PwC Legal International Business Reorganisations Network – Monthly Legal Update

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Welcome

Welcome to the ninth edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for 2016.

PwC's 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 and developments relevant to multinational organisations.

We hope that you will find this publication helpful, and we look forward to hearing from you.

In this issue

In our September 2016 issue:

- PricewaterhouseCoopers Legal LLP (UK) discusses a recent court case highlighting the importance of legal structures and accountability of boards in the circumstances of post-acquisition integration;
- PricewaterhouseCoopers, Société cooperative (Luxembourg) considers recent reforms to Luxembourg's company registration and publication regime; and
- Law Square Bcbva (Belgium) reports on a new real estate investment vehicle now available to investors.

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PricewaterhouseCoopers Legal LLP (UK) – Case study: Jackson Lloyd Ltd and Mears Group PLC v Smith and others

At a glance

It is common ground that the *Transfer of Undertakings (Protection of Employment) Regulations 2006* (**TUPE**) does not apply to share transfers as there is no change in the identity or activities of the employer.

However, following the decision in ***Jackson Lloyd Ltd and Mears Group PLC v Smith and others***, acquirer companies need to be careful with how they manage a post-acquisition integration so as to avoid an "inadvertent" TUPE transfer of employees from the newly acquired company to another group company.

In detail

Facts of the case

Mears Group PLC (**MG**) and Jackson Lloyd Ltd (**JL**) were the two main companies in the social housing repair and maintenance industry and when JL got into financial difficulties, Mears Limited, (**ML**), a subsidiary of MG, bought all of the shares in JL.

MG announced the acquisition, confirming that it would immediately integrate the new business and its 400 – 500 employees into MG. The integration process was to be led by the MG CEO, MG integration managers and their support staff. Accordingly MG began to exercise control and influence over JL. The intention was to use MG systems, policies, procedures, methods and its central services to turn around the JL business, "*leaving Jackson Lloyd Ltd's operatives in their former liveried uniform but to all intents and purposes controlled by Mears Group PLC*".

The JL board resigned upon completion of the acquisition and were replaced with MG nominee directors. It was a key factor in the judgement that decisions regarding the integration process and changes to JL, including dismissal of staff by redundancy or otherwise, were made without any involvement of the JL board and that no JL board resolutions were passed. Instead, all decisions were made at MG level.

Decision

The employment tribunal therefore found that the economic activity of JL had passed to MG and that TUPE did apply. Therefore, the company was liable to the employees for failure to inform and consult in relation to the TUPE transfer. This decision was upheld on appeal.

The interesting thing about this decision is that it shows the willingness of the tribunal, on the basis of the facts, to imply a business transfer and consequently the application of TUPE even in the absence of any clear intention of the parties to do so. The tribunal even acknowledges that for commercial reasons JL was intended to remain an "*autonomous independent company*" with its own contracts but rejected this on the basis that JL was nothing more than a trading name. However it did not go as far as to say that the arrangement was a sham which could be looked behind.

The decision interestingly also does not consider the wider implications of the "implied" business transfer, for example whether any assets or contracts of JL are equally deemed to have transferred. Any deemed transfer of assets or contracts could have a much wider business impact, including unintended tax and contractual implications. In the JL situation for example a transfer of the contracts could have given rise to a re-tendering risk but the tribunal does not consider the impact of its decision on these contracts.

Lessons learnt

Companies embarking on a post-acquisition integration programme will need to carefully consider how they manage and communicate that process and ensure that decision making occurs in line with the legal entity structure and corporate governance principles. While it remains settled law in the UK that a share transfer itself does not give rise to any requirement to consult with employees, this case shows that a subsequent integration of the business might. The way in which the integration of functions is carried out needs to be carefully managed as there could also be a risk of a "creeping" TUPE transfer if there is piecemeal integration of functions rather than the "big bang" that happened in this case.

Additionally it is important to note that this will not necessarily be the case in all jurisdictions. For multi-national reorganisations the impact will need to be considered on a country by country basis. For example, in France there is a requirement to consult with employees 2 months in advance of a share or business transfer, even if there is no works council or it is a small or medium sized company.

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PricewaterhouseCoopers, Société cooperative (Luxembourg) – The new publication regime in Luxembourg

At a glance

Since 27 May 2016, new laws have been introduced to reform the legal publication scheme for companies and associations by modifying various provisions relating to the registration and filing to the Trade Register (**RCS**) as well as introducing a new publication platform.

With the new laws, Luxembourg finalises the reform of the Trade Register started by the law of 19 December 2002 on the Register of Commerce and Companies, Accounting and Annual Accounts of Undertakings and completed by the Grand Ducal Regulation dated 14 December 2011 regarding the electronic filing of the accounting package.

In detail

As part of the reforms, the Memorial C will be replaced by a new publication platform (**RESA**), while the introduction of automated features to the Trade Register will make processing faster and easier. Along with this new system, the changes will increase registration obligations and amend some other existing rules.

Furthermore, access to filed documents will now be available for free. On the other hand, filing costs for financial statements will increase progressively for filing performed after the legal deadline.

Major Changes

A new publication platform: RESA

Any document filed for publication from 1 June 2016 will be published on RESA. Documents filed for publication will be automatically and immediately published after their filing; however, there is an option to delay the publication for a maximum of 15 days as from the filing date. Once published, documents will be freely available for consultation. Documents filed for publication will have to meet certain standards (PDF/A, A4, black font/white background, 35mm margins, etc.).

Convening notices for a general meeting will be published in RESA as well.

