PwC International Business Reorganisations Network – Monthly Legal Update

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Welcome

Welcome to the fourth 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 April 2019 issue:

- PwC Legal AG Rechtsanwaltsgesellschaft (Germany) considers new laws permitting a cross-border merger of a foreign EU/EEA corporation into a German partnership;
- PricewaterhouseCoopers Sociedad Civil (Uruguay) reports on a new law law seeks to improve decent youth work while establishing a temporary scheme for employment promotion; and
- PwC Legal CVBA (Belgium) reports on the New Belgian Code of Companies and Associations.

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PwC Legal AG Rechtsanwaltsgesellschaft (Germany) – Cross-border merger of a foreign EU/EEA corporation into a German partnership

At a glance

By the fourth act regarding the amendment of the German Transformation Act (UmwG) the German legislator allows a cross-border merger of a corporation subject to the laws of a foreign EU/EEA country (**EU/EEA corporation**) as transferring entity into a German (limited) partnership as acquiring entity.

By implementing the amended German Transformation Act, the German legislator intended to mitigate the effects of the Brexit on UK Limiteds having their head offices in Germany. The practical impact of the new possibilities for the UK Limiteds, however, seems to be low. The more significant fact is, that due to the new German national rules German law now accepts a cross-border merger of any EU/EEA corporation into a German (limited) partnership and provides a secured legal framework for such transaction.

It should be noted that this new German regulation is beyond the EU cross-border-merger directive.

In detail

Fourth act regarding the amendment of the German Transformation Act (UmwG)

On 1 January 2019 the fourth act regarding the amendment of the German Transformation Act (UmwG), extending the scope of cross-border mergers, came into effect. Whereas until 31 December 2018 under German law it was only possible to merge a foreign EU/EEA corporation as transferring entity into a German corporation as acquiring entity. The German legislator now also allows to merge a foreign EU/EEA corporation into a German (limited) partnership. In this respect, the new German law provisions even go beyond the current applicable EU cross-border-merger directive which limits the scope of permitted cross-border-mergers to EU /EEA corporations. (Still) not covered by the new German Transformation Act is a cross-border merger of a foreign partnership subject to the laws of a EU/EEA county as transferring entity into a German corporation and / or partnership as acquiring entity.

Mitigation of legal effects of the Brexit for UK Limiteds with head offices in Germany

The reason for such change of the German Transformation Act is that the German Federal Ministry of Justice and Consumer Protection strives to diminish the consequences resulting from the United Kingdom leaving the European Union (Brexit) for the approximately 8,000 – 10,000 UK Limiteds having their head office, i.e. place of effective management, in Germany.

With the effectiveness of the Brexit the freedom of establishment does no longer apply to these UK Limiteds. As a consequence a UK Limited with its head office in Germany will no longer be recognized as a corporation in Germany, but will be regarded as a German general partnership (OHG), civil law partnership (GbR) or sole proprietorship (Einzelkaufmännisches Unternehmen). In each case this leads to the loss of the limited liability of the shareholders.

In order to avoid the legal consequence of an unlimited personal liability of the shareholders of a UK Limited due to the Brexit, various legal options such as the implementation of an asset deal, a cross-border merger into a German corporation, a conversion of the UK Limited into a SE and subsequent relocation of the SE's registered office to Germany or a contribution followed by a (cross-border) amalgamation to the German sole shareholder, used to be available.

In practice these options do not fit to the (German) UK Limiteds in most of the cases. These are often small companies with low capital resources, for which the minimum share capital of EUR 25,000 to be contributed to a German GmbH (limited liability company) can be an obstacle. Furthermore, some of the options run out of time (cross-border mergers need approximately 4 months until implementation).

Therefore, the German legislator had the intention to create a further legal instrument to enable an orderly change into a German legal company form and, therefore, permitted all EU / EEA corporations to merge into a German partnership in accordance with the provisions of the amended German Transformation Act. Practically relevant might be in particular the merger into a German limited partnership with a Mini-GmbH (UG – haftungsbeschränkt) as general partner which provides limited personal liability for the shareholders and needs almost no nominal capital.

According to the amended German Transformation Act British corporations now could effect a merger into a German partnership if the merger plan is notarised prior to the exit of the United Kingdom from the EU or the expiry of a transitional period during which the United Kingdom in Germany continues to be regarded as a member state of the EU. Furthermore, the merger must be registered with the German commercial register immediately, but no later than two years after the effectiveness of the Brexit.

