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 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 November 2015 issue:

- PwC Legal The Netherlands considers the proposed introduction of a central shareholders register and an ultimate beneficial owner register in the Netherlands;
- PwC Legal Finland highlights the main changes to the new Finnish Corporate Governance Code; and
- PwC Australia reports on the key findings of Australia's corporate regulator on the regulation of corporate finance for the period 1 January to 30 June 2015.

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PwC Legal The Netherlands – Ultimate Beneficial Owner Register vs central Shareholders Register in the Netherlands

At a glance

In the fight against money laundering schemes, as well as schemes used by business to avoid their tax responsibility, two initiatives have been taken by the Dutch legislator and the European Parliament:

a introduction of a central shareholders register; and

b introduction of an ultimate beneficial owner register.

The introduction of those registers will increase the transparency of shareholders and ultimate beneficial owners in the Netherlands. However, it is noted that registers will not be publicly available as restrictions to the accessibility of both registers will apply.

The introduction of the central shareholders register is currently on hold and will be reconsidered. It is suggested to combine both initiatives.

The introduction of the ultimate beneficial owner register needs to be in place before May 2017.

In detail

In 2015 two initiatives have been taken that will increase the transparency of shareholders of entities in the Netherlands:

a introduction of a central shareholder register; and

b introduction of an ultimate beneficial owner register (**UBO Register**).

Central Shareholders Register

In January 2015, a draft bill on the introduction of a central shareholders register in the Netherlands was published for consultation by the Dutch legislator.

According to the draft bill, specific details of the shareholders, usufructuaries and holders of a right of pledge on shares in the capital will be registered in the central shareholders register. The registration of the details of depositary receipt holders is not envisaged in the draft bill. In the central shareholders register only direct shareholders will be registered, the (indirect) ultimate beneficial owners of the companies will not appear from this register.

The central shareholders register will be managed by the Dutch Chamber of Commerce and the Dutch civil-law notaries will be obliged to register any changes to the information in the central shareholders register.

Access to the information in the central shareholders register will be limited. Only Dutch civil- law notaries, certain public authorities, the shareholders, usufructuaries and holders of a right of pledge and the directors of the relevant company will have access to the information in the central shareholders register.

Initially it was the intention that the bill come into force on 1 January 2016. However, in July 2015, the Dutch minister published a statement stating that, after consultation with the Dutch Chamber of Commerce and the Royal Dutch Association of Civil-law Notaries (KNB), it appeared that the introduction of the central shareholders register would need to be reconsidered due to the complexity of the introduction of the central shareholders

register and the fact the UBO Register will be introduced.

Ultimate Beneficial Owner Register

On 20 May 2015, the European Parliament adopted the fourth Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the **Directive**). According to the Directive, it will be mandatory to include information about the ultimate beneficial owners of companies in a public register. The member states need to adopt appropriate legislation to comply with the Directive before May 2017.

Unlike the central shareholders register, the UBO Register will apply to all entities, such as foundations, cooperatives, trusts and partnerships.

An ultimate beneficial owner is – in short - an individual who has an interest of more than 25% of the capital interest and/or has the power to exercise more than 25% of the control rights of the relevant entity. The personal details of the ultimate beneficial owners need to be registered in the UBO Register.

The UBO Register will be managed by a Dutch public institution, probably the Dutch Chamber of Commerce. The (directors of the) entity will be obliged to register its ultimate beneficial owners at this UBO Register.

The information in the UBO Register will only be accessible to authorized public authorities, authorities that are obliged to perform client research (e.g. civil-law notaries and banks) and any other persons or authorities who have a legitimate interest.

The Dutch legislator has not published a draft bill for the introduction of the UBO Register in the Netherlands yet and it is to be expected that the two-year implementation period will be fully used.

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PwC Legal Finland – The New Finnish Corporate Governance Code

At a glance

The new Finnish Corporate Governance Code (**Code**) for companies listed on the OMX Nasdaq Helsinki Exchange will enter into force as from 1 January 2016. The new Code will replace the current Finnish Corporate Governance Code that was approved by the board of the Securities Market Association on 1 October 2010.

The main changes concern the structure and layout of the Code. In addition, the new Code includes a few new recommendations, which relate to such things as transparency in preparing nominations to the board of directors and auditors, and related party transactions.

In detail

Background

The reason for the renewal of the Code is the recommendation issued by the Commission on 9 April 2014 on the "comply or explain" principle, because of which the structure of the Code was required to be changed so that it is clearly evident which parts of the Code cannot be deviated from, which parts of the Code are recommendations following the comply or explain principle, and which parts of the code constitutes merely additional explanations.

The main aims of the renewal of the Code has been to enhance openness, transparency, comparability and good governance practises in a way that supports competitiveness and success of Finnish listed companies. The aim of the Code is that Finnish listed companies apply corporate governance practices that are of a high international standard.

The new Code was approved by the board of the Finnish Securities Market Association on 1 October 2015, and on 21 October 2015 the board of Nasdaq OMX Helsinki Oy verified the new Code to be applied as good corporate governance practices in listed companies. The new Code will enter into force as from 1 January 2016

Main changes of the new Code

The main changes relate to the structure of the Code, which have been clarified as required by the recommendation issued by the Commission on 9 April 2014. In addition, the total amount of individual recommendations has been reduced to 28, compared to the 54 recommendation included in the previous Corporate Governance Code.

