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PwC International Business Reorganisations Network – Monthly Legal Update

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Welcome

Welcome to the second edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for 2019.

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 February 2019 issue:

- PwC Legal S.R.L. (Argentina) reports on the introduction of a new Corporate Criminal Responsibility Regime in Argentina; and
- PricewaterhouseCoopers LLP (UK) considers recent changes to the cross-border merger and Societas Europaea frameworks in the United Kingdom.

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PwC Legal S.R.L. (Argentina) – New law against bribery and corruption

At a glance

The Argentine Government has established a Corporate Criminal Responsibility Regime through Law 27, 401 (**Regime**).

The Regime assigns criminal liability to companies for the acts of its managers and employees but it also extends it for the acts of third parties that result in an undue benefit for the companies.

In detail

Background

The Argentine Government has established a Corporate Criminal Responsibility Regime through Law 27, 401, which entered into force on March 1, 2018.

The Regime will be applied to private legal entities, with national or foreign capital (with or without state participation), that have committed national and transnational bribery and other crimes against the Public Administration, such as influence peddling (national or transnational), negotiations incompatible with the exercise of public duties, publication of forged financial statements, among others.

Companies can be liable for these crimes if they directly committed them and even if they obtain benefits from bribery and corruption acts carried out by its representatives, employees and other third parties of the company's environment.

With this new Regime, Argentina joins the list of countries like United States, United Kingdom, France, Brazil, Mexico, Colombia, Chile that have already implemented a Law of Criminal Responsibility for legal entities.

Compliance Program

To be exempted from the penalties that the Regime establishes, it is required that companies duly comply with a Compliance Program directed at preventing, detecting and correcting irregularities and acts of corruption. The Compliance Program must be related to the inherent risks in the activity that the companies perform, taking into account its size and economic capacity.

Undoubtedly, an effective Compliance Program is a key element for organizations to defend themselves from these types of crimes, thus it should be developed considering both a Top Down and a Bottom Up perspective.

a The Top Down approach focuses on coordinating the compliance efforts of the organization as a whole, to construct a solid strategy and structure that can effectively manage changes over time.

b The Bottom Up perspective should be aimed at identify the universe of compliance and develop the control framework through the effective usage and implementation of procedures, technology and human resources of the company's environment.

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PricewaterhouseCoopers LLP (UK) – Cross-border mergers and Societas Europaeas post-Brexit

At a glance

On 31 October 2018 and 1 November 2018, the UK published draft legislation to amend the Cross-border merger and Societas Europaea (a European legal entity form, **SE**) frameworks in the UK post-Brexit.

As a result:

a it will no longer be possible to start any Cross-border mergers, SE formations or SE migrations after 29 March 2019;

b any ongoing Cross-border mergers, SE formations or SE migrations which have not been completed and registered by 29 March 2019 will no longer be able to complete after that date; and

c whether completion of outbound Cross-border mergers after 29 March 2019 is possible where the UK pre-merger certificate has been obtained prior to 29 March 2019 will depend on the local Cross-border merger laws of the destination EEA State.

In detail

Background

Both Cross-border mergers and SEs are concepts introduced to the UK by European legislation.

A Cross-border merger is a statutory merger process by which companies in two Member States merge, resulting in the automatic transfer of assets and liabilities and the automatic dissolution of the transferring company. Aside from the Cross-border merger, the UK has no domestic statutory merger procedure, as most European countries have).

An SE is a European pubic limited-liability company form, the unique aspect of which is the ability to transfer its registered seat between Member States.

The draft UK regulations amending the Cross-border merger and SE frameworks in the UK post Brexit are, respectively, the *Companies, Limited Liability Partnerships and Partnerships (Amendment etc.) (EU Exit) Regulations 2018,* the **CBM Amendment Regulations**, and the *European Public Limited-Liability Company (Amendment etc.) (EU Exit) Regulations 2018,* the **SE Amendment Regulations**.

Their impact on corporate reorganisations in the UK in terms of:

a timing;

b the ability to use Cross-border mergers post-Brexit; and

c the ability to use SEs post-Brexit is as follows.

