PwC International Business Reorganisations Network – Monthly Legal Update

Edition 7, July 2018

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Welcome

Welcome to the seventh 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 July 2018 issue:

- Advokatfirmaet PwC AS (Norway) considers the Norwegian LLC as an attractive investment vehicle; and
- PricewaterhouseCoopers (Australia) explores the proposed changes to the Australian financial services licensing regime for Foreign Financial Services Providers.

Contact us

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Advokatfirmaet PwC AS (Norway) – The Norwegian LLC as an attractive investment vehicle

At a glance

The Norwegian Limited Liability Companies Act gives flexible rules and a good framework for investments through a Limited Liability Company (**AS**).

The simplification of the Limited Liability Companies Act has been subject to constant discussions over the last years. In 2017, the government suggested a quite comprehensive amendment of the Limited Liability Companies Act. However, most of the amendments were put on hold for now, and will be reviewed the following years. Nevertheless, a few amendments have been made, making it even easier and more favourable to make investments.

We will address some aspects of the Norwegian Limited Liability Companies Act, which contributes to an agile process in relation to investments through an AS. This includes some of the most important recent developments. The purpose of this article is to give an introduction to the Norwegian Limited Liability Companies Act, and how to invest through an AS.

In detail

1. The Norwegian AS – an Overview

The Norwegian AS is the Norwegian edition of the familiar and widespread LLC, characterized by the owners having a limited liability for the company in such way that they cannot be held responsible for any obligations beyond the stock capital. In number, this form of ownership is by far the most widely used type of company in Norway.

2. Legal and practical aspects

a Incorporation of an AS

The Norwegian AS can be formed by one or more shareholders with a minimum share capital of NOK 30 000. The amount has been suggested to NOK 1, but the resolution has not yet been passed.

An AS may be incorporated by a cash contribution, alternatively with a contribution in kind. Previously, the founders had to prepare an opening balance. This requirement was abandoned in relation with the recent amendments of the Limited Liability Companies Act.

The AS may be incorporated with only one director and a contact person (alternatively a general manager). The general manager and at least half the members of the board of directors shall reside in Norway. However, this does not apply to nationals of states that are parties to the EEA Agreement, when they reside in such state.

The process of incorporating an AS is quite simple. The founder prepares and signs the articles of incorporation. The founder then forwards the articles of incorporation to their bank to create a bank account. The share capital can then be paid to the company's bank account. At this point the founder will be able to report the company to the Register of Business Enterprises for registration. The whole process is estimated to take 1 or 2 weeks.

There is also a new alternative for incorporation of an AS through an online portal, which potentially will reduce both set up time and costs.

Previously, the board of directors of the company actively had to resolve that a company should not have an auditor. The requirement was removed in 2017, and makes it even easier to incorporate a company which is not subject to auditing.

b Tax Deduction for investments in start-up companies

On 1 July 2017 new tax rules regarding investments in small companies and start-ups were published. The new rules increase the profitability of the investments in such companies. Personal taxpayers who invest directly or indirectly in such companies may on certain conditions achieve a tax deduction in their general income. The deduction in general income may be as high as NOK 500 000 per year. This will constitute a tax deduction of NOK 115 000 (tax rate: 23 %).

c Mergers

The regulations regarding mergers divide between ordinary mergers where the shareholders receive a compensation, and mergers of group companies without compensations. In the following, we will mainly address mergers between group companies.

i Merger with compensation

An ordinary merger between two limited liability companies implies that the surviving company take over the surrendering company's assets, rights and obligations in its entirety. The shareholders in the surrendering company receive remuneration in the form of shares in the surviving company, and their shares in the surrendering company is redeemed. Once the merger is completed, the surrendering company has been dissolved.

The Limited Liability Companies Act also accepts cross-border mergers to be performed. This applies for mergers between one or more private limited liability companies and one or more foreign companies having their registered offices or their main offices in another EEA-state (EU plus Iceland, Liechtenstein and Norway), and which are subject to the laws of another EEA-state than Norway. A private limited liability company can only be merged with a foreign company which has a company structure that according to its state's company legislation corresponds to a private or a public limited liability company.

ii Merger between group companies

Merger of group companies is a quite simple procedure and can be performed in two different cases: 1) mergers between a parent company and a wholly owned subsidiary; and 2) mergers between companies with the same owner. In both cases there can be one or more surrendering companies involved in the merger.

The surviving company and the surrendering company enter into a merger plan signed by the board of directors of the respective companies. The formal merger resolutions are made by the board of directors if the merger is between a parent company and a wholly owned subsidiary. In cases of mergers between companies with the same owner, the general meetings of the involved companies make the formal resolutions.

After the merger resolution has been made, the resolution shall be reported to the Register of Business Enterprises within a month. The Register of Business Enterprises shall then publish the merger resolutions and notify the companies' creditors that any objection to the merger must be reported to the company within six weeks from the announcement. By the end of the six week period, the surviving company shall notify the Register of Business Enterprises that the merger shall take effect.