Evaluation and analysis

Doubtful practical impact on UK Limiteds

Despite a good intention of the German legislator, the change of law with view to the creation of a facilitation possibility for the Brexit must be viewed critically. Especially for small UK Limiteds, a cross-border merger procedure remains complicated, time-consuming and costly. Besides, also from a practical point of view, it is questionable if the new law provides improvement. As the willingness of the UK Companies House to cooperate in the case of a cross-border merger into a German corporation is low, it is most likely that such willingness to cooperate will not increase in case of a cross-border merger into a German (limited) partnership. In addition, in terms of time, the implementation of such cross-border merger from a UK law point of view may not be feasible prior to the Brexit anymore. It is doubtful that under UK law the mere notarisation of the merger plan prior to the Brexit considered to be sufficient under the new German Transformation Act also will be regarded as sufficient under UK law.

Creation of new merger opportunities for EU/EEA – states

The German legislator, however, did not only provide rules for UK Limiteds in relation to the Brexit. Far more significant is the fact that the German legislator has created general rules for a cross-border merger of foreign EU/EEA corporations into a German partnership indefinite in time. This means that at least according to national German law provisions a cross-border merger of any corporation from another EU/EEA country as transferring entity into a German (limited) partnership is acceptable. This basically expands the legal structuring possibilities in relation to cross-border mergers into Germany. In particular, in the absence of an EU-harmonised legal framework for cross-border mergers involving partnerships, the new German national rules can help to facilitate the implementation of such cross-border transactions. Also a proposal of the European Commission issued in April 2018 amending the current cross-border-merger directive amongst others in relation to the cross-border merger rules does not provide any provisions allowing cross-border mergers (or any other cross-border transactions such as demergers or conversions) involving partnerships.

Outlook

Although the creation of the new cross-border merger possibilities is to be welcomed, it remains to be seen what the scope of the new German rules will bring in practice. In particular, the applicable national law of the transferring foreign EU/EEA corporation (if any at all) and related legal uncertainties as well as the still time-consuming and costly implementation procedure may present a challenge for the entities involved in the newly implemented possibilities of cross-border mergers to Germany. Besides, the new German law provisions also only cover the (German) legal aspects of such transactions. Any tax aspects in this context remain unanswered.

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PricewaterhouseCoopers Sociedad Civil (Uruguay) – Law on decent work for the youth and employment promotion

At a glance

On 23 October 2018, the Legislative Power passed a law that seeks to improve decent youth work while establishing a temporary scheme for employment promotion.

This law comprises two chapters: the first one sets forth provisions concerning decent work for youngsters and the second chapter deals with employment promotion through the enforcement of a temporary program of employment subsidy.

In detail

Background

As per the aims laid out, this law seeks to broaden the application of Law No. 19,133 (promotion of youth employment) and, with it, foster the recruitment of youth on the basis of their educational background.

Additionally, it contributes to the creation of jobs for youngsters to address the lack of it as the records show the focus is put on workers of over forty-five years of age.

Chapter I - Decent youth work

Conditions for employers

Benefits under Law No. 19,133 shall not be applicable to youngsters related to the owner or owners of the companies hiring them, that is, up to the fourth degree of consanguinity and the second of affinity.

Flexible recruitment timelines

Under the modalities of first work experience, work practice for graduates or secure work for youngsters, a probation period of thirty calendar days may be set for contracts with a six-to-eleven-month duration, while a probation period of sixty calendar days may be set for contracts with a twelve-to-eighteen-month duration.

Incentive for companies

There is an increase in the base amount of subsidies allocated for the modalities of first work experience and work practice for graduates, and a subsidy for the modality of educational work practice in companies is established.

Employers facilitating a reduced workload for their young employees or study leave for up to eight days will obtain an 80% subsidy on the hours in question.

Educational work practice in companies

This modality is intended for students between ages fifteen and twenty-nine and will be paid with a 75% of the value attributed to the grade and business activity developed subject to a minimum amount equivalent to the National Minimum Wage (**NMW**) calculated in proportion to the number of hours worked.

Companies adopting this modality shall have a tutor to aid the educational process of the student.

It is worth mentioning that unpaid educational work practice is now considered exceptional.

Subsidy program for companies owned by youngsters

a 50% of special social contributions coming from employer contributions will be subsidized, subject to a top limit of 15 BFC.

b Companies whose owners or half plus one of its owners are young women, youngsters with a vulnerable socio-economic status or youngsters with disabilities will get an additional monthly subsidy of 5 BFC for a period of eighteen months.

