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Planned amendments to harmonise Liechtenstein's Law on Persons and Companies (PGR) with the First and Fourth EU directives[1]

1. General

Liechtenstein joined the European Economic Area (EEA) in 1995 and its accession has necessitated the harmonisation of domestic law with numerous EU directives.

The planned amendments to harmonise Liechtenstein's Law on Persons and Companies (PGR) with the First and Fourth EU directives relate to the Company Limited by Shares (Aktiengesellschaft; AG) and the Private Company Limited (Gesellschaft mit beschränkter Haftung; GmbH). These amendments will not affect legal forms specific to Liechtenstein, such as the Establishment (Anstalt), the Trust reg. (Treuunternehmen) and the Foundation (Stiftung).

Liechtenstein's Company Law is currently being revised with regard to disclosure (publication), capital protection provisions, mergers, annual accounts, consolidated accounts, auditor qualifications and branch disclosure.

It is further intended to incorporate into the PGR a number of amendments which, while not relating to the EU, will serve to promote the corporate sphere (e.g. authorised capital, conditional capital and participation certificates).

2. PGR provisions regarding the disclosure of the business report (annual accounts consisting of balance sheet, profit and loss account, notes on the accounts, plus annual report)

The following discussion will basically deal with the disclosure of the business report in view of the incorporation of the First and Fourth EU directives into Liechtenstein law. Detailed consideration will not be given to the disclosure requirements under various particular laws enacted prior to the present reform of the PGR (e.g. with regard to insurance companies, banks and stock exchange listed companies).

The amendments to the PGR are due to come into effect on 1 January 2001. This means that, for accounts closed after 1.1.2001, the companies concerned will be required to prepare and publish their business report in accordance with the provisions of the new PGR.

The existing PGR does not stipulate any disclosure of business reports prior to 1.1.2001. The regulation provided for in Art. 207 Para, 3 PGR was not issued. Apart from the special conditions laid down for banks, investment funds, insurance companies and the like, creditors were not granted any right of inspection.

[1] The draft law is going through the Liechtenstein Parliament *(Landtag)* in 1999 and may be subject to only minor amendments. More particularly, as from autumn 1999 a specially formed commission will be dealing with the incorporation of the EU directives into Liechtenstein law.

The planned amendments to the PGR will result in the following disclosure requirements:

LEGAL FORM

A

Establishment · Trust reg. · Foundation with subsidiary commercial object · Cooperative Society (where possible in terms of legal form, object and internal organisation)

B (related to EU directives)

Company Limited by Shares · Limited Partnership with a Share Capital · Private Company Limited · General Partnership[2] and Limited Partnership with general partners in the above-mentioned legal entities

Condition *Article 1057 new PGR*[3]

In practice, disclosure is not required of the Establishment, Trust reg., Foundation and Cooperative Society.

1. Issue of bonds offered for public subscription (including participation certificates)
2. Company shares which can be traded on a stock exchange.

Art. 1122 et seq new PGR

Disclosure

1. The annual accounts and auditor's report approved by the supreme governing body of the entity are to be published in the official journals for announcements.

OR

2. In Case A above – but extremely rarely –, a copy of the annual accounts, together with auditor's report, must be provided, within one year of approval by the supreme governing body of the entity, to anyone who so requests, at the expense of the applicant – unless publication has already been effected in accordance with Art. 1122 et seq new PGR.

Disclosure [4]

Large companies

It is necessary to file[2] the following documents with the Public Register, within 9 months of the end of the financial year:

1. Annual accounts approved by the supreme governing body of the entity
2. Auditor's report[5]
3. Proposal for the appropriation of the results
4. Resolution on the appropriation of the results
5. With regard to points 3 and 4, it is also necessary to indicate the annual profit or loss, if this is not contained in the annual accounts.

After the documents have been filed with the Public Register, it is necessary to announce in an official journal the number under which the said documents have been filed with the Public Register. It is not necessary to make this type of announcement in the case of shares/bonds traded on a stock exchange because the above-mentioned documents themselves have to be published in the official journals. The annual report (report on the economic position of the company) does not have to be filed with the Public Register. It is to be kept at the registered office of the company for public inspection or copies are to be made available upon payment[6].

Medium-sized companies

1. In principle, the treatment is the same as for large companies.
2. However, in accordance with Art. 1127 new PGR, the balance sheet can be abridged and some extra items have to be added.
3. The notes on the annual accounts have been abridged in accordance with Art. 1127 Para. 1 (2) new PGR.

