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 2018.

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 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 2018 issue:

- Landwell - PricewaterhouseCoopers Tax & Legal Services, S.L. (Spain) examines a recent judgment relating to the remuneration of directors; and
- PricewaterhouseCoopers (Australia) explores the potential impact of Australia's new Anti-Money Laundering and Counter-Terrorism Financing regulation of cryptocurrency.

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Landwell - PricewaterhouseCoopers Tax & Legal Services, S.L. (Spain) – Spotlight on the remuneration of directors

At a glance

The amendment of the Spanish Capital Companies Act (**Act**) for the improvement of corporate governance, which came into force on December 2014, has left a lot of questions broadly discussed by the legal doctrine and subject of relevant judicial discussion.

A recent judgment of the Spanish Supreme Court has turned around the mainly accepted interpretation of the regulation of the remuneration of directors since the amendment of the Spanish Capital Companies Act in 2014 (**Supreme Court Judgment**). This new interpretation could have relevant impact on corporate governance and tax matters, if it becomes consolidated case law, and companies shall review their situation in order to adapt to it and mitigate potential risks that may arise in case of not doing so.

In detail

1. Directors remuneration system in Spain

One of the most important aspects of the latest amendment of the Spanish Capital Companies' Act was the establishment of new rules for the remuneration of directors. Prior to the amendment, the Act only made reference to the need of contemplating the remuneration system in the articles of association and of having it approved by the shareholders.

As a consequence of the amendment, the Act now makes reference to the need of shareholders to approve the remuneration system of the directors "in their condition as such" (article 217), while establishing the legal requirement of formalising a contract between the company and its managing director or directors performing executive duties (article 249). Such contract shall include all compensation items related to the performance of such executive duties (including dismissal compensation, should the case be) and shall be approved by the board of directors.

Therefore, the main legal doctrine and judicial precedents, including the General Directorate of Registrars and Notaries, understood the Act to be making a difference between (i) the remuneration to be paid to directors for the development of their duties ("in their condition as such") under article 217, and (ii) the remuneration to be paid to managing directors or directors performing, in addition, executive duties for the development of such kind of duties under article 249. The first remuneration type was required to be included in the articles of association and approved by the shareholders, while the second one was required to be approved by the board of directors.

The Spanish Supreme Court has recently argued against the abovementioned interpretation, ruling that the application of both articles is not mutually exclusive but cumulative.

2. Judgment of the Spanish Supreme Court 98/2018 of February 26

This judgement issued by the Spanish Supreme Court has turned around this interpretation, which was generally accepted by notaries, registrars and jurists, and is having great impact on several related aspects such as tax and labour aspects or the need to update companies' remuneration policies.

Following the challenging of a Registrar ruling, the Supreme Court stated that they do not share the interpretation maintained by the General Directorate of Registrars and Notaries based, mainly, on the understanding that application of different legal requirements to non-executive and executive directors compromises transparency and negatively affects the information rights of shareholders.

Therefore, according to the Supreme Court, the approval of the remuneration of directors (either executive or non-executive) is structured in three levels:

a Provisions of articles of association

The remuneration system and remuneration items of all directors shall be included in the bylaws.

b Shareholders' resolutions

The maximum amount for the remuneration of all directors, for the exercise of their duties as directors, managing directors and executive directors, for all remuneration items, shall be established by resolution of the general shareholders' meeting.

c Directors' resolutions

Unless otherwise resolved by the general shareholders' meeting, the directors shall distribute the remuneration among them considering the functions and responsibilities assigned to each of them. Likewise, if the Board of Directors (in the event that the relevant company is managed by such body) appoints a managing director or delegates its executive duties in favour of one of its members by any other title (e.g. through the granting of general powers of attorney), article 249 shall apply. Therefore, the company and the relevant director shall formalise the relevant contract considering the legal requirements for its approval.

3. Consequences of the judgement and actions going forward

Even though the commented judgement does not constitute consolidated case law, the judgement will foreseeably have important consequences that companies need to anticipate.

This ruling has set forth the need for each company to review its current situation and adapt to the requirements on a case-by-case basis. Generally, the recommended course of action involves the following:

a Review of the functions performed by the directors, their scope and limitation in order to determine the existence executive directors.

b Review of the articles of association to determine the remuneration system established in them and to confirm that it covers the situation of the company.

c Review of the remunerations already paid in order to check their alignment with the judgement.

d Review of the contracts subscribed with the executive directors.

e Taking the relevant measures to ratify past actions and establishing actions going forward.