Chapter II – Employment promotion

Temporary program of employment subsidy

The Executive Power has been allowed to grant a temporary employment subsidy that will benefit private employers recruiting new workforce.

Employers recruiting workforce under the requirements set forth by the law will obtain a subsidy equivalent to 25% of the worker's monthly wage taxable by special social contributions or 40% in the case of workers over forty-five years old.

The maximum subsidy amount is equivalent to 25% of 1.5 NMW and it will be granted for a period of eighteen months. Only new employees with a maximum wage of 2.5 NMW will be eligible for subsidy.

It should be noted that the program will be applicable from the day the law goes into effect until the maximum funding amount foreseen is met.

Subsidy will be implemented through the Social Security Office (BPS for its acronym in Spanish), who shall issue a credit in favour of the company for the equivalent of the applicable sum to be registered under payments of social security contributions.

Requisites for participation of companies

a Be up to date on payments to the Social Security Office, the General Tax Office and the Ministry of Labor and Social Security (BPS, DGI and MTSS for their acronyms in Spanish).

b Not having laid off employees (dismissal for gross misconduct is excluded) nor be paying unemployment insurance within the 90 days that precede and the 90 days that follow the recruitment.

c Neither companies registered as "Service User" before BPS nor workforce supplying companies are eligible for the program.

d The company cannot be beneficiary of other tax incentives or subsidies current at the time the law goes into effect.

Contribution fee for Labor Reintegration Fund

This fee — equivalent to 0.10% on the amount levied by special social security contributions — is imposed upon employers, employees and the State as of 1 January 2019.

Having said that, the Executive Body may raise the fee up to 0.125% upon consultation with the professional organizations that best represent the interests of employers and employees.

Effective date

The law goes into effect as of 1 January 2019.

Pending is its regulation to be carried out by the Executive Power within sixty days after it has been enacted.

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PwC Legal CVBA (Belgium) – New Belgian Code of Companies and Associations

At a glance

A completely new Belgian Code of Companies and Associations (**new CCA**) was adopted on 23 March 2019 *(see also our contribution in the September 2017 edition of this newsletter, in which the new CCA was already announced)*.

The new CCA is applicable as of 1 May 2019. For existing companies, the new CCA will be applicable as of 1 January 2020, with the possibility to apply the new CCA earlier via a so-called "opt-in". At the latest by 1 January 2024, all companies should have amended their articles of association to align with the new CCA.

The impact of the new CCA cannot be overestimated and will affect every single Belgian company in various ways.

In this update we give more information on the transitional measures regarding the entry into force as well as the most important changes compared to the current companies code.

In detail

Timeline

1 May 2019: the new CCA is immediately applicable to new companies incorporated as from such date. For existing companies, the new CCA will not apply immediately, unless the company decides to "opt-in" (this requires a modification of the articles of association).

1 January 2020: the new CCA becomes applicable to all companies which already existed on 1 May 2019

At the occasion of the first change to the articles of association by a company after 1 January 2020, the articles of association have to be aligned in full to the new CCA.

1 January 2024: final deadline to align the articles of association of the company to the new CCA if not yet done.

Most important changes

Below is a (non-exhaustive) selection of the most important changes in the new CCA.

Reduction of the number of company types

Belgium currently has a large number of company types. In the new CCA, only the following company types will remain:

a the ordinary partnership, without or with legal personality;

b the limited partnership (CommV/SComm);

c the private limited liability company (BV/SRL);

d the cooperative company (CV/SC);

e the public limited liability company (NV/SA); and

f the European company (SE) and the European cooperative company (SCE).

PwC Legal CVBA (Belgium)

Reform of the Belgian Companies Code adopted

Currently, the public limited liability company NV/SA is the most frequently used legal entity form, even for smaller companies. In the new CCA, the idea is that the private limited liability company BV/SRL will become the new "by-default" company type, offering increased flexibility compared to the old BVBA/SPRL.

The cooperative company, which is currently often used because it allows for easy entry and exit of shareholders and offers a lot a freedom to organise shareholders' rights, will be reserved for companies with a "real" cooperative purpose (i.e. companies having as purpose the promotion of the economic and / or social activities of its shareholders).

