PwC International Business Reorganisations Network – Monthly Legal Update

Edition 1, June 2015

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Welcome

Welcome to the first edition of the revised PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update.

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 2015 issue:

- PwC Legal UAE highlights the key changes under the new Federal Law No. 2 of 2015 concerning Commercial Companies which will affect companies operating in the United Arab Emirates;
- PwC Australia considers proposed reforms to Australia's foreign investment laws; and
- Law Square (Belgium) details the practical consequences of the last phase of the abolition of bearer shares held in Belgian companies.

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 Legal UAE – The new UAE Commercial Companies Law (Federal Law No. 2 of 2015)

At a glance

In the UAE the new Federal Law No. 2 of 2015 concerning Commercial Companies (**New CCL**) will come into force shortly, replacing the Federal Law No. 8 of 1984 (**Old CCL**).

According to the New CCL all onshore companies are required to amend their existing memoranda and articles of association in accordance with the New CCL by 30 June 2016. Companies that fail to make the required amendments by that date will be automatically dissolved.

The most noticeable part of the New CCL is what has not changed, with the restrictions on foreign ownership of onshore companies maintained, at least for the time being.

In detail

The stated objective of the New CCL is to continue the UAE's development into a global standard market and business environment and, in particular, raise levels of corporate governance, protection of shareholders and promotion of corporate social responsibility.

The following article highlights the key changes which will affect all types of companies operating in the UAE. To get a better understanding of the forthcoming changes the article includes short links with reference to the situation under the Old CCL.

1. Key changes for all UAE companies

a Foreign ownership restriction

The New CCL contains a new provision explicitly invalidating any transfer of shares which may affect the minimum UAE national shareholding of 51% (article 10 of New CCL).

The Old CCL, in contrast, did not have such provision explicitly invalidating any transfer of shares that will be a breach of the minimum UAE national shareholding of 51%. Nevertheless the Old CCL did prohibit any assignment of a UAE national shareholding below the 51% threshold.

PwC Legal UAE commentary

Despite much speculation, the New CCL retains the same approach as the Old CCL in relation to the foreign ownership restrictions i.e. 51% (UAE national) /49% (foreign), or 100% GCC nationals.

Whilst, the UAE government has said that it is considering relaxing this restriction in certain industry sectors under a new Foreign Direct Investment Law regime, the timing of that law is unclear at this stage.

b Holding companies

While the Old CCL did not recognise the concept of a "holding company", the New CCL does.

Limited Liability Companies (**LLCs**) and Joint Stock Companies (**JSCs**) are now permitted to be established as holding companies in order to conduct business activities solely through their relevant subsidiaries (article 266 of the New CCL).

PwC Legal UAE commentary

In many other jurisdictions, setting-up holding companies is now a common practice for large corporate groups to achieve tax and/or other corporate benefits in their corporate structure.

By recognising the concept of a "holding company" under the New CCL, the UAE will become more appealing, as a jurisdiction, to large corporate groups when they are considering restructuring or establishing a presence in the UAE.

c Director's/manager's duties

The Old CCL imposed limited duties and obligations on directors/managers.

However, under the New CCL a director/manager (a person authorised to manage the company) must preserve the rights and works of the company with the care of a precise person (article 22 of the New CCL). In addition, any provision in the company's memorandum and articles of association exempting any director/manager from personal liability (that he/she bears in his/her capacity as an officer) is voidable (article 24 of the New CCL).

PwC Legal UAE commentary

The New CCL introduces this explicit article:

a stipulating that directors/managers must act for the benefit of the company; and

b voiding any provision in the company's memorandum and articles of association exempting a director/manager from personal liability.

The intention is to bring directors'/managers' duties closer to international standards.

d Companies registrar

The New CCL introduces for the first time the concept whereby the Minister of Economy will issue a regulation setting out the activities and functions of the Companies Registrar. In particular, the Companies Registrar shall supervise the trade name register (to avoid double registration), hold company records and enable concerned parties to inspect the relevant company records (articles 33 – 38 of New CCL).

PwC Legal UAE commentary

We await to see whether the establishment of the Companies Registrar will lend more coordination to the formation and dissolution of companies in the UAE.