Small companies

1. The documents are to be filed with the Public Register within 12 months of the closing of the accounts.
2. Filing/disclosure of abridged balance sheet in accordance with Art. 1126 new PGR (same as for medium-sized companies but without the supplementary information).
3. It is not necessary to file/disclose the profit and loss account (unlike medium-sized companies).
4. The proposal for the appropriation of profit/loss and the resolution on the appropriation must be clear from the balance sheet or the documents filed.
5. The notes on the annual accounts are abridged in accordance with Art. 1126 new PGR. The notes for filing/disclosure should not refer to profit and loss account items.
6. The auditor's report does not need to be filed/disclosed.
7. No annual report (economic situation report) need be drawn up.
8. As with large companies, an announcement must be published after the filing of documents.
9. Account must also be taken of Art. 1057 new PGR (see above).

3. Declaration of shareholdings

In the notes on the annual accounts, all Column B companies (see chart) must indicate the name and registered office of other companies of which the B company, or a person acting for the B company, owns at least one fifth (20%) of the shares. In addition, it is necessary to indicate for such companies, their shareholding, their shareholders' equity and, where annual accounts are available, the result of their last financial year. It is also necessary to give the name, registered office and legal form of any undertakings in which the general partner is the B Company (Art. 1092 (10) new PGR). Alternatively, instead of beeing included in the notes on the annual accounts, this information can be given in the form of a list of shareholdings. The list of shareholdings provided for in Art. 1093 new PGR is an integral part of the notes on the annual accounts. The notes must also indicate where the list of shareholdings is deposited.

While the list of shareholdings (Art. 1093 new PGR) does not need to be announced in the official publications (Art. 1122 Para. 2 new PGR[7]), it must still be filed with the Public Register.

The 20 % criterion is calculated on the basis of the capital not of the voting rights. The application of this provision is intended to reveal interlocking capital relationships. The notes on the annual accounts do not have to indicate the previous year's figures. Interestingly, the information is not confined to the shareholdings: the percentages held must be shown for each undertaking, whether they relate to shares in affiliated undertakings, to rights in the capital of other undertakings, which, by creating a durable link with those undertakings, are intended to contribute to the company's activity, or simply to securities consisting part of the fixed assets of the B company presenting the annual accounts.

Shares held in trust are not subject to the disclosure obligation.

3.1 Auditor's obligation to check

At this point, it should be noted that no provision has been made for the auditor to check that the disclosure requirements have been duly fulfilled. However, if, in the ordinary course of his audit, the auditor becomes aware that the disclosure obligation has not been fulfilled, then reference to this omission will be made in his report.

In general terms, future auditor's reports will be divided into two parts: the first part will concentrate on the core statements with regard to proper bookkeeping and accounting and the Board's proposal for the appropriation of profits (Art. 196 Para. 1 new PGR); the second part will consist of «notes», i.e. references to breaches of the law, such as infringement of the requirements with regard to disclosure, inactivity of the Board in case of insolvency, refund of invested capital or not carrying out resolutions of the general meeting, as well as undisclosed distributions of profits with unequal treatment of shareholders. This latter part, which is separate and not for publication, will be brought to the attention of the supreme governing body as so-called «remarks» (See Art. 197 Para. 1 new PGR – unamended).

3.2 Obligation to check on the part of the Public Register

In accordance with Art. 1130 new PGR, the Public Register will check whether the documents filed are complete and, where applicable, whether they have been announced. If the documentation is incomplete, the Public Register will call for the missing items to be filed within a determined grace period.

If a company seeks relief from the requirements on grounds of size, the Public Register has the right, in the event of doubt, to demand information on net turnover and the average number of employees.

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[2] In the case of the General Partnership and Limited Partnership simplifications are possible if the conditions of Art. 1122 Para. 3 new PGR exist. We will not go into this in greater details as we wish to concentrate on the Company Limited by Shares.

[3] Article 1057 new PGR is not related to the First and Fourth EU directives.

[4] Inland branches of a company with its registered office abroad, which are comparable in legal form to a «Column B» company, are also subject to disclosure of the business report and auditor's report prepared, checked and published for them in accordance with the relevant (foreign) law.

[5] In Germany, a distinction is made between the auditor's report and the audit certificate. This is not necessary in Liechtenstein because the auditor's report is shorter. The so-called «remarks» no longer form part of the auditor's report but are delivered to the supreme governing body in the form of a management letter or a special report.

[6] This section also applies largely to the consolidated business report. The proposal for the appropriation of the profit or loss and the resolution on the appropriation of the profit or loss are not necessary because they are already included in the unconsolidated accounts.

[7] This also applies to the consolidated accounts in accordance with Art. 1124 Para. 2 new PGR.

4. Information which may be omitted from the notes on the annual accounts (see also point 3 above)

In accordance with Art. 1094 new PGR, *reporting* may not be required (i.e. certain information may be omitted from the notes on the annual accounts) if this is in the public interest of the Principality of Liechtenstein (Art. 1094 Para. 1 new PGR).

