PwC International Business Reorganisations Network – Monthly Legal Update

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Welcome

Welcome to the third 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 March 2016 issue:

- PwC Legal Netherlands considers the new Dutch legislation regarding the preparation and filing of annual accounts;
- PwC Legal Turkey highlights the main features of asset transfer and spin off procedures in Turkey; and
- PwC Australia reports on the central role that tax compliance has on Australia's foreign investment clearance process.

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PwC Legal Netherlands – New Dutch legislation regarding the preparation and filing of annual accounts

At a glance

On 1 November 2015, new Dutch legislation regarding the preparation and filing of annual accounts entered into force. This legislation implements EU directive 2013/34.EU on annual financial statements.

This new legislation applies to financial years which started on or after 1 January 2016.

In detail

This new legislation includes - among other things -:

a reduction in the term for filing annual accounts;

b introduction of the so-called micro company; and

c modification of the threshold amounts for determining company size.

As a result of these changes, the administrative burden for small companies will be lower.

Reduction in the term for filing annual accounts

The most important change for all Dutch legal entities (to the extent that they are obliged to publish annual accounts) is the reduction of the ultimate term for the publication of the annual accounts (by filing these accounts with the Dutch Chamber of Commerce). Previously, annual accounts needed to be filed with the Dutch Chamber of Commerce within 13 months after the financial year ended. This period is reduced to 12 months for financial years started on or after 1 January 2016.

Introduction of micro company

Under Dutch law, the reporting, auditing and filing requirements depend on the size of the company. For financial years started on or after 1 January 2016, in addition to the three already existing size categories, a fourth size category was introduced. To this so-called micro company, additional far-reaching exemptions regarding the preparation and filing of annual accounts apply.

Modification threshold amounts

The threshold amounts of the other categories are also extended. These new amounts are:

	Micro	Small	Medium	Large
Total value of assets	≤ € 350.000	≤ € 6 million	≤ € 20 million	> € 20 million
Net turnover	≤ € 700.000	≤ € 12 million	≤ € 40 million	> € 40 million
Number of employees	< 10	< 50	< 250	≥ 250

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PwC Legal Turkey – Asset transfer and spin off procedures in Turkey

At a glance

Asset transfer and spin off are governed by different regulations under Turkish legislation. The main legislation for asset transfer is the Turkish Code of Obligations No.6098 (**TCO**), whereas spin off is mainly regulated within the provisions of the Turkish Commercial Code No. 6102 (**TCC**).

Before the TCC, spin off was only regulated under the tax legislation since it was usually preferred due to tax concerns. However, considering the practical needs and its close connection to commercial law, it is also stipulated under the commercial law legislation for the first time with the enactment of the TCC in 2012.

Before opting in an asset transfer or spin off procedure, the main purposes of companies (e.g. transfer of assets, mitigation of damages, restructuring for specialization purposes) should be evaluated in detail.

In detail

Asset transfer is the procedure through which the assets of an entity are transferred in return for a certain consideration. On the other hand, spin off can be defined as the transfer of assets to one or more companies in return for acquiring shares in such company(s).

The main features of asset transfer and spin off can be observed in the following topics:

a liability towards creditors;

b companies in risky financial standing;

c necessary permissions; and

d employees.

Liability towards creditors

TCO and TCC set forth certain rules for the protection of creditors in case of asset transfer and spin off.

As per the TCO, the transferee of an asset transfer transaction, who takes over an asset with the assets and liabilities thereof, shall be liable against the creditors for the debts of such asset. Nevertheless, the previous debtor of the asset shall continue to be liable as a joint debtor together with the transferee for a period of 2 (two) years upon the transfer transaction. Therefore, the creditors may demand their receivables either from the previous debtor or the transferee company in case of asset transfer.