In theory, the Companies Registrar should provide better access to corporate records by registering the information that companies are legally required to supply. However, given that only "concerned parties" may request information from the Companies Registrar, we do not expect the general public will have access to such information.

e Accounting requirements

The Old CCL imposed only limited accounting requirements on companies.

Now all companies are required to keep accounting records at their head office for a minimum period of five years (article 26 of New CCL). In addition, all companies must apply international accounting standards and practices when preparing their accounts in order to give a clear and accurate view of profits and losses.

PwC Legal UAE commentary

The aim is to bring accountability and transparency of a company up to international standards. Consequently, a company should be able to accurately reveal, at any time, the financial position of the company, and enable shareholders to verify that the company's accounts are properly kept in accordance with the New CCL.

It is helpful that the New CCL permits companies to retain electronic versions of their documents (provided that such documents will be saved in compliance with a decree to be issued by the Minister of Economy).

f Free zone companies

The Old CCL was not applicable to free zone companies.

Generally, the New CCL will not be applicable to free zone companies. However, if the laws of the free zone permit certain free zone companies to operate outside the relevant free zone (ie onshore), then the New CCL will be applicable to such free zone companies (article 5 of New CCL).

PwC Legal UAE commentary

Allowing certain free zone companies to operate onshore will provide greater business flexibility/mobility and, therefore, it is logical for such free zone companies to be subjected to the New CCL.

However, it is unclear how this will work in practice, as the Federal Cabinet has yet to issue a resolution to determine the conditions and requirements to register free zone companies to operate outside of the relevant free zone.

g Excluded companies

The Old CCL only excluded companies excluded by resolution of the Federal Cabinet and companies operating in certain oil, gas or power sectors.

Companies exempt from the New CCL are:

a companies excluded by resolution of the Federal Cabinet;

b companies wholly owned by federal or local government and companies held in full by such companies (if a special provision to this effect is contained in the company's memorandum and articles of association); and

c companies operating in certain oil, gas or power sectors in which the federal or local government directly, or indirectly, holds 25%(if a special provision to this effect is contained in the company's memorandum and articles of association) (article 4 of New CCL).

2 Key changes for Limited Liability Companies (LLC)

a Sole shareholder

Under the Old CCL the minimum number of shareholders in an LLC was two.

Now, one natural person, or corporate entity, may be the sole shareholder of a LLC (article 71 of the New CCL), and one corporate entity may be a sole shareholder of a Private JSC (article 255 of the New CCL).

PwC Legal UAE commentary

Allowing a sole shareholder to incorporate an LLC means that sole shareholders may enjoy the benefit of limited liability in their businesses by exercising their sole discretion.

Given the continuing foreign ownership restriction, this change will primarily benefit Emirati and entrepreneurs from other GCC countries.

b Share pledges

The Old CCL did not include provisions permitting shareholders in LLCs to pledge their shares.

The New CCL allows shareholders in LLCs to pledge their shares. Pledges must be made in accordance with the company's memorandum and articles of association, and be notarised. Such pledges shall only be valid (against the company and/or relevant third parties) from the date of entry on the commercial register (article 79 of New CCL).

PwC Legal UAE commentary

The Old CCL was silent in respect of pledging of shares, and so it was questionable whether shares could be pledged legally under the old regime. Introducing a new provision for perfecting security by way of share pledge over shares in an LLC should improve access to debt financing as shareholders will now be able to grant security over their shares.

However, it remains unclear how the new provision will be interpreted as the New CCL is silent in respect of the concepts of "share certificate" or "numbered/registered shares" attributable to any shareholder in an LLC.

c Maximum number of directors/managers

The Old CCL determined a maximum of five directors/managers.

The New CCL removes this cap on the number of directors/managers: The management of an LLC can be undertaken by one or more directors/managers as determined by the company's memorandum and articles of association or the general assembly of the company (article 83 of New CCL).

PwC Legal UAE commentary

Removing the cap on the number of directors/managers appointed to an LLC will allow for greater business flexibility and networking, and enable talented external advisers to sit on the board of directors/managers (particularly helpful to regional family businesses with a large group of companies).

d Non-compete by directors/managers

The Old CCL did not include a provision explicitly restricting directors/managers from managing competing businesses.

