PwC International Business Reorganisations Network – Monthly Legal Update

Edition 3, August 2015

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Welcome

Welcome to the third edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for 2015.

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 2015 issue:

- PwC Ireland gives a high level overview of some of the significant changes brought in by the new Irish Companies Act 2014;
- PwC Legal Germany reports on a new decision of the Regional Court of Frankfurt on matters of codetermination of employees; and
- PwC Australia provides an update on foreign investment law developments in Australia.

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

PwC Ireland – The new Irish Companies Act 2014

At a glance

After 15 years of preparation, a new Companies Act for Ireland was enacted on 23 December 2014 (the **Act**). The bulk of legislation came into force on 1 June 2015.

Irish company law was previously based on the needs of large public limited companies, but the new law focuses on the private limited company with shares and simplifies the existing law.

The law in relation to companies remains substantially the same, but there are some significant changes including new obligations and exposures on Directors, amendments to the type of entity and the introduction of a new regime whereby two Irish private companies can now merge.

In detail

1. New Company Types and Conversion

From commencement of the Act on 1 June 2015, there is a transition period of 18 months during which time all existing private companies with shares must choose to become either:

a a Private Company Limited by Shares (**LTD**);

b a Designated Activity Company (**DAC**); and

c another form of company.

Other entities in Ireland now include:

a an unlimited company (**UC**);

b a public company (**PLC**); and

c a guarantee company (**CLG**).

If the companies do nothing, i.e. do not convert to a LTD or DAC, they will be deemed a DAC for the transition period and a LTD thereafter.

Company limited by shares

The LTD company type will have a number of advantages including a more simplified format allowing for a simple constitution. No name change is required.

Some of the main differences between the LTD and the existing private company limited by shares (**EPC**) are set out below:

EPC	LTD
Minimum of two directors	Minimum of one director
No requisite skills requirement for secretary	Company secretary must have the requisite skills or access thereto
Two document Memorandum & Articles of Association	Single document Constitution
Capacity limited by powers in Memorandum – ultra vires	Ultra vires does not apply
No facility available to register persons authorised to bind the company at CRO	Option to register those entitled to bind the company at CRO

Only single member companies may dispense with AGM	Multi member companies may dispense with AGM
Written resolutions must be passed by all members	May pass written resolutions by the relevant majority

Designated Activity Company

Certain companies will be required to register as a DAC (e.g. regulated financial institutions). Others will need to decide if a DAC vehicle will suit their current or desired structure. These companies will have a two document constitution and must have two directors. A name change will also be required whereby Designated Activity Company or DAC must replace Limited.

Unlimited Company

An unlimited company will continue to have a Memorandum and Articles of Association called a Constitution. However, it may opt to have just one member (currently it must have at least two), it must have two directors and it must add the suffix "Unlimited Company" or "UC" to its name.

Public Limited Companies

This is the only company type permitted to have shares listed on the stock exchange. A PLC will continue to have a Memorandum and Articles of Association called a Constitution. However, it may opt to have just one member (currently it must have at least seven) and at least two directors. No name change is required.

Guarantee Companies

This is the most common form of entity used by charities, sports and social clubs and management companies. A CLG will continue to have a Memorandum and Articles of Association called a Constitution. However, it may opt to have just one member (currently it must have at least seven). It will be able to take advantage of the audit exemption (not currently available) and it must have two directors. Finally, a name change will also be required whereby Company Limited by Guarantee or CLG must replace Limited.

2. Codification of Directors' Duties

Previously, judges have decided what the fiduciary and care duties of directors are. These are now restated and codified in eight rules in the Act, as set out below

Directors duties

- Act in good faith
- Act honestly and responsibly
- Act in accordance with the company's constitution and to exercise those powers only for lawful purposes
- Not to use company property unless approved by the members or the company constitution
- Not to fetter discretion unless permitted by the constitution or unless it is in the company's interest
- To avoid conflicts of interest
- To exercise care, skill and diligence
- To have regard for the interests of members as well as employees

A breach of directors' duties can result in a director having to personally account for any direct or indirect gains accrued by the director and to indemnify the company for any loss or damage arising from the breach. A court may grant relief from liability where it is satisfied that the director acted honestly and reasonably at all times. Company Law Offences are categorised 1 to 4 (1 being the most serious and carrying a maximum fine of EUR500,000 and/or up to a maximum of 10 years in prison).

Other statutory duties for Directors

Directors of all public limited companies and certain larger private companies (those with a balance sheet exceeding EUR12.5m and turnover exceeding EUR25m) will be required to produce a compliance statement to be included in the director's report on the financial statements.