By an amendment of the Limited Liability Companies Act in effect from January 1 2018, mergers became even easier to carry through, as the requirement for an opening balance sheet was abandoned. The amendment applies for every type of merger.

A merger between group companies is a plausible alternative to a liquidation of a company, as the merger process is considered to be easier to perform.

d Demergers

The Limited Liability Companies Act accepts many alternatives to how, and to how many companies, the assets, rights and obligations of the demerging company shall be distributed. An AS may be demerged into two or more companies by establishing one or more new companies while the demerging company continues to exist. Alternatively the demerging company can be demerged in two or more new companies by establishing one or more new companies while the demerging company is liquidated. An alternative to carry out a demerger to new companies, is to carry out a demerger to one or more existing companies (and alternatively also to both new and existing companies).

As a main rule, it is only possible to carry out horizontal demergers. The rules in the Limited Liability Companies Act do not accept vertical demergers, i.e. demergers to a subsidiary. However, in practice a “drop down” demerger can be achieved by using a horizontal dummy company to be merged with a subsidiary of the demerging entity.

Further, the Limited Liability Companies Act accepts cross-border demergers to be performed. To be able to perform a cross-border demerger, at least one foreign company and one Norwegian company must participate in the demerger and the other entities must be located within the EEA (EU plus Iceland, Liechtenstein and Norway).

Demergers have a quite simple procedure. The board of directors in the involved companies prepare and sign a demerger plan which shall outline: 1) the planned distribution of the assets, rights and obligations of the involved companies, and 2) the distribution of shares and consideration of the shareholders in the involved companies. After the board of directors in the involved companies have signed the demerger plan, the general meeting of the involved companies have to decide to approve the demerger.

After the demerger resolution has been made, the resolution shall be reported to the Register of Business Enterprises within a month. The Register of Business Enterprises shall then publish the demerger resolutions and notify the companies’ creditors that any objection to the demerger must be reported to the company within six weeks from the announcement. By the end of the six week period, the surviving company shall notify the Register of Business Enterprises that the demerger shall take effect.

By an amendment of the Limited Liability Companies Act in effect from January 1 2018 demergers became even easier to carry through, as the requirement for an opening balance sheet was abandoned. The amendment applies for every type of demerger.

The implementation of the demerger process should be possible to carry out in approximately 8-10 weeks (included the six week notice to the creditors).

e Capital increase

A capital increase may be carried out in three different ways: i) by cash contribution; ii) by conversion of debt; and iii) by contribution in kind. For all three options, the capital increase may be carried out either by subscription of new shares or with an increase of the nominal value of the existing shares.

A resolution to increase the share capital shall be adopted by the general meeting, based upon a proposal from the board of directors. The general meeting may however authorize the board of directors to increase the share capital on certain terms. The alternatives under ii) and iii) also require the board of directors to prepare a statement to the general meeting, and the statement shall be confirmed by an auditor.

The process regarding a capital increase is estimated to take about two weeks and is relatively cost-effective.

f Reduction of share capital

Any resolution to reduce the share capital shall be adopted by the general meeting based upon a proposal from the board of directors. The reduction amount may be used only for: i) coverage of loss that cannot be covered otherwise; ii) distribution to the shareholders or retirement of the company’s own shares; and iii) allocation to fund to be used as decided by the general meeting.

As a starting point, the Register of Business Enterprises publish the resolution to reduce the share capital and notify the companies' creditors that any objections must be reported within six weeks from the announcement. By the end of the six week period, the company shall notify the Register of Business Enterprises that the reduction of share capital shall take effect. However, in some cases the reduction of share capital can take effect without a notification to the creditors.

Previously, the auditor had to confirm that the interests of the company's creditors will not prevent the resolution from taking effect. Further, the auditor had to confirm that any reduction amount to be used for coverage of loss could not be covered otherwise. However, by an amendment in 2017, these requirements were removed. The amendment will reduce the costs related to a reduction of share capital.

g Winding up

An AS is dissolved and deleted in two stages. First, the company must decide that it should be dissolved. The next stage is for the company to approve the deletion. Both stages must be notified to the Register of Business Enterprises. After the first stage is registered in the Register of Business Enterprises, a six week creditor notice period will be incurred and potential creditors of the company have six weeks to raise potential claims against the company. This process is done simply and efficiently as the Register of Business Enterprises publish the resolution to dissolve the company and notify the company's creditors that they have six weeks to raise their potential claims against the company.

The time between these two stages is normally called the 'dissolution period', during which the dissolution board, which is elected by the general meeting, must prepare for the dissolution of the company. During the dissolution period, the dissolution board must prepare a list of the company's assets, rights and obligations, and then prepare a balance sheet with a view to the dissolution. Both the list and the balance sheet must be audited.

3. Closing words

The Norwegian legislation which applies to the administration of an AS is generally flexible and facilitates an easy execution of investments in the Norwegian market.

The Norwegian rules regarding AS correspond to a large extent with the rules regarding public limited companies, which are commonly referred to as the Norwegian "company laws". The tendency in the development of the Norwegian company laws is to make simplifications and facilitate the use of electronic solutions.