On the other hand, a different protection mechanism is stipulated for the creditors in case of spin off. Accordingly, a company wishing to realize a spin off transaction will make an announcement to its creditors prior to the spin off transaction. On the basis of such announcement, the creditors will inform the company about their receivables and may demand guarantee from the company for these receivables. The company should provide guarantee for the receivables of creditors, otherwise the spin off transaction cannot be completed. Thus, the announcements to be made before the spin off transaction serve the purpose of protecting the creditors in case of spin off transaction.

Companies in risky financial standing

In principle the transferor should notify its creditors in advance about the planned asset transfer transaction. However, the asset transfer is not subject to registration before official authorities. Therefore, if the transferor does not comply with its notification obligation, the creditors may not be aware of the transfer transaction. In such case, companies that are not in a solid financial position may transfer their assets without informing the creditors and the receivables of these creditors may be at risk.

In order to protect the creditors from such risk, the Execution and Bankruptcy Code (**EBC**) stipulates a specific provision. Accordingly, if the financial situation of the debtor insolvent company and its intention of damaging the creditors is known by the creditors or there are clear indicators for such intention, the asset transfer transaction may be challenged before the court. In such case, if the transferor company meets the criteria in the EBC, the asset transfer transaction may be cancelled through a lawsuit to be filed.

On the other hand, no explicit regulation was foreseen for the spin off of companies in risky financial standing. Yet, it is required to prepare a sworn financial advisor's report in case of spin off. Such report must clearly indicate that the receivables of the creditors are not at risk due to the planned spin off transaction. Therefore, the financial status of the company can be ensured through the sworn financial advisor's report in case of spin off.

Necessary permissions

As per the Law regarding the Protection of Competition No. 4054 (**CL**), if the volume of a merger and/or acquisition transaction (including share and/or asset transfer) exceeds certain ratios set forth by the Competition Authority, the permission of the Competition Authority must be obtained. Accordingly, asset transfer transaction must be assessed in terms of CL and other applicable competition legislation. Also, in order to determine the value of the asset to be transferred (if the asset is a real estate), the permission of the competent court may be necessary.

Although no specific permission requirement was foreseen for the spin off procedure, certain governmental permissions may be required depending on the company's field of activity. For instance, if the company's shares are publicly traded, the permission of the Capital Markets Board should be obtained before the spin off transaction.

Employees

In principle, if the asset transfer or a spin off transaction constitutes a workplace transfer, the employees will be automatically transferred to the transferee company. However, for the automatic transfer of employees, the working conditions of the employees should be maintained. Otherwise, the employees may terminate the employment relationship due to the asset transfer/spin off transaction in line with the Turkish labor legislation. In the case of a workplace transfer, the date when the employee started working in the transferor company will be taken into consideration in the calculation of employment receivables (e.g. severance payment, notice pay etc.).

In addition, the TCC requires the approval of employees for the transfer of employment agreements in case of spin off, regardless of workplace transfer. Accordingly, if the employee does not reject the transfer of his or her employment agreement, the employment relationship will be transferred with all the rights and liabilities arising until the transfer date. If the employee rejects the transfer of employment, the employment agreement will be terminated at the end of the employee's legal notice period. Therefore, it may be inferred that the approval of employees should be obtained in case of spin off, even if the spin off transaction does not constitute a workplace transfer.

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PwC Australia – Tax compliance central to Australia's foreign investment clearance process

At a glance

The Australian Government has announced that conditions will formally be applied to the clearance of foreign investment proposals, aimed at ensuring foreign investors are compliant with Australian tax laws. The conditions include requirements relating to the settlement of outstanding debts, ongoing compliance with tax laws and annual reporting to the Australian Taxation Office (**ATO**).

The conditions 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.

There are a number of implications arising from the imposition of the conditions, with possible impacts on the timing and certainty of clearance of transactions and the creation of ongoing compliance and reporting obligations for foreign investors.

In detail

The national interest test

The Australian government has always welcomed foreign investment that is in Australia's national interest and this is the criterion by which foreign investment proposals are assessed, under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**).