Timing

Both the CBM Amendment Regulations and the SE Amendment Regulations are scheduled to come into force on **Exit Day** which is 11 pm on 29 March 2019 (s 20(1) of the *European Union (Withdrawal) Act 2018*).

Cross-border mergers post-Brexit

The CBM Amendment Regulations revoke all UK regulations pertaining to Cross-border mergers in their entirety with effect from Exit Day (reg. 5(a)-(d) of the CBM Amendment Regulations). As such, there will be no legal basis for the needed court applications/orders to effect a Cross-border merger in the UK after Exit Day, and it will not be possible to start any Cross-border mergers after Exit Day.

With respect to ongoing but incomplete Cross-border mergers on Exit Day, there will be the following scenarios:

a **Inbound into the UK, missing final UK court approval:** In this case, there will be no legislative basis anymore for the UK court to grant the final merger approval after Exit Day since the relevant regulation granting this power to the court (reg. 16 of the *Companies (Cross-Border Mergers) Regulations 2007/2974*) will no longer exist. Completion of the Cross-border merger will not be possible.

b **Outbound out of the UK, missing UK pre-merger certificate:** Similar to above, there will be no legislative basis anymore for the UK court to grant the pre-merger certificate as the relevant regulations will no longer exist. Completion of the Cross-border merger will not be possible.

c **Outbound out of the UK, UK pre-merger certificate obtained prior to Exit Day, but not yet finally completed in the destination EEA State:** In this case, whether the merger can be completed will depend on whether the Cross-border merger legislation in the destination EEA State allows mergers just with Member States or also with 3rd party countries (which the UK will then be). Based on very preliminary analysis, it may possible to complete the merger for example in Luxembourg but not for example in Liechtenstein, subject to confirmation with local counsel).

SEs post-Brexit

The SE Amendment Regulations amend the UK SE regulations (the *European Public Limited-Liability Company Regulations 2004*) as well as the EU SE regulations (the *Council Regulation 2157/2001/EC of 8 October 2001 on the Statute for a European Company*, as retained under the *European Union (Withdrawal) Act 2018*) to automatically convert all SEs registered in the UK to "UK Societas", a new company form, on Exit Day (regs. 8 and 97 of the SE Amendment Regulations). They also revoke all parts of the UK and EU regulations governing the formation and transfer of SEs with effect from Exit Day (regs. 99 and 103 of the SE Amendment Regulations). Therefore, it will be impossible to form or transfer an SE or UK Societas after Exit Day.

With respect to ongoing transfers of SEs out of the UK, the relevant transferring SE will be deemed transferred if (and only if) it will have been registered in the destination EEA State before Exit Day. If the registration in the destination EEA State has not yet taken place by Exit Day, then the relevant SE will automatically convert to a UK Societas in the UK and will no longer be able to transfer out of the UK (new para 12A(3)-(5) in reg. 8 and reg. 97 of the SE Amendment Regulations).

By way of additional background for SEs registered in the UK, the Explanatory Memorandum to the SE Amendment Regulations makes it clear (at 7.5-7.7) that the UK Societas company type is intended to be a temporary transitional stage for UK SEs, introduced to minimise the administrative and operational burden of losing the SE framework. The expectation is that the UK Societas will then proceed to convert to regular PLCs in due course. In line with this intention, the process for converting from a UK Societas to a PLC has been simplified (reg. 135 of the SE Amendment Regulations).

The takeaway

The most important takeaway is that the changes to the Cross-border merger and SE frameworks in the UK will apply from Exit Day, 29 March 2019, regardless of any transitional period.

Practically, neither new nor ongoing but incomplete Cross-border mergers, SE formations and SE transfers will be able to complete after 29 March 2019. However, Cross-border mergers out of the UK where the UK pre-merger certificate has already been obtained may be able to complete depending on the destination EEA State's laws.

The intention by the UK to discontinue both Cross-border mergers and SEs post-Exit Day is clear from the explanatory memoranda accompanying the draft regulations. The UK considers these processes to be unworkable post-Brexit, being corporate reorganisation processes introduced to ease reorganisations within the EU/EEA area only.

Please note that this article focuses on high-level insights into a number of the key aspects of the CBM and SE Amendment Regulations. The full draft regulations can be found **here** and **here**, and their Explanatory Memoranda can be found **here** and **here**.

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