Going forward, authorised representatives, shareholders, and statutory auditor for legal entities have to be registered and provide the following information:

a name;

b registration number;

c name of the register;

d registered office; and

e legal form.

This enables a transversal approach whereby the change of the name or registered office of a Luxembourg entity (A) will be automatically reflected in all the file of the companies that have appointed A as manager, director or statutory auditor since 1 June 2016.

Archives of the Mémorial C will remain available on the RCS website. In addition, all documents already filed before 1 June 2016 will be also published in Mémorial C.

New features and automation of filing to RCS

In some cases, the system will now automatically generate and publish the appropriate information, where the following forms are filled:

a appointment of legal representatives;

b resignation of legal representatives and *réviseur(s) /commissaire(s) aux comptes*; and

c changes in registered address.

In the case of a publication by mention, the system will also automatically generate the mention eliminating the need to prepare a mention manually.

From 1 June 2016, any information automatically generated by the system will also be automatically updated on the RCS.

Increased filing fee

Filing costs for financial statements will vary depending on the date when they are filed. From 1 January 2017, the following fees will apply, regardless of the financial year concerned:

a EUR 50 for a delay from 1 day to 1 month;

b EUR 200 for a delay from 1 month and one day to 4 months;

c EUR 500 for any delay higher than 4 months.

New registration obligation

Other changes include a new obligations to the RCS for Undertakings for Collective Investment Luxembourgish branches of Sociétés Civiles, Economic Interest Grouping, and European Economic Interest Grouping (whether incorporated in Luxembourg or not) to be registered on the RCS.

Entry into force

Unless otherwise stated, the requirements of the new laws entered into force as from 1 June 2016.

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Law Square Bcbva (Belgium) – A new Belgian real estate investment fund regime

At a glance

On 20 July 2016, the Belgian Parliament voted on the Program Law II modifying, amongst other things, the Belgian law of 19 April 2014 on alternative investment funds and their managers (**AIFM Law**).

These modifications were necessary to allow the adoption of a new royal decree implementing a new regime for real estate investment funds "*Fonds d'investissement* immobiliers *spécialisés*" (**FIIS**). This royal decree is currently being analysed by the Belgian Council of State and should be officially adopted and published in the coming weeks.

The FIIS is a new closed-ended investment fund regime allowing institutional and professional investors to invest in real estate.

In detail

A new investment vehicle for real estate

The current Belgian regulatory landscape did not previously allow for the setup of flexible and efficient real estate investment funds dedicated for institutional and professional investors.

Instead, real estate vehicles that may be used include the regulated real estate company, société immobilière réglementée (**SIR**) which is not an investment fund, but rather, a listed company available for retail investors with a long term corporate strategy. The SICAFI regime has become obsolete since the conversion of all SICAFI into SIR in 2014.

The objective of this new regime is to close the gap between SIR's and real estate investment funds by setting up a solid but flexible, legal, regulatory and tax framework for institutional real estate investment funds.

The FIIS will, in most cases, be regulated under Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers (**AIFMD**) and will benefit from the corresponding European passport, but will not be supervised by the Belgian Financial Services and Markets Authority (**FSMA**).

Key features provided under the draft FIIS Royal Decree

a Light registration: Unlike other European fund regimes, the FIIS will not be subject to a prior approval procedure nor ongoing supervision of the FSMA. Only a registration with the Ministry of Finance is required, which means the FIIS can be established and operational in record-time of approximately 15 days, at a low cost.

b Sole investor: By derogation to the Belgian companies' code, a sole investor may hold all the shares of the FIIS. In which case, the FIIS will fall outside the scope of the AIMFD.

c No listing obligation: The FIIS is a closed-end fund with no requirement to be listed.

d Broad definition of real estate: The definition of real estate includes (amongst other things) real estate assets, shares in real estate companies or Belgian or foreign REITs, real estate certificates, rights under real estate leasing, shares in other FIIS or in foreign real estate investment funds, concessions.

e Different corporate forms available: Public limited liability company ("SA" / "NV"), limited partnership ("SCS" / "Comm. V.") or partnership limited by shares ("SCA" / "Comm. VA.").

f No risk diversification requirements: A FIIS may hold one single real estate asset.

g No leverage limits: There are no limits on the use of leverage.

h Distribution: As is the case for Belgian REITs, it will be mandatory for the FIIS to distribute 80% of its net income.

i Minimum capital and asset value: The FIIS should have a minimum share capital of at least EUR 1.2 million. Within two years, the total value of the assets held by the FIIS has to exceed EUR 10 million.

j Direct investments in Belgian real estate: The FIIS may not hold Belgian real estate indirectly. Indirect investments through subsidiaries are only temporarily allowed as the FIIS acquiring Belgian real estate indirectly will benefit from a 24 months period before having to proceed to restructuring.

k No developer: A FIIS is prohibited from acting as a real estate developer during the 5 years after construction.

l Limited duration: The FIIS shall have a duration of a maximum of 10 years in its initial period, with the possibility for shareholders to unanimously extend that duration for successive periods with a maximum of 5 years each.

Tax aspects

For an overview of the tax benefits the FIIS offers, we refer to a previous newsflash, dated 30 June 2016: *https://news.pwc.be/new-belgian-real-estate-investment-fund-fiis-draft-legislation-introduced-in-parliament/*.

Conclusion

The FIIS should become a vehicle of choice for asset managers and investors looking to combine legal and regulatory flexibility together with tax efficiency.

In addition, for FIIS qualifying as AIFs, this flexible and efficient framework will be combined with both the investors' protection of AIFMD and the marketability of a real estate investment vehicle benefiting from the European passport.

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