the software. The 2nd Respondent declined an application to register the Assignment and advised the Applicant to license the application software instead of an outright sale.

Notwithstanding the 2nd Respondent's advice, the Applicant proceeded with the Assignment, did not report the sale of the software or show any fee income in its income statement or reflect the intangible asset in its statement of financial position. Rather, the Applicant made yearly provisions and remittances to its parent as management/franchise fees, despite not obtaining the relevant NOTAP registration. The 1st Respondent took the view that the franchise/management agreement was illegal, null and void and the Applicant's accrual of charges in respect of same was criminal, and rendered the Applicant's 2013 and 2014 accounts materially misstated.

At the conclusion of its investigation, the 1st Respondent directed the Applicant to withdraw and restate the financial statements for the relevant years; suspended the directors who attested to the financial statements from vouching for the integrity of any financial statements issued in Nigeria; and suspended the Engagement Partner (of the external auditors) until investigation as to the extent of negligence and concealment are ascertained.

Pursuant to the foregoing, the Applicant filed an Originating Summons seeking, amongst other things, judicial interpretation of the Act and declarations setting aside the 1st Respondent's decisions.

Decision

The focus of this article is on the Court's interpretation of Section 7 of the Act, which provides as follows:

"*Subject to section 8 of this Act, no payment shall be made in Nigeria to the credit of any person outside Nigeria by or on the authority of the Federal Ministry of Finance, the Central Bank of Nigeria or any licensed bank in Nigeria in respect of any payments due under a contract or agreement mentioned in section 4 (d) of the Act, unless a certificate of registration issued under the Act is presented by the party or parties concerned together with a copy of the contract or agreement certified by the National Office in that behalf.*"

The Court rejected the Applicant's contention that section 7 means where a contract is not registered with NOTAP, the contract would still be enforceable and the Applicant could make payment in the local currency. The Court held that the Act makes no distinction between payments in local or foreign currency, therefore, no payment could be made on an unregistered contract. The Court held that since exportation of the software (i.e. the Assignment) was not approved, importation (licensing) could not be valid in law. Consequently, the Court declared the Assignment illegal, null and void.

The Court also rejected the argument that the Respondents could not regulate the commercial decisions of the Applicant as a sale and lease/licence back agreement was a commercial decision reserved for the Applicant's Board of Directors and not a matter of financial reporting. The Court held as follows:

"*The true intendment of the Section is to prevent a situation where technologies which are beneficial to the Country are not shipped out under any guise of 'business decision' of any public entity. It is therefore clear that the purpose of the National Office for Technology Acquisition and Promotion Act is one to generate income for the government of the Federal Republic of Nigeria on one hand and to prevent dumping of technologies in the Country on the other hand. It is convenient to say that Section 7 of the National Office for Technology Acquisition and Promotion Act is to protect national interest. It is submitted that in so far [as] the Plaintiff is incorporated under the Nigerian laws; its business decision must fall in line with Section 7 of the National Office for Technology Acquisition and Promotion Act. The Plaintiff is in effect seeking to contract outside Section 7 of the National Office for Technology Acquisition and Promotion Act, it is then the law that a person cannot contract outside a statute. The effect of such contract is the nullification.*"

Conclusion

Prior to the Court's decision, it was generally believed that a NOTAP certificate was only necessary if the Nigerian entity wished to access foreign exchange at the official bank rate. It was therefore common for payers to source foreign currency from the parallel market or use their own foreign currency to make payments on unregistered contracts. The effect of this decision is that such practice is now considered illegal, on the basis that it is irrelevant that the obligor (i.e. the Nigerian entity) generates revenue in foreign currency or independently sources foreign exchange as no payment can be made on an unregistered contract. It is important to note however that this decision only applies to registrable contracts under the Act. Other transactions requiring international payments would need to pass the eligibility test under the Central Bank of Nigeria's Foreign Exchange Manual.

The decision will strengthen the practice (by the Federal Inland Revenue Services) of disallowing tax deductions in respect of payments made without a NOTAP registration certificate.

The Court upheld the sanctions imposed by the 1st Respondent, thereby confirming the 1st Respondent's oversight functions over directors of public interest entities (the definition of public interest entities is the subject of appeal in another case being considered by the Court of Appeal of Nigeria) and emphasises the importance of directors' statutory duty to prepare financial statements.

Although this decision is the subject of an appeal, it is the extant law on the issues raised in this matter pending a contrary decision by a superior court.

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PricewaterhouseCoopers Tax & Legal, Sarl (Cameroon) – Harmonisation of the Articles of Association with the revised OHADA Uniform Act relating to Commercial Companies and Economic Interest Groups

At a glance

Commercial companies and economic interest groups formed prior to the revised OHADA Uniform Act relating to Commercial Companies and Economic Interest Groups (**OHADA Uniform Act**), which entered into force on 5 May 2014, are required to update their Articles of Association in accordance with the amendments introduced by the OHADA Uniform Act.

As the OHADA Uniform Act entered into force on 5 May 2014, the time limit for harmonising Articles of Association is 4 May 2016.

In detail

Purpose of harmonising Articles of Association

Pursuant to Article 909 of the OHADA Uniform Act, the purpose of harmonisation is to repeal, amend and replace, where necessary, the provisions of any Articles of Association contrary to the mandatory provisions and to include therein the supplements warranted by OHADA Uniform Act.

This will involve (but is not limited to):

a the removal of current non-compliant provisions and the insertion of the mandatory provisions of the revised OHADA Uniform Act;

b the insertion of the new optional or discretionary provisions based on the company's objectives.

Legal entities subject to obligation to harmonise Articles of Association

The obligation applies to:

a all commercial companies, particularly private

b companies, sleeping partnerships, private limited companies and public limited companies;

c economic interest groups; and

d companies governed by a special regime, subject to any legislative or regulatory provisions that affect them in accordance with Article 916 of the OHADA Uniform Act (this is also the case for publicly traded and semi-public companies).

Methods for harmonising Articles of Association

Articles of Association may be harmonised using one of the following two methods:

a amending the existing Articles of Association; or

b adopting all the provisions of the newly written articles.

Harmonisation is decided upon by the meeting of shareholders or of partners sitting under the conditions of validity of ordinary decisions, notwithstanding any legal or statutory provisions to the contrary, provided there shall be amendment in substance of only those clauses which are incompatible.

However, if harmonisation affects clauses that are not incompatible, making it unnecessary, the fact shall be duly noted by the meeting of shareholders or of partners whose decision shall be subject to the same publication as for the decision to amend the Articles of Association.

Moreover, where, for any reason whatsoever, the meeting of shareholders or of partners has been unable to reach a valid decision, the proposed harmonisation of the articles shall be submitted for the approval of the competent court sitting at the request of the legal representatives of the company.

Time limit for harmonising the Articles of Association

Pursuant to Article 908 of the OHADA Uniform Act, the companies subject to the obligation to harmonise their Articles of Association are required to do so within a period of two years from the entry into force of the OHADA Uniform Act.

As the OHADA Uniform Act entered into force on 5 May 2014, the time limit for harmonising the Articles of Association is 4 May 2016.

Failure to harmonise the Articles of Association

Where the Articles of Association of a company are not harmonised with the provisions of the revised OHADA Uniform Act within a period of two years from the date of entry into force, the clauses of the articles repugnant to these provisions shall be deemed to be unwritten and the new provisions shall apply.

The importance of harmonising the Articles of Association

Harmonising Articles of Association is a means of ensuring the continuity of the contractual and regulatory framework of the entities concerned and of mitigating the related risks, thereby protecting the company from legal insecurity.

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