The components of Australia's 'national interest' has been intentionally left without definition in FATA, providing the Treasurer, acting on the advice of the Foreign Investment Review Board (**FIRB**), with the flexibility to assess each proposal on its merits, without being bound by prescriptive rules.

The inherent uncertainty for foreign investors in this approach has been addressed to some degree by the publication of Australia's Foreign Investment Policy by FIRB (**the Policy**), which provides guidance on the kinds of factors that will often be considered in the assessment of Australia's 'national interest'.

The protection of Australia's tax base has long been one of the factors that FIRB and the Treasurer has taken into account when assessing Australia's 'national interest'. The focus on tax has steadily increased in recent years, in line with enhanced information-sharing between Australian Government agencies.

New conditions on foreign investment clearance

The Treasurer is empowered to provide a certificate of non-objection in respect of a foreign investment proposal, including subject to conditions, under section 74 of FATA. The imposition of conditions has traditionally occurred in response to issues of concern that are specific to the particular proposal. We are aware, for instance, that approval has been conditional upon obtaining a private ruling from the ATO.

In his statement of 22 February the Treasurer confirmed that a standard set of conditions would be applied to clearance of investment proposals; in summary these conditions require applicants to, and use its best endeavours to procure its associates do, the following in relation to a proposal:

a comply with Australian tax law in relation to the proposal and associated transactions;

b provide information to the ATO in relation to the application or potential application of Australia's tax laws to the proposal or associated transactions;

c notify the ATO of any material transactions or dealings it has or will enter into in connection with the proposal or associated transactions, to which the transfer pricing or anti-avoidance provisions of the Australian tax law may apply that have not been previously notified;

d pay any outstanding tax debt which is due and payable at the time of the proposal; and

e necessary permissions.

The Treasurer has foreshadowed the imposition of two additional conditions where a significant tax risk is identified, in this case an applicant may be required to:

a engage in good faith with the ATO to resolve any tax issues in relation to the proposal; and

b provide information specified by the ATO on a periodic basis, including a forecast of tax payable.

New conditions on foreign investment clearance

The Treasurer's announcement of the imposition of these additional conditions come shortly after an extensive process of reform of Australia's foreign investment framework undertaken throughout 2015. The process constituted the most significant change to Australian foreign investment structure in 40 years, including:

a transferring certain responsibilities from FIRB to the ATO, particularly in relation to compliance and enforcement, taking advantage of the greater resource and technical capabilities of the ATO;

b formalising information sharing between Commonwealth government agencies;

c amending screening thresholds for certain types of acquisition;

d establishing registers of foreign land ownership;

e introduction of significant fees for applications before a proposal is considered by FIRB; and

f undertaking a wholesale re-write of the FATA.

You can find additional information on these in the previous alerts which we published in 2015.

It is early days in the life of the new regime, although the increased focus and resource of the foreign investment clearance process is obvious.

Many foreign investors who had become accustomed to the old regime had regarded it as a procedural, rather than substantive, review. The new regime requires foreign investors to carefully prepare their foreign investment proposal, including doing the analysis needed to be able to clearly articulate the commercial rationale for a transaction, the tax impact it will have and the benefit of the transaction to Australia. This will be increasingly important to avoid delay in processing of applications and the unnecessary characterisation of proposals towards the higher end of the risk spectrum, which may lead to the imposition of additional conditions.

The takeaway

The imposition of the conditions confirms the central role that tax compliance has in the assessment of Australia's national interest. The conditions will result in heightened scrutiny of the tax impact of foreign investment proposals, particularly in relation to corporate group restructuring by multi-national groups.

The requirement to provide potentially extensive information to the ATO, along with the ongoing annual reporting requirements, imposes additional compliance obligations on foreign investors.

The conditions follow the broader foreign investment reform process in 2015 and underline the importance for investors to adopt a renewed diligence in carefully planning foreign investment proposals.

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