Based on our experience, one thing that makes the administration of a LLC in Norway easy, is the agile and practical electronic interaction with the Norwegian Register of Business Enterprises, e.g. that copies of company documents sufficiently can be submitted, and necessary electronic signatures from any involved party can be performed, through the online portal www.altinn.no.

Who to contact

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PricewaterhouseCoopers (Australia) – Proposed changes to the AFS licensing regime for Foreign Financial Services Providers

At a glance

On 1 June 2018, the Australian Securities and Investments Commission (**ASIC**) released a consultation paper (**CP 301**) announcing proposed changes to the current licensing regime applying to foreign financial services providers (**FFSPs**) carrying on business in Australia. The proposed changes include the repeal of current relief instruments, the introduction of a 'foreign Australian Financial Services Licence', and the imposition of a 12-month transitional period to enable FFSPs to comply with the changes. Outlined below is a summary of the proposed changes, which are expected to take effect from 30 September 2019, subject to consultation with the financial services industry and the passage of legislation.

ASIC is currently seeking feedback from relevant stakeholders on the proposed changes, with final submissions to be received by no later than 31 July 2018.

In detail

The consultation paper released by ASIC proposes changes to the current licensing regime applying to FFSPs which provide financial services to wholesale clients in Australia.

1. The current regime

Currently, certain FFSPs that wish to carry on a financial services business in Australia are able to access one of two types of relief provided by ASIC:

a limited connection relief

Class order [**CO 03/824**] (as extended by *ASIC Corporations (Foreign Financial Services Providers – Limited Connection, Instrument 2017/182*) exempts FFSPs from holding an Australian financial services licence (**AFSL**) where the FFSP's services in Australia are limited to inducing or intending to induce persons in Australia to use its financial services, and where the provider only provides financial services to wholesale clients.

b Sufficient equivalence relief

ASIC Corporations (Repeal and Transitional) Instrument 2016/396 currently offers relief from the requirement to hold an AFSL where the FFSP is regulated under one of eight specified overseas regulatory regimes that ASIC considers to be 'sufficiently equivalent' to the regime in Australia.

The abovementioned relief instruments are set to expire on 27 September 2018. ASIC's consultation paper confirms that the current relief regime will be extended past the original expiry date for a further twelve months (i.e. until 30 September 2019) while ASIC consults with the financial services industry in respect of the proposed changes.

2. The proposed regime

From 30 September 2019, ASIC proposes that a new licensing regime apply to FFSPs. Under this proposed regime, FFSPs will no longer be able to access relief from the requirement to hold an AFSL, and will be required to either apply for an ordinary

AFSL or a new, modified form of AFSL, termed a 'foreign AFSL'.

Holders of 'foreign AFSLs' will be required to provide similar documentation in support of their application as required for an ordinary AFSL, and will be required to comply with some (but not all) of the general obligations applying to ordinary AFSL holders under s912A(1) of the *Corporations Act 2001* (Cth). A foreign AFSL may also impose tailored conditions on a licence holder, depending on the jurisdiction in which it is registered and the services that it intends to provide in Australia.

However, foreign AFSL holders will be exempted from complying with certain obligations required of an ordinary AFSL holder if the FFSP is licensed in a foreign jurisdiction with a financial services regime that ASIC considers is 'sufficiently equivalent' to the Australian financial services regime. The jurisdictions currently assessed by ASIC as being of 'sufficient equivalence' (subject to the financial service being provided) include Germany, Hong Kong, Luxembourg, United Kingdom, Singapore, USA, Denmark, Sweden, France, and Brazil.

ASIC's intention is that the 'foreign AFSL' will allow for the continued operation of FFSPs in Australia while enabling ASIC to achieve greater oversight of the compliance of FFSPs with Australian regulatory requirements, and in effect maintain desired regulatory outcomes as well as the integrity of Australia's financial services industry.

ASIC's consultation paper proposes that in the event that ASIC proceeds with the proposed 'foreign AFSL' licencing regime, a 12 month transition period will apply (to 30 September 2020) to provide time for affected FFSPs to adapt to the regulatory changes.

3. The takeaway

ASIC's proposed licensing changes for FFSPs intend to address various concerns raised by ASIC in respect of the operation and regulation of the current financial services licensing regime and related exemptions. If implemented, the proposed changes will have a significant impact on FFSPs, which will need to consider whether they will be required to go through the process of obtaining an Australian or foreign financial services licence or whether alternate arrangements can be entered into with an existing AFSL holder, in relation to the financial services that are proposed to be provided in Australia. If you are a FFSP currently relying on the existing relief, you should continue to monitor the progress of the new licensing laws proposed in CP 301 and commence planning for potential changes to your current arrangements.

Who to contact

If you would like to make a submission to ASIC in response to consultation paper CP 301, would like to explore the options available to you under the proposed regime, or have any other queries or concerns in relation to the proposed changes to the licensing regime for FFSPs, please reach out to one of our financial services specialists:

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