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 2018.

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 2018 issue:

- PricewaterhouseCoopers, Société coopérative (Luxembourg) analyses the regime for simplified dissolution under Luxembourg law, including the practial considerations and the consequences for foreign shareholders and third parties; and
- PricewaterhouseCoopers (Australia) reports on key changes to the Australian regulatory landscape in 2018.

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PricewaterhouseCoopers, Société coopérative (Luxembourg) – The simplified dissolution regime under Luxembourg law

At a glance

In August 2016, the Bill no. 5730 