Under the New CCL other than with the consent of the general assembly of the company, a director/manager is not permitted to manage another competing company (including another company with objects similar to the company) (article 86 of New CCL).

PwC Legal UAE commentary

This concept of non-compete is consistent with the new director's/manager's duties provisions (ie directors/managers have to act for the benefit of the company).

e Valuation of shares for non-cash consideration

Under the Old CCL shareholders could agree to a valuation of shares in kind, and the basis of such valuation was prescribed in the company's memorandum and articles of association.

Under the New CCL Valuation of shares can be assessed in kind either by:

a agreement with all of the shareholders, and subject to the approval of the DED; or

b by a financial consultant approved by DED (article 78 of New CCL).

PwC Legal UAE commentary

Whilst it has become slightly more onerous for the shareholders to agree to a valuation of their shares in kind (ie non-cash consideration) as such valuation has to be approved by the DED, the New CCL does allow professional financial advisers (pre-approved by the DED) to assist with such valuation (which could potential expedite the valuation process especially in situations where there is a disagreement between the shareholders).

The assistance of professional financial advisers should add certainty to the valuation process. Those advisers must be mindful of their duties under the New CCL.

3 Key changes for JSCs

a Share capital (general)

Under the Old CCL:

a 55% of a Public JSC's share capital was required to be offered to the public on an IPO, and there were no provisions concerning underwriting and/or book-building activities;

b minimum share capital was AED 10 million for a Public JSC and AED 2 million for a Private JSC;

c the concept of an authorised share capital was not recognised;

d only a single class of shares was permitted; and

e there was no prohibition on financial assistance.

Key changes within the New CCL include:

a only 30% of a Public JSC's share capital must be offered to the public in an IPO, and the New CCL also stipulates that the Securities & Commodities Authority may issue resolutions concerning underwriting and/or book-building activities (articles 117, 123 and 129 of New CCL);

b minimum share capital of AED 30 million for a Public JSC (article 193 of New CCL), and AED 5 million for a Private JSC (article 256 of New CCL);

c a Public JSC may have an authorised share capital not in excess of twice the issued share capital (article 193 of New CCL);

d more than one class of shares is now permitted as the Federal Cabinet may issue a resolution determining rights, obligations and conditions of different classes of shares (article 206 of New CCL); and

e JSCs and their subsidiaries may not provide financial assistance to any shareholder to hold shares, bonds and sukuk issued by the company (financial assistance includes loan, gifts, donations, company's assets as security or provision of security/guarantee of the obligations of another person) (article 222 of New CCL).

PwC Legal UAE commentary

In essence, the intention of these various changes (some of which are stricter than the Old CCL, and some of which are more relaxed) is to stimulate interest in companies wishing to grow their businesses through UAE capital markets fund raisings, whilst at the same time provide more comfort and transparency to potential investors (especially non-professional investors from the public at large).

b Protection of minority shareholders

The Old CCL granted a relatively limited protection of minority shareholders.

The New CCL includes:

a subject to the consent of board of directors/managers and general assembly of the company, a Public JSC may not undertake transactions, with related parties, of a value in excess of 5% of the share capital of such company (article 152 of New CCL);

b shareholders with 5% or more of a Public JSC may apply to the Securities & Commodities Authority and/or a competent court claiming that the affairs of the company are, or have been, conducted to the detriment of any of the shareholders (article 164 of New CCL); and

c voiding any resolutions passed for, or against, a certain class of shareholders, or to bring a special benefit to a related party, without consideration of the interests of the Public JSC as a whole (article 170).

PwC Legal UAE commentary

In light of recent financial uncertainly in the global markets, protection of minority shareholders has been elevated on the agenda of companies wishing to promote good corporate governance and corporate social responsibility in order to regain the confidence of investors. The measures under the New CCL are another step to ensure that the UAE's stance on corporate governance reflects international standards.

c Auditors rotation

Whereas the Old CCL had no requirements regarding auditors rotation, all Public JSCs must now apply a three year auditor rotation policy. The general assembly may appoint one or more auditors for one renewable year, provided that such term does not exceed three successive years (article 243).