The consequences of not aligning the remuneration system with the judgement should be taken into account from two main perspectives:

From a tax perspective, the Spanish Corporate Income Tax Law establishes that expenses on acts contrary to the legal system are non-deductible. Therefore, if case law determines that the Capital Companies' Act shall be interpreted in the way explained above, the consequence may be that remunerations of directors not complying with the above interpretation are not considered deductible for CIT purposes.

From a corporate or civil law perspective, attention shall be drawn to the liability of directors not complying with the recommended measures, as Spanish corporate law establishes that directors may be held liable before the company itself, corporate creditors, shareholders and other stakeholders in case of breach of their duties as such, when such breach entails a damage.

The fact that directors do not review the situation of the company in order to adapt it to this new interpretation or in the case paid remunerations are not aligned with the interpretation set forth by the judgement, may be considered as a breach of their due diligence duty.

From the point of view of the affected director, the fact that the shareholders are understood to be entitled to approve the maximum annual remuneration of directors (including executive directors and managing directors) entails that they may, from time to time, approve a maximum amount below the one stated in their relevant contract. This fact shall be taken into account when drafting, executing and approving these contracts, taking into consideration specific clauses that may mitigate the consequences and better protect the directors.

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PricewaterhouseCoopers (Australia) – New AML/CTF Regulations for Cryptocurrency exchanges

At a glance

Global cryptocurrency regulation is a varied landscape, with some countries implementing outright bans on Initial Coin Offerings, and others setting out to become 'blockchain islands'. Australia appears to recognise cryptocurrency is here to stay and has introduced regulatory oversight by amending Anti-Money Laundering and Counter-Terrorism Financing (**AML/CTF**) laws to cover Australian digital currency exchanges. The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) commenced regulatory oversight on 3 April 2018. Despite many applauding the new laws as a boost to consumer confidence in the budding digital currency industry, some believe regulating exchanges will merely chase investors offshore in search of friendlier jurisdictions.

This article explores the potential impact of Australia's new AML/CTF regulation of cryptocurrency

In detail

1. New AML/CTF Laws

On 3 April 2018, AUSTRAC commenced regulation of digital currency exchanges (DCEs) under new AML/CTF laws in Australia made through amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (Act).

2. Who and what is covered?

The new laws apply to anyone who provides a registrable digital currency exchange service. This covers any service that involves the exchange of any fiat currency, whether Australian dollars or not, to cryptocurrency and vice versa. The service must be provided in the course of carrying on a digital currency exchange business.

Cryptocurrency, or 'digital currency', is defined as a 'digital representation of value that functions as a medium of exchange, a store of economic value, or a unit of account'. Digital currency is also defined as being publicly available, interchangeable with money, able to be used for consideration and not government-issued. This definition excludes money in closed gaming environments and any government-issued cryptocurrencies that may exist in the future. The AML/CTF laws may also be amended at a later date to identify specific digital currencies that fit, or do not fit, within the definition.

Once registered, DCEs are subject to AML/CTF compliance and reporting obligations. DCEs will be required to collect and store information on customers' identities and transactions, have a system to monitor suspicious activity, report any suspicious transactions over AUD 10,000 and establish an AML/CTF compliance program. With many smaller exchanges in start-up phase, the cost and technical knowledge required to implement and maintain an adequate AML/CTF compliance program will be challenging, and could lead to the larger exchanges gaining further market prominence.

DCEs may apply to the AUSTRAC CEO for exemptions from any of the provisions, although it remains to be seen whether the AUSTRAC CEO would grant any such exemptions.

3. Time limits for registration

All DCEs must be registered with AUSTRAC by 14 May 2018. After that date, new exchanges will be required to register before beginning their business operations. Registration must be renewed every three years.

14 May 2018 is the deadline to register with AUSTRAC

From 3 April to 2 October 2018, AUSTRAC will implement a 'policy principles period' during which a DCE will not be subject to enforcement action as long as it is taking 'reasonable steps' to implement these compliance obligations. After the period expires, all DCEs must be registered and be compliant. This 'policy principles period' gives DCEs time to establish an AML/CTF compliance program and implement the necessary procedures to support ongoing AML/CTF compliance.

4. Penalties for non-compliance

Under section 76A of the Act, a person can face up to two years' imprisonment, a fine of up to AUD105,000, or both, for providing unregistered DCE services, or if they breach a condition of their registration. The penalty doubles if the breach occurs after receiving compliance directions from the AUSTRAC CEO or there is a breach of a compliance undertaking.

If a second breach occurs, the penalty increases to seven years' imprisonment, AUD420,000 or both.