The obligation of large companies to *segment their net turnover on the basis of activities and geographically determined markets* may be lifted if the company concerned, or an undertaking in which it has an interest of at least 20 %, might suffer a significant disadvantage thereby (Art. 1094. Para. 2 new PGR).

The obligation to provide the *list of shareholdings*, respectively the related *information in the notes on the annual accounts* (Art. 1092 (10) new PGR), may be lifted (Art. 1094 Para. 3 new PGR) if:

a) the information is of minor importance in giving a fair view of the position of the company with regard to assets, liabilities, financial position and profit or loss; or
b) the disclosure might inflict a significant disadvantage on the company or another undertaking.

The obligation *to indicate in the notes on the annual accounts the shareholders' equity and the annual result* (Art. 1092 (10) new PGR) may also be lifted if the undertaking which is the object of the report does not have to publish its annual accounts and if the reporting company, or the persons acting on its behalf, own less than half of its shares (Art. 1094 Para. 4 new PGR).

Save for the exception referred to in the first paragraph, the fact that the foregoing exceptions have been applied must be indicated in the *notes on the annual accounts* (Art. 1094 Para. 5 new PGR).

4.1 The public interest of the Principality of Liechtenstein

The information contained in the notes on the annual accounts must not be disclosed if to do so would have an adverse effect on the public interest. In particular, this relates to the protection of sovereign interests and legal transactions conducted by state bodies (e.g. research contracts involving public interests).

4.2 The likelihood that a significant disadvantage might be inflicted on the company or the other undertaking (Point (b) in 4 above)

There must be a plausible case that significant disadvantages might be inflicted on the company or other undertakings. The test of plausibility will be reasonable scenarios capable of indicating the probability of the specific occurrence. The significant disadvantages may be intangible and they do not have to be quantified. The literature cites such examples as effects on turnover, reduction in competitiveness and disadvantages arising from political causes.

«In the opinion of the government, a significant disadvantage may be deemed to exist as soon as there is the likelihood of a disadvantage occurring, subject to a certain degree of probability or at least plausibility ... A significant disadvantage also exists if companies abroad have to reckon on significant economic disadvantages on political grounds.» (Government of the Principality of Liechtenstein, Report and Motion of the Government presented to the *Landtag* with regard to the amendment of the Law on Persons and Companies (PGR), No. 153/1998, Part II, p. 319).

The fact that this exception has been invoked must be indicated in the notes on the annual accounts. However, the reasons do not need to be justified as that would defeat the protective object of the provision.

The auditor will ensure that the use of the protection clause is clearly noted and will state the written justification in his working papers.

5. Failure to publish the annual accounts – Position of the European Court of Justice (ECJ)

It is a well known fact that, in Germany, more than 90 % of SMEs – and above all entities in the form of Private Company Limited – refuse to file their balance sheet, profit and loss account and auditor's report with the Trade Register. Moreover, there are no appropriate sanctions to apply in such cases.

However, in a judgement pronounced on 29 September 1998 in case C-191/95, Commission v. Germany, the ECJ found against Germany. The Federal Republic was ordered to pay the costs of the proceedings because it had not provided appropriate sanctions to apply in the event of companies failing to comply with their obligation to publish their annual accounts, as required by the First Directive (in connection with the Fourth Directive).

The ECJ refused to accept that Germany did not have the necessary administrative apparatus to enforce compliance with the regulations.

As the ECJ was unable to impose a fine, the only financial penalty borne by Germany was the cost of the proceedings.

6. Holding companies

At this point, it should be noted again that holding companies in the form of an Establishment, Trust reg. or Foundation do not fall within the scope of the disclosure and consolidation obligation or any other duty prescribed in the First, Fourth and Seventh EU directives.

Holding companies of the legal form indicated in Column B (see chart on page 2), which have as their sole object the acquisition, management or exploitation of interests in other undertakings (subsidiaries), are relieved of the obligation to prepare consolidated business reports provided that they satisfy the criteria laid down in Art. 1098 new PGR. Thus, the exceptions provided for in the directives are carried over into the amended version of the PGR. The most important of these criteria are that no influence should be exercised over the management of subsidiaries and loans should be granted only to subsidiaries.

Furthermore, holding companies which are relieved of the obligation to draw up consolidated business reports need supply the information required under Art. 1092 (10) new PGR (i.e. the abovementioned list of shareholdings) only in respect of majority interests (Art. 1094 Para. 6 new PGR).

Note:

For further information with regard to the planned amendments to the Law on Persons and Companies, please contact the author of this article, Mr Roger Frick (business economist HWV, Swiss certified public accountant), at the Allgemeines Treuunternehmen.

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