PwC Legal UAE commentary

Public JSCs should be mindful not to breach this requirement of rotating auditors every three years (if the same auditors have been retained up to the statutory maximum appointment period under the New CCL).

d Takeover regime

The Old CCL did not include explicit provisions concerning takeovers.

Under the New CCL any person, or group of associated persons, desiring to act in any way that may lead to the takeover of shares (or securities convertible to stocks) in the share capital of a Public JSC must comply with all resolutions issued by the Securities & Commodities Authority (article 292 of New CCL).

PwC Legal UAE commentary

The New CCL includes a "placeholder" for the introduction of a takeover code by the Securities & Commodities Authority, and we await confirmation on the timeline for the development of the regulatory framework of the takeover code.

e Corporate governance regime

Similar to the takeover regime, the Old CCL did not include explicit provisions concerning corporate governance.

Under the New CCL, for Private JSCs with more than 75 shareholders, the Minister of Economy shall issue resolutions concerning a corporate governance framework.

For Public JSCs, the Securities & Commodities Authority shall issue resolutions concerning a corporate governance framework.

The board of directors/managers of the relevant Private or Public JSC shall be responsible for compliance with the applicable corporate governance framework, and failure to do so may lead to a penalty up to a maximum of AED 10 million (articles 6 and 7 of New CCL).

PwC Legal UAE commentary

Similar to the provisional takeover code mentioned above, the New CCL includes "placeholders" for the introduction of corporate governance frameworks for both Public JSC and Private JSC, and we await confirmation from the relevant authorities on the timeline for the development of those frameworks.

The takeaway

This article aims to provide an overview of the key provisions rather than an exhaustive list of all of the changes. Whilst the New CCL represents the first major overhaul of commercial companies law in the UAE since 1984, certain aspects remain ambiguous, and we await further guidance and clarifications from the relevant authorities in due course.

Who to contact

For more information, please contact:

Alan Wood (ME M&A Leader)
Practitioner of Law (UAE)
Solicitor (England & Wales)
Direct: +971 (0) 4 304 3739
Email: alan.wood@pwclegal.co.ae

David Pang (M&A Specialist)
Practitioner of Law (UAE)
Solicitor (England & Wales)
Direct: +971 (0) 4 304 3229
mail: david.pang@pwclegal.co.ae

PwC Australia – Australian foreign investment reform

At a glance

The Australian Government has announced reforms to enhance the integrity of Australia's foreign investment review and compliance processes, following the Treasury consultation earlier in the year.

The reforms include the imposition of significant fees for investors proposing to enter into transactions, an enhanced penalty and enforcement regime and clarification of definitions relating to agricultural land and enterprises. Legislation will be introduced to Parliament in time for a 1 December 2015 commencement.

Background

Foreign investment has played an important role in the development of the Australian economy and has been supported by successive Australian governments. Foreign investment is regulated in Australia through a screening process established under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**Act**), associated legislation and policy, which is administered by the Foreign Investment Review Board (**FIRB**) and its secretariat within Treasury.

There has been growing community concern about the role of foreign investment in exacerbating housing affordability problems in Australian cities, as well as a perceived loss of control of rural lands; these issues were raised during the 2013 election and explored by the House of Representatives Standing Committee on Economics (**House Committee**) in 2014.

In light of the recommendations of the House Committee, the Treasury undertook a consultation process in early 2015, releasing the '*Strengthening Australia's Foreign Investment Framework*' discussion paper (**Discussion Paper**). The Discussion Paper included a range of proposals aimed at tightening the administration and compliance of the foreign investment review process and received over 192 submissions in response.

The Prime Minister and Treasurer announced on 2 May a package of measures to be introduced reflecting, in large part, the key proposals in the Discussion Paper. It is expected that legislation will be introduced into Parliament to amend the Act in the last quarter of the year, with a view to most of the new provisions commencing on 1 December.