Each director will be required to confirm in the directors' report that all relevant audit information of which they are aware (having made reasonable enquiries) has been conveyed to the auditors. It will be an offence to knowingly or recklessly make a false statement.

The disclosure of interests in shares and share options has been amended so that de minimis interests of less than 1% are no longer required to be notified.

3. New Merger Regime for Private Limited Companies

Part 9 of the Act now provides for a new regime whereby two Irish private companies can merge. The procedure is modelled on the CBM Regulations applicable to cross-border mergers. It allows for merger by:

a acquisition – one company acquires the assets and liabilities of another company which is then dissolved by operation of law (without the requirement to be placed into liquidation);

b absorption – a parent company absorbs the assets and liabilities of the wholly owned subsidiary which is then dissolved by operation of law (without the requirement to be placed into liquidation); or

c formation of a new company – a newly incorporated company acquires the assets and liabilities of a company which is then dissolved by operation of law (without the requirement to be placed into liquidation).

Mergers under Part 9 of the Act can be effected by either court order confirming the merger or by using a new Summary Approvals Procedure (**SAP**) under which a majority of the directors of each merging company swears a declaration in respect of the post-merger solvency of the successor company. No later than 30 days after this declaration is sworn, the members of each merging company must pass a unanimous special resolution approving the common draft terms of the merger.

Please note the SAP is not available where one of the companies is a PLC. In this situation an application must be made to the High Court.

4. Directors Loans

The new Act introduces changes to the requirements relating to directors' loans in that all loans should be properly documented. Under the new Act, if a loan to a director is not in writing, it is presumed that the loan is repayable on demand and bears interest. If a loan by a director to a company is not in writing, it is presumed not to be a loan and is not repayable. If the director can prove that it is a loan but it has not been documented, the loan will be interest free, unsecured and to the extent that it is not secured, it is subordinate to all other indebtedness of the company.

5. Loans / Intra-group transactions

Under the Act, a company is prohibited from:

a making a loan or a quasi-loan to a director of the company of its holding company or a person connected with such a director;

b entering into a credit transaction as a creditor for such a director or a person so connected; or

c entering into a guarantee or providing any security in connection a loan, quasi-loan or credit transaction made by any other person for such a director or a person so connected.

However, the Act provides that a company is not prohibited from making a loan or quasi-loan to any body corporate which is its holding company, subsidiary or a subsidiary of its holding company.

6. Commentary

Now is an opportune time for organisations with a large number of companies to review their group structure before the end of the transition period and so we are likely to see an increase in group simplifications in Ireland.

While the Act has simplified much of the existing company law legislation, it has placed a far greater burden on directors and clients should be properly advised on the implications that the new Act could have on their constitution.

Who to contact

For more information, please contact:

Ruairí Cosgrove
Director
+ 353 (0) 1 792 6070
ruairi.cosgrove@ie.pwc.com

Trudy Kealy
Senior Manager
+353 (0) 1 792 6881
trudy.kealy@ie.pwc.com

PwC Legal Germany - New decision of the Regional Court of Frankfurt on matters of codetermination of employees

At a glance

The Regional Court of Frankfurt (the **Court**) decided on 16 February 2015 (File Number Az. 3/16 O 1/14) that employees who do not work in Germany are to be included when determining the threshold of Sec. 1, 5 German Codetermination Act (Mitbestimmungsgesetz – MitbestG. This is in contrast to the current practice where only employees working in Germany are considered.

The decision is not yet final and binding. It is up to the Higher Regional Court to uphold or reject the decision

In detail

A German corporation employing more than 2,000 employees has to set up a supervisory board whereby half of its members are composed of employees or their representatives (Sec. 1 MitbestG). The employees of the subsidiaries of a group are deemed to be employees of the controlling company (Sec. 5 MitbestG). According to the decision of the Court this comprises also employees of other EU countries.

Prior to the decision of the Court, it was generally accepted that only employees working in Germany are to be considered when determining the threshold. The Courts' decision was issued following a legal dispute at Deutsche Börse AG. This corporation only exceeds the threshold of Sec. 1 MitbestG when taking employees of other EU countries into account. Up to then, its supervisory board had been put together according to the German One-Third Codetermination Act (Drittelbeteiligungsgesetz - DrittelbG) (i. e. just one third of its members had been elected by the employees). A university professor of labour law from Munich had filed a motion for reviewing the composition of the supervisory board after acquiring 100 registered shares in Deutsche Börse AG.