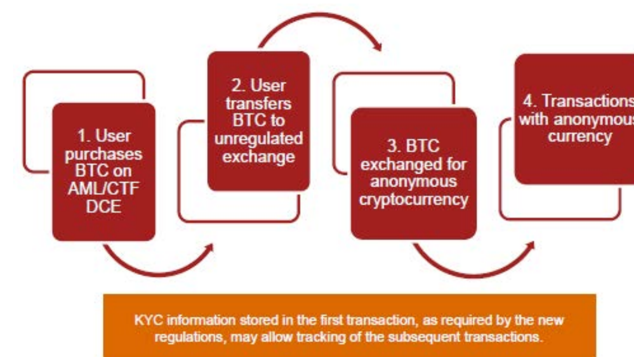
5. Market response to regulation

Australian DCEs appear to welcome the new laws. There are currently seven major DCEs operating in Australia, and within the first two weeks of implementation, four of them have received licences from AUSTRAC (Blockbid, Bid Trade, BTC Markets and Independent Reserve). Blockbid, which is preparing to open in 2019, is the first DCE to prospectively register.

Cryptocurrency analysts also tend to agree that AML/CTF laws will boost consumer confidence and promote the adoption of cryptocurrencies into mainstream transactions. The uptick in confidence will come from participants knowing that these new laws allow AUSTRAC to monitor Australian exchanges and probe into large-value cryptocurrency to fiat transactions, which until now have remained unchecked.

Even crypto-to-crypto exchanges which are excluded from the new laws are likely to be impacted as it would still be possible to track a user's information on a crypto-to-crypto exchange if the initial fiat-to-currency transaction occurred on an AML/CTF regulated exchange. Purchases of 'completely anonymous' cryptocurrencies, such as Monero, may therefore be capable of being tracked.

6. Is this the end of anonymous trading?



Whilst the Australian market will be better protected through regulation, there are still foreign alternatives for crypto investors looking to remain anonymous. It will be interesting to monitor the account activity at Australian DCEs in the coming months to identify any trends. The foreign DCE market includes more than 100 DCEs that allow Australians to purchase cryptocurrencies without AML/CTF checks. Users can also use VPNs to mask their geographical location to open accounts through these DCEs or when purchasing cryptocurrencies.

However, AML/CTF compliance is becoming a norm globally in crypto-regulation and, as each new jurisdiction jumps on board with regulation, the window of opportunity for fully anonymous cryptocurrency purchases appears to be narrowing.

7. The potential flight risk

While there is risk that some investors head offshore, up and coming DCEs themselves may also leave for friendlier jurisdictions. OKEx, one of the world's largest exchanges, packed up operations in Hong Kong and moved to the 'blockchain island' of Malta following China's clampdown on cryptocurrency trading. Bitfinex, also in Hong Kong, is looking to move to Switzerland, a country self-described as a 'cryptocurrency haven'.

One of Australia's most successful DCEs, CoinJar, relocated to London in 2014 citing an unwelcoming regulatory environment as the reason. At that time, Australian banks had closed 17 DCE accounts in order to comply with their own AML/CTF obligations.

Whilst some jurisdictions pose more minimum regulatory requirements on cryptocurrency platforms, the overall global landscape is changing.

Under the European Union's Fourth Anti-Money Laundering Directive (4AMLD) passed in June 2017, member states will have 18 months to begin AML/CTF regulatory oversight for cryptocurrency transactions. The US, Taiwan, Vietnam, India and many other jurisdictions have also passed, or are in the process of passing, laws that implement AML/CTF regulations for DCEs.

Some jurisdictions are taking an even harder stance. In January 2018, South Korea banned all anonymous cryptocurrency trading. China has seen the mass exodus of DCEs and in February 2018 released an AML Regulatory Framework that will apply not just to DCEs, but also to cryptocurrency miners and wallets.

The takeaway

Australia's new AML/CTF laws for DCEs came into effect on 3 April 2018. Existing DCEs have until 14 May 2018 to register with AUSTRAC while new exchanges will be required to register prior to opening their doors for business.

The new laws effectively bring DCEs under the scope of existing AML/CTF compliance and reporting obligations, which many financial institutions are subject to, and will require DCEs to incur costs and develop increased technical capability to ensure compliance. However, the new laws are in line with the global trend towards imposing AML/CTF regulations on cryptocurrency transactions. When considering the endgame for many cryptocurrencies is to achieve mainstream adoption, Australia's new laws should only help to promote the integrity of cryptocurrency trading within the broader marketplace.

AUSTRAC has released a guide for DCEs on preparing and implementing an AML/CTF program, which can be downloaded here.

If you operate, or intend to operate, a DCE you can enrol for the AUSTRAC digital currency register here.

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Spotlight on the remuneration of directors

PricewaterhouseCoopers (Australia)

New AML/CTF Regulations for Cryptocurrency exchanges

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