Further to the announcement made by the Prime Minister and Treasurer, FIRB has announced that any foreign investors who voluntarily disclose possible breaches of foreign investment rules for residential real estate during the period from 2 May 2015 to 30 November 2015 are expected to receive more lenient treatment.

In detail

Key Changes

The key changes that have been announced were foreshadowed in the Discussion Paper and include:

1 **Higher criminal penalties** – the maximum criminal penalties available under the Act will increase to 750 penalty units (AU$127,500) or 3 years imprisonment for an individual and 3,750 penalty units (AU$637,500) for a company.

2 **Introduction of civil penalties** – civil penalties, akin to those existing in the *Corporations Act 2001 (Cth)* will be introduced to the Act, supplementing the existing criminal penalties, to provide a more graduated penalty regime to respond to different types and severity of non-compliance.

3 **Specific penalties for real estate** – in addition to criminal and civil penalties that may be available, a number of specific penalties will be introduced in relation to acquisitions of residential real estate:

- compensation orders to avoid investors profiting from non-compliance, requiring the disgorgement of gains made on sale, or a percentage of purchase price or market value; and
- infringement notices for less serious breaches, which are tiered depending on whether the foreign investor voluntarily comes forward or is detected through compliance activities.

4 **Third party liability** – third parties who are involved in a breach of the Act may now be liable:

- those who 'knowingly assist' an investor to breach the Act may be subject to the same civil penalty that would apply to the primary offender – The ambit of this could conceivably include agents, service providers and professional advisors; existing criminal liability would remain;
- property developers who fail to market a development in Australia in breach of the relevant advanced off-the-plan certificate may be subject to both civil and criminal liability; and
- property developers who fail to comply with foreign investment reporting requirements may be subject to infringement notice or civil penalty.

5 **Notification fees** – fees will now be charged for investors notifying FIRB of proposed transactions, in contrast to the historical position in which no fees have been charged. The amount of the fee will depend upon the type and value of the proposed investment.

6 **ATO to conduct compliance and enforcement functions** – the Australian Tax Office (**ATO**), rather than FIRB, will conduct audit, compliance and enforcement activities relating to acquisition of residential real estate, utilising the enhanced data and organisational capabilities of the ATO.

7 **Agribusiness** – a AU$55 million screening threshold for investments in agribusiness will be introduced. The proposed definition of 'agribusiness' will include primary production businesses (generally those within Division A of the Australian and New Zealand Standard Industrial Classification Codes) and certain first stage downstream manufacturing businesses (including meat, poultry, seafood, dairy, fruit and vegetable processing and sugar, grain and oil and fat manufacturing).

8 **Agricultural land** – the screening threshold for acquisition of agricultural land was reduced to AU$15 million from AU$252 million through changes to the Australia's Foreign Investment Policy. The Act will be updated to introduce a new definition of 'agricultural land' which goes beyond the existing definition of 'rural land' to include land used, or that could reasonably be used, for a primary production business.

9 **Foreign ownership land register** – an agricultural land register with information provided directly to the ATO will be established from 1 July 2015 and the Government is in negotiations with the states and territories to use their land titles data to expand the register to include all land by 1 July 2016.

What you need to do?

1 **Reporting prior breaches** –depending on individual circumstances, foreign investors who voluntarily disclose possible breaches of the Act relating to residential real estate before 30 November 2015 may be given twelve months to divest a property rather than a shorter period determined by the Treasurer and not be referred to the Commonwealth Director of Public Prosecutions for criminal prosecution.

2 **Ongoing compliance** – The reforms underline the need for foreign investors to be fully aware of their notification and clearance obligations. Investors need to factor the notification process into their timetables and seek legal advice early in the process of assessing an acquisition, to avoid delay.

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PwC Australia
Australian foreign investment reform

Law Square (Belgium)
2015: The year of the final abolition of bearer shares!

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

Law Square (Belgium) – 2015: The year of the final abolition of bearer shares!

At a glance

2015 is definitely the year of the final abolition of bearer shares in Belgium. All companies which still have bearer shares in circulation must sell these shares.

Action is required, both at the company level and at the shareholder level.