Another notable revision is that the reporting obligations are renewed and collated to a separate chapter in the new Code.

While most of the recommendations of the new Code correspond to the recommendations of the previous Corporate Governance Code, the new Code does include a few new recommendations which listed companies must take into consideration.

These new recommendations relate to:

a the process preceding the nomination of the board of directors and especially transparency of the process;

b an obligation for the company to define of diversity principles;

c a recommendation relating to related party transactions; and

d a recommendation concerning nomination committees established by shareholders.

In addition, the criteria concerning the evaluation of the independence of the directors and independence is specified, for example, if director's board membership has continued for 10 years the director shall be deemed as non-independent unless the company presents a specific reason to evaluate the situation differently.

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PwC Australia – Corporate Finance Activity in Australia – Recent Insights from ASIC

At a glance

The Australian Securities and Investments Commission (**ASIC**) has released its latest report on the regulation of corporate finance for the period 1 January 2015 to 30 June 2015. The report provides some useful insights into ASIC's supervision of recent public fundraising and mergers and acquisitions activity, and serves as a useful reminder of companies' legal obligations when implementing major transactions.

In detail

On 21 August 2015, ASIC issued report 446 *ASIC regulation of corporate finance: January to June 2015*. The report includes information about ASIC's surveillance activities and regulation of the market for the first half of this year, specifically in relation to fundraising, mergers and acquisitions, corporate governance and other areas of corporate finance. The report highlights the corporate regulator's current focus and offers the following insights:

- Over the period, ASIC raised concern with almost a quarter of prospectuses lodged with the regulator. This resulted in almost 80 per cent of those prospectuses being revised. ASIC issued 24 interim stop orders in relation to 17 offers.

- Key areas of concern in relation to prospectuses included inappropriate disclosure of financial information and improper disclosure of financial forecasts. Other focus areas included insufficient disclosure of control issues, relationships with related parties, funding or financing arrangements and compliance with the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (the JORC Code) in prospectuses for mining entities.

- Other problem areas with prospectus disclosure involved:
  - insufficient disclosure of business models, capital structure and substantial holders;
  - poor quality information on directors' interests, benefits and employment history and their relationship with the company; and
  - insufficient risk disclosure – either because it was not prominent enough or included without being sufficiently tailored to the company concerned.

- Given the issues around insufficient or improper disclosure of financial information, ASIC has flagged that it is considering clarifying its policy on prospectuses and possibly updating its Regulatory Guide 228 'Prospectuses: Effective disclosure for retail investors'. ASIC has stated that it is likely to heavily scrutinise prospectuses that include less than 2.5 to 3 years' audited financial information where the entity has a relevant operating history.

- Where a prospectus includes financial forecasts and contains EBIT or EBITDA multiples, the 'investment overview' section of the prospectus should include all forecast periods in respect of the multiples.

- ASIC is focusing on foreign companies based in emerging markets that conduct public fundraising activities in Australia. The regulator has identified defective disclosure and risks around inadequate governance practices, lack of verification of operations, potential fraud, related party transactions, conflict of laws issues and regulatory non-compliance. As a result, in those cases there is a renewed focus by ASIC on due diligence surveillance, review of fundraising documents and ongoing compliance such as continuous disclosure under the ASX listing rules.

- The report emphasises the need for rigorous due diligence and verification of prospectuses to ensure the public receive informed and proper disclosure and to ensure issuers, directors and others involved in the offer can take advantage of the 'due diligence' defence.

- As part of its review of takeover documents during the period, ASIC noted the following concerns:
  - Scale back arrangements – In a scale back, shareholders of a target company can elect to receive a form of consideration (e.g. shares in the acquirer) subject to a limited cap. Where the cap is reached, the acquirer scales back the chosen consideration and will substitute it with the alternative (e.g. cash). Such arrangements may cause uncertainty for investors and result in a significant difference between the consideration an investor elects and the consideration the investor actually receives. In these cases arrangements need to be structured appropriately in accordance with the *Corporations Act 2001* (Cth) and ASIC policy.
  - Last and final statements – ASIC considers bidders who make a last and final statement should be held to the same to ensure certainty for investors and the market. If a bidder wants the flexibility to depart from its statement, then it must be clearly stated by an appropriate qualification.
  - Currency of independent expert reports – If a target statement includes an independent expert's report, the target should ensure the report is based on the latest financial information. In a recent case, ASIC stepped in to make sure a target arranged a supplementary independent expert's report due to the subsequent release of material financial information. If a significant change occurs affecting the information in an expert's report, then it may be necessary to revise the original report particularly where it may affect the expert's valuation or recommendation.

The Takeaway

ASIC's report is a useful reminder of key risk areas for companies engaging in corporate finance transactions and indicates the regulator's current areas of focus. Companies considering any corporate finance activity should take advice early on in the process to manage compliance with the Corporations Act and having due regard to current ASIC policy

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