The Economic Interest Grouping (ESV/GIE), the agricultural company (LV/S.Agr.), the unlimited liability cooperative company (CVOA/SCRI) and the partnership limited by shares (Comm.VA/SCA) are abolished.

Abolishment of capital for the private limited liability company

The share capital is abolished for the private limited liability company BV/SRL.

Although there will no longer be a "minimum share capital" (set at EUR 18,550 for the BVBA/SPRL), the founding shareholder(s) must ensure that the company has sufficient equity upon incorporation. This needs to be justified in a detailed financial plan.

The provisions for equity distributions are extensively modified and are made subject to a double test:

a net assets test: first, the general shareholders' meeting should establish that the company's net assets remain positive after the distribution (similar to the currently applicable requirements); and

b liquidity test: second, the company's management body must establish that, after the distribution, the company will continue to be able to pay its debts as they become due within a period of at least 12 months; this decision of the management body must be justified in a report which must be reviewed by the company's statutory auditor.

This double test will not only apply in case of distribution of profits (dividend) but also in case of repayment of a contribution to a shareholder (either as alternative to the "old capital decrease" or in the framework of the exclusion / withdrawal of a shareholder).

Finally, it will become possible for private limited liability companies to distribute profits of the ongoing financial year as a so-called "interim dividend" (now, this is only possible for public limited liability companies).

The public limited liability company (NV/SA) will remain subject to the capital requirement rules as are currently in place.

Introduction of multiple vote shares

The new CCA introduces the possibility to issue multiple-vote shares. It will be possible to disconnect the link between the contribution paid for a share and the voting rights attached to a share.

For listed companies, restrictions apply: maximum 2 votes per share, and only for fully paid up shares that have been held by the same shareholder for an uninterrupted period of 2 years.

For non-listed companies no restrictions are applicable.

New types of securities for the private limited liability company

The prohibition for private limited liability companies to issue warrants and convertible bonds is abolished.

Under the new CCA it is possible for private limited liability companies to issue other type of securities developed in legal practice, such as reverse convertible bonds.

Cap on director's liability

The new CCA introduces a general cap on the liability of directors, although the scope is significantly reduced compared to the initial proposal.

The amount of the liability cap depends on the turnover and balance sheet total of the company and ranges between EUR 125k and EUR 12m.

The cap only applies for smaller accidental errors and does not apply to e.g. serious errors, fraud, tax matters and social security debts in case of insolvency.

Removal of some impediments and remediation of gaps

Some rules and restrictions which give rise to practical difficulties are removed or remedied.

For example:

a it will be possible for private and public limited liability companies to have only one shareholder (whereas currently at least two shareholders are required – if not the sole shareholder risks to become unlimitedly liable);

b it will be possible to contribute labour into a private limited liability company in return for shares;

c modern and flexible communication tools towards shareholders can be used; and

d introduction of an explicit transfer of seat procedure (by way of a cross-border conversion).

Statutory seat will determine applicable company law

In the new CCA, the applicable company law will be based on the location of the statutory seat.

This means that Belgian company law will apply to companies having their statutory seat in Belgium, irrespective where the real seat or the activity of the company is located.

The statutory seat can be located in Belgium upon the incorporation of the company, but the seat can also be moved into Belgium under the procedure of the inbound cross-border conversion (with continuation of legal personality). Also outbound cross-border conversions are expressly provided for in the new CCA.

The statutory seat theory will become applicable to all companies as of 1 May 2019.

Governance

Various changes are made to the governance of the NV/SA:

a possibility for an NV/SA to opt for 1) one-tier governance system 2) two-tier governance system or 3) single director structure; and

b the shareholders' absolute right to dismiss the directors of an NV/SA at any time, without cause and without severance pay, will no longer be of mandatory law (a notice period or severance pay can be granted).

Action plan

The impact of the new CCA cannot be overestimated. Given the extensive changes, the new CCA will affect every single Belgian company in various ways.

Each company / group will need to:

a understand the driver(s) for their current legal structure (e.g. US check the box entity, listed company and BVBA/SPRL for lighter governance);

b assess whether it can change and what the opportunities are; and

c decide on the timeline for implementation (immediately grasp the opportunity or wait and see).

We can help with the development of a concrete action plan.

Tax impact of the reform

Further to the entry into force of the new CCA (and more in particular the abolition of the capital requirements in the private limited liability company (BV/SRL)) the tax legislation will be adjusted in order to make sure that the rules of the new CCA are tax neutral.

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