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Disclosure under Liechtenstein's Law on Persons and Companies (PGR) Amendments to harmonise with the First and Fourth EU directives

1. General

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

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

Liechtenstein's Company Law was amended as of 1. 1. 2001 with regard to disclosure (publication), capital protection provisions, mergers, annual accounts, consolidated accounts, auditor qualifications and branch disclosure.

In addition, a number of amendments have been incorporated into the PGR which, whilst not required to meet EU directives, will serve to promote the corporate attributes (e.g. authorised and conditional capital, 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 disclosure of the business report in the light of the incorporation of the First and Fourth EU directives into Liechtenstein law is discussed below. Detailed consideration will not be given to the disclosure requirements under various particular laws enacted prior to this reform of the PGR (e.g. with regard to insurance companies, banks and stock exchange listed companies).

3. Public access to the annual accounts

In accordance with Art. 998 Para. 2a PGR (Public Register provisions) anyone may apply in writing for copies of the public register entries of a Company Limited by Shares, a Limited Partnership with a Share Capital and a Private Company Limited. The copies must be supplied even if the applicant does not demonstrate a justified interest. The accuracy of the information dispatched must be certified unless the applicant waives certification.

The annual accounts and, where applicable, the auditor's report are an integral part of the register entry.

As may be seen from the chart on page 2, the time limit for filing of documents with the Land and Public Registry is 15 months after the balance sheet date (close of the financial year). Thus, in normal cases – i.e. a financial year closing on 31. 12. 2002 – the first filing would take place on 31 March 2004. (The earliest possible filing date would

In practice¹, the disclosure requirements may be represented schematically, as follows:

Legal Form



Company Limited by Shares · Limited Partnership with a Share Capital · Private Company Limited · General Partnership² and Limited Partnership with general Partners in the above mentioned legal entities



Art. 1122 et seq PGR



Disclosure⁵

Large companies

It is necessary to file² the following documents with the Land and Public Registry within 15 months⁶ of the balance sheet date:

1. Annual report approved by the supreme governing body of the entity
2. Auditor's report³
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 Land and Public Registry, it is necessary to announce in the official journals the number under which the said documents have been filed with the Land and Public Registry. 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 submitted to the Land and Public Registry. It is to be kept at the registered office of the company for public inspection and copies are to be made available upon payment⁴.

Medium-sized companies

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

Small companies

The following documents are to be filed with the Land and Public Registry within 15 months of the closing of the accounts:

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

be 30 April 2003, this, however, only in the case of a company with a financial year running from 1 February 2001 to 31 January 2002.)

In the case of the Establishment, Trust reg., and other legal forms not affected by the EU directive, the annual accounts and auditor's report do not form part of the Public Register entry. As a general rule, with legal forms of this kind, inspection of the Register records will be refused if no justified interest can be plausibly demonstrated for inspection or if such inspection would only serve the unlawful use of a right or the pursuit of unfair objectives.

In the case of the General Partnership and Limited Partnership, the annual accounts and, where applicable, the auditor's report, approved by the supreme body of the company, instead of being filed with the Land and Public Registry and announced in the official organ for public notices can be kept available for inspection by anyone at the registered office of the company (a copy of the annual account must be obtainable on simple request, at a charge not exceeding the administrative expense):

1. provided that all of the general partners are companies organised in the legal form of a Company Limited by Shares, a Limited Partnership with a Share Capital or a Private Company Limited and subject to the law of another EEA state and provided that none of these companies publishes the designated documents of the company concerned with its own documents; or
2. provided that all of their general partners are companies which, while not subject to the law of an EEA member state, have a legal form comparable to a Company Limited by Shares, a Limited Partnership with a Share Capital or a Private Company Limited.