Justification for decision

The Court justified its decision as follows

a the materials pertaining to the MitbestG were based on the premise of taking employees from Germany into account only. This, however, originated from the territoriality principle which changed due to EU legislation;

b the wording of the MitbestG does not indicate to exclude employees employed in countries other than Germany;

c the MitbestG does also not constitute a concept of its own regarding corporate groups but refers to the general terms of Sec. 17, 18 German Stock Corporation Act (Aktiengesetz - AktG) which does not distinguish between domestic and foreign dependent companies; and d at least subsidiaries situated in EU-countries must be taken into account mandatorily. Any divergent practice would violate the European Community laws´ principle of non-discrimination as stated in Art. 18 of the Treaty on the Functioning of the European Union (TFEU).

Views on this subject

Most law scholars are criticizing the Courts´ decision. Especially the legislative materials pertaining to the MitbestG speak against the inclusion of the foreign workforce. Any changes on this sensitive issue are the sole responsibility of the German legislators who – up to now – did not see any good reasons to do so. Nearly all law scholars are of the opinion that this decision will be overruled by the higher court.

Consequences

In case the decision of the Court is upheld, there would be far-reaching consequences especially for medium-size companies with a large work force and international structures. Many of their supervisory boards would then be composed incorrectly or even would have to be newly formed.

Our recommendations

We recommend to attentively follow up on the future development of this matter. German corporations that would presently not be~~en~~ affected by mandatory codetermination or are subject to the DrittelbG, should monitor the number~~s~~ of their employees, especially taking into account subsidiaries in other EU countries. International group restructures and acquisitions should also be viewed from the perspective of the German codetermination law. However, in our opinion one should not act hasty and structure the group without careful planning.

In order to prevent any surprises, it could be worthwhile contemplating alternate structures. Whether a business partnership with a foreign general partner or the founding of a Societas Europea (SE), there are several group structures which are still not subject to German codetermination.

Who to contact

For more information, please contact:

Robert Dorr

Local Partner and German Head of International Business Reorganisations, Stuttgart

Direct: +49 (0) 711 25034 1505

Email: robert.dorr@de.pwc.com

Dirk Krome

Senior Manager, Stuttgart

Direct: +49 (0) 711 25034 1530

Email: dirk.krome@de.pwc.com

PwC Australia – Foreign investment law update

At a glance

As the regulation of foreign investment in Australia continues to evolve we provide an update on a number of recent developments:

- signing of the China-Australia Free Trade Agreement;
- announcement of a 3% stamp duty surcharge in Victoria for foreign acquirers of real property;
- commencement of real estate surveillance and enforcement by the Australian Taxation Office;
- announcement of a package of reforms of Australian foreign investment laws;
- amendment of complying fund requirements for the Significant Investor Visa program; and
- establishment of a Premium Investment Visa program.

In detail

Signing of the ChAFTA

The China Australia Free Trade Agreement (**ChAFTA**) was signed by both countries in a ceremony in Canberra on 17 June 2015. Each country will now undertake their treaty ratification processes ahead of the agreement becoming effective; this is expected by the end of the year.

In summary, the benefits of ChAFTA to Chinese investors in Australia are:

a the asset threshold for screening investments made by Chinese private investors in non-sensitive sectors will be raised from its current level of $252 m to $1,094m, in line with investors from other major trading partners such as the United States, Japan and New Zealand;

b tariffs on resources, energy and manufactured goods will be eliminated immediately, whilst tariffs in certain sensitive industries such as automotive, steel, aluminium, plastics, canned fruit, carpets, clothing and footwear, will be phased out within 2 to 4 years; and

c a more liberal approach to visa and immigration requirements will apply to Chinese investors.

Surcharges for foreign investors acquiring real estate in Victoria

The Victorian Government has announced in the 2015-16 State Budget that a 3% surcharge will apply to stamp duty payable on the acquisition of residential real estate in Victoria by foreign investors from 1 July 2015. A 0.5% land tax surcharge will also apply to absentee property owners from 2016.

Commencement of surveillance and enforcement by the Australian Taxation Office

The Australian Taxation Office (**ATO**) has assumed responsibility for the audit, compliance and enforcement of foreign investment laws relating to acquisitions of residential real estate.

The ATO has commenced using its data matching capabilities to review foreign investment applications for the period 1 July 2010 to 30 June 2016 for potential breaches of foreign investment laws. We understand that over 150 cases of potential breaches are currently under investigation by the ATO.