In detail

On 14 December 2005, the Belgian legislator introduced a gradual abolition of bearer shares held in Belgian companies (Act of 14 December 2005 on the abolition of bearer shares, as amended on several occasions, the **Act**).

During the first phase, which started on 1 January 2008 and ended on 31 December 2013, bearer shares could no longer be issued. Listed companies were obliged to amend their articles of association, to include the possibility to convert into and/or to issue a new type of shares ie the dematerialised shares, while this was only optional for non-listed companies. Non-listed companies could therefore decide not to have dematerialised shares.

As from 1 January 2014, all bearer shares still in circulation were automatically (by force of law) converted into registered or dematerialised shares for non-listed companies, depending on the company's articles of association. Listed companies' bearer shares became dematerialised shares by force of law.

Also, as from 1 January 2014, all rights pertaining to these bearer shares were "suspended". Therefore, owners of bearer shares presenting themselves at a general shareholders' meeting in 2014, could no longer participate in or vote at the general shareholders' meeting, could no longer receive a dividend, etc. However, they could, during 2014, at any time and without penalty, make themselves known and ask the issuing company to convert their shares and record them as a shareholder accordingly. As from then on, their rights were reinstated.

Since 1 January 2015, we have entered into the last phase of the abolition of bearer shares.

Public sale between 1 January 2015 and 30 November 2015

All companies which still have bearer shares in circulation on 1 January 2015 must sell these shares, in accordance with the formalities provided for by the Act, as further detailed by a Royal Decree of 25 July 2014.

The sale must be preceded by the publication in the Annexes of the Belgian State Gazette and on the website of Euronext Brussels of an announcement.

The legal references and the request to all shareholders to make themselves known and claim their shares should be included. The effective sale can only take place one month but in any case should be initiated within three months as from this publication, and must be completed by 30 November 2015. As long as the sale has not taken place, the owners of such shares can claim the conversion of their shares.

Listed companies must organise this sale through Euronext Brussels. Non-listed companies must organise an auction through Euronext Expert Market ie the new Multilateral Trading Facility of Euronext Brussels. A recognised intermediary will act as auctioneer. The latter will determine a bid price based on recent transactions or if not available, based on the company's net-asset value. The shares will have to be offered on four subsequent occasions, unless all shares would have been sold in the meantime.

Anyone, including the (other) shareholders of the issuing company or the company itself, can act as a buyer.

Deposit with the Deposit and Consignments Fund between 1 December 2015 and 31 December 2015

Between 1 December 2015 and 31 December 2015, the net proceeds of the abovementioned sale needs to be deposited with the Belgian Deposit and Consignments Fund (**D&C Fund**). The shares which were not sold need to be registered in the name of the D&C Fund in the companies' shareholders' register. A special notification will have to be sent to the D&C Fund, containing, amongst others, the certificate of registration, the number of shares, the price received for the shares, etc.

As from 1 January 2016

The issuing company must have its statutory auditor or, if there is none, an auditor, external accountant or recognised bookkeeper confirm in writing that it has complied with the selling procedure. This written confirmation must be submitted to the D&C Fund. The company must also state in its 2015 annual accounts that this verification occurred.

Anyone who presents himself as a shareholder after 1 January 2016 may request a corresponding refund (if the shares were sold) or may claim the unsold shares. However, by doing so this shareholder will be fined an amount equal to 10% of the net profits or the value of the shares per year of arrears. This means that as from 1 January 2026, those shares will become worthless.

Therefore, to avoid that the Belgian State becomes the owner of the sales proceeds and/or of the shares, the issuing company should inform the D&C Fund, before 31 December 2025, of its intention to buy the shares back.

Criminal sanctions

Non-compliance with the foregoing selling procedure may lead to criminal sanctions being imposed on the issuing company.

2015 is definitely the year of the final abolition of bearer shares. Action is required, both on company level and on shareholders' level.

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Australian foreign investment reform

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Who to contact

For more information, please contact:

Elise De Baerdemaecker
+32 2 710 78 03
elise.de.baerdemaecker@lawsquare.be

Bart Vanstaen
+32 2 710 43 10
bart.vanstaen@lawsquare.be

www.pwc.com

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