4. Declaration of shareholdings

In the notes on the annual accounts, all companies (see chart opposite) must indicate the name and registered office of other undertakings of which the company, or a person acting for the company, owns at least one fifth of the shares. In addition, it is necessary to indicate for such undertakings, 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 company (Art. 1092 (10) PGR). Alternatively, instead of being 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 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 PGR) does not need to be announced in the official publications (Art. 1122 Para. 2 PGR7), it must still be filed at least to the Land and Public Registry.

The 20% criterion is calculated on the basis of the capital not of the votes. 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 an affiliation, an interest or simply securities constituting part of

¹ In theory, in the event of publicly subscribed bonds or shares being admitted to trading on a stock exchange, according to Art. 1057 PGR there exists also a duty of disclosure for the Establishment, the Trust reg., the Foundation with subsidiary commercial object and the Co-operative Society. As such cases do not arise in practice, they will not be treated in detail here.

² In the case of the General Partnership and Limited Partnership with foreign shareholders in the legal form of a Company Limited by Shares, a Limited Partnership with a Share Capital or a Private Company Limited simplifications are possible if the conditions of Art. 1122 Para. 3 PGR obtain. These are explained in Point 3 («Public Access to the Annual Accounts»).

³ Inland branches of a company with its registered office abroad, which are comparable in legal form to an above mentioned company, are also subject to disclosure of the annual accounts and auditor's report prepared, checked and published for them in accordance with the relevant (foreign) law.

⁴ In the case of annual accounts which correspond to the calendar year, the first financial statements to be prepared in accordance with the new regulations will be those as at 31 December 2002. These accounts will then need to be filed with the Land and Public Registry by no later than 31 March 2004.

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 view is that the so-called «notes» (Art. 197 Para. 1 PGR) 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 PGR.

the fixed assets of the company presenting the accounts.

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

4.1 Auditor's obligation to check

At this point, it should be noted that there is no requirement 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.

The view is that, in future, auditor's reports will be divided into two parts: the first part will concentrate on the core statements with regard to proper book-keeping and accounting and the Board's proposal for the appropriation of profits (Art. 196 Para. 1 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, trading while insolvent, investment refund guarantees or 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 (See Art. 197 Para. 1 PGR).

4.2 Obligation to check on the part of the Land and Public Registry

In accordance with Art. 1130 PGR, the Land and Public Registry will check whether the documents filed are complete and, where applicable, whether they have been announced. If the documentation is incomplete, the Land and

Public Registry will call for the missing items to be submitted within a determined grace period.

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

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

In accordance with Art. 1094 PGR, reporting may not be required, if this is in the public interest of the Principality of Liechtenstein (Art. 1094 Para. 1 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 PGR).

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

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

The obligation to indicate in the notes on the accounts the shareholders' equity and the annual result (Art. 1092 (10) PGR) may also be lifted if the undertak-

ing 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 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 PGR). Exception: Paragraph 1 above.

5.1 The public interest of the Principality of Liechtenstein

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

5.2 The likelihood that a significant disadvantage might be inflicted on the company or the other undertaking (Point (b) in 5 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 (parliament) 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 himself will ensure that the use of the protection clause is clearly noted and will state the written justification in his working papers.

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

It is a well-known fact that, in Germany, SMEs – and above all GmbHs – refuse to submit their balance sheet, profit and loss account, notes on the accounts and auditor's report to 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.

Clauses 2 and 3 of Paragraph 66 of the concluding section of the PGR provide for penalties of CHF 1 000 to CHF 5 000 in the event of non-compliance with the disclosure obligations. These penalties may continue to be applied until the obligations are complied with or until proof is provided that such obligations do not exist.

7. Holding companies

At this point, it should be noted once again that holding companies in the legal 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 the 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 a consolidated report, provided that they satisfy the criteria laid down in Art. 1098 PGR. Thus, the exceptions provided for in the EU 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 a consolidated business report need supply the information required under Art. 1092 (10) PGR (i.e. the above-mentioned list of shareholdings) only in respect of majority interests (Art. 1094 Para. 6 PGR).

Note:

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