Responsibility for the administration of the foreign investment regulation of residential real estate, including the collection of the application fees, the upfront screening process, compliance activities and enforcement action, will be transferred to ATO from 1 December 2015.

Foreign investment reforms

Foreign investment in Australia is primarily regulated by the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**Act**), the *Foreign Acquisitions and Takeovers Regulations 1989* (Cth) (**Regulations**) and Australia's Foreign Investment Policy (**Policy**).

The Australian Government announced a package of reforms to enhance compliance by foreign investors with Australia's foreign investment requirements in May 2015. In support of this, the Australian Government has released an updated edition of the Policy, which provides guidance on the measures, and proposed legislative changes to the Act and Regulations. The new legislation is expected to come into force in December 2015.

Establishment of register of foreign interests in agricultural land

A register has now been established by the ATO to record interests in agricultural land held by foreign investors (**Register**). Importantly, it is expected that information in the Register will be made available to the Australian public in 2016.

Compulsory notification of foreign interests in agricultural land

From 1 July 2015, all acquisitions by foreign investors of interests in Australian agricultural land must be notified to the ATO within 30 days of the acquisition, regardless of value. Foreign investors have until 31 December 2015 to notify the ATO of existing interests they may have.

Registration is different to national interest screening

The obligation to register the acquisition of an interest in agricultural land is distinct from the obligation to notify the Treasurer of a proposed acquisition of an interest in 'Rural Land' or vacant 'Urban Land' for assessment of whether the acquisition is contrary to the Australian national interest.

The term 'Agricultural Land' is defined in the Policy as: 'land in Australia that is used, or that could be reasonably used, for a primary production business'.

In contrast, the term 'Rural Land' is defined in the Policy more narrowly as: 'land used wholly and exclusively for carrying on a business of primary production. To be a business of primary production, the business must be substantial and have a commercial purpose or character'.

For completeness, these definitions will be captured in the new legislation.

For instance, an acquisition of an interest in vacant land that might be used for agriculture may require registration as 'Agricultural Land' but may not fall within the definition of 'Rural Land'. In this case it is likely to be considered 'Urban Land' and may be subject to compulsory national interest screening under the Policy, regardless of value. For completeness, we also set out below the screening thresholds for acquisitions of 'Rural Land':

Investor	Screening threshold
US, NZ, Chile private investor	$1,094m – standalone basis
Singapore, Thailand private investor	$55m – standalone basis
All other private investors	$15m - cumulative basis
Foreign government investors	$0

New complying investment framework for Significant Investor Visa program

The Australian Government has announced changes to the complying investment framework for the popular Significant Investor Visa (**SIV**) program in order to direct investment away from residential real estate and passive investment towards investment in innovation and industrial development.

The changes to the investment framework will commence from 1 July 2015 and will require a visa applicant to invest at least $5 m over four years in the following investments:

Minimum Investment amount	Type of investment
$500,000	AusIndustry registered funds (either Early Stage Venture Capital Limited Partnership or Venture Capital Limited Partnership).
$1,500,000	Funds investing in emerging companies (e.g. a company that have a market capitalisation of less than $500,000,000 at the time the securities of the company are purchased by the fund).
Balance up to $3,000,000	Managed funds (open or close-end) or Listed Investment Companies that invest in a combination of eligible assets that include other ASX listed companies, corporate bonds, annuities and real property.

Importantly, investment in residential real estate will only be permitted to comprise 10% of the $5m minimum investment amount (although investors may invest in excess of this outside of this limit).

New premium investment visa program

A new class of investment visa, the Premium Investment Visa (**PIV**) program will be introduced on 1 July 2015. Unlike SIV which requires investor to invest $5 m into complying investments for a minimum of 4 years before being eligible to apply for a permanent visa, PIV offers a more expeditious, 12 month pathway to permanent residency. It is established to attract talented entrepreneurs and innovators and access to the program will be by invitation of the Australian Government.

An applicant under the PIV will be required to invest a minimum of $15,000,000 in managed funds or direct investment in ASX listed assets, government or semi-government bonds or notes, corporate bonds or notes, proprietary limited companies, real property in Australia (excluding residential property), annuities or government approved philanthropic donations.

Who to contact

For more information, please contact:

Andrew Wheeler
Partner, Sydney
+61 (2) 8266 6401
andrew.wheeler@au.pwc.com

Simon Lewis
Director, Sydney
+61 (2) 8266 2161
simon.lewis@au.pwc.com

Kent Chong
Associate, Sydney
+61 (2) 8266 0289
kent.a.chong@au.pwc.com

www.pwc.com