

Spring cleaning for general counsels and corporate secretaries

The Covid crisis may have forced us to do more house cleaning than usual but there are some corporate housekeeping tasks that may have been left undone. Run through our checklist to get spring 2021 off to a good start:

1 Virtual decision making and meetings



The Covid-19 Justice and Safety Emergency law continues to be in operation until further notice (which has to be given 2 months in advance). The law allows companies and other legal entities whose articles of association do not allow for virtual decision making and meetings to nevertheless reach decisions and hold meetings via electronic means. Although the law reduces the risks of making decisions in this way, we recommend that you review your articles of association (or other relevant statutory documents) to make sure that virtual decision-making and meetings are properly provided for. Often articles of association provide for decisions to be taken in writing but only if there is unanimous agreement on the decision and the method of decision making. Properly crafted articles of association can allow for decision making taking place electronically without the need for unanimity. This can be important in joint ventures if one party tries to block decision making by not participating in shareholder meetings at all, although it is not unusual that the joint venture agreements provide for deadlock resolution arrangements.

2 UBO register



Although you have until 27 March 2022 to register the ultimate beneficiary owners (UBOs) of legal entities with the Dutch Chamber of Commerce, this is something that you can get done now. In general, any natural person who owns or controls, directly or indirectly more than 25% of the shares or other interests in the company must be registered as an UBO. If no natural person can be identified as an UBO then the statutory directors should be registered as “pseudo” UBOs. The information that must be provided and is published in the UBO register is year and month of birth, nationality and current country of residence. The nature and size of the UBO interest is also published (in percentage, no valuation or figures). Copies of documentation evidencing this information must be submitted to the Chamber of Commerce including tax identification numbers. This information is only accessible to certain competent authorities such as the Authority for Financial Markets (AFM), the Public Prosecutor and the Police amongst others. Lawyers and financial service providers are required under anti-money laundering legislation to check whether information provided to them matches the information available in the UBO register. Kindly note that an exemption applies for certain businesses or legal entities pursuant to which they need not register their (pseudo)UBOs, of which the most important ones are (i) domestic listed companies, (ii) local wholly owned subsidiaries of a non-domestic listed company and (iii) branch offices of non-Dutch resident companies.

3 Mandatory Disclosure Rules (DAC6)



The European Mandatory Disclosure Directive entered into force on 25 June 2018 and requires intermediaries such as lawyers, notaries and tax advisers to file information with the competent tax authorities about cross-border arrangements that are potentially tax aggressive. From 1 January 2021, your advisers in the Netherlands are obliged to report these types of cross-border arrangements. The reporting obligation stretches back to 25 June 2018. Although the reporting obligation rests primarily on your advisers, if they are bound by non-disclosure obligations due to legal privilege then you are obliged to report the arrangement. Your adviser must advise you if they rely on legal privilege to not report the arrangement so that you can take the necessary steps.

4 GDPR data processing



Since a decision of the European Court of Justice in July 2020, which invalidated the Privacy Shield mechanism, parties that transfer personal data outside of the European Union have been struggling to put in place the correct mechanisms for data transfer. Given the hefty fines that were handed out in 2020 arising from transgression of privacy legislation, companies active in the Netherlands should take the time in 2021 to take the following steps:

1. map all of the possible data transfers that take place within the business, verify that these transfers are adequate, relevant and strictly limited to what is necessary;
2. identify the transfer tools that you rely on such as standard contractual clauses, certification or codes of conduct;
3. assess whether the transfer tool is adequate in the relevant circumstances;
4. adopt supplementary measures where necessary;
5. monitor and re-evaluate on an ongoing basis.

5 Anti-slavery and child labour legislation



You may have noticed already in 2020 that your contractual counterparties require compliance with anti-slavery legislation for example in the UK. The Netherlands expects to introduce by the end of 2021, legislation that will require Dutch companies to audit their supply chain to ensure that no child labour has been used in the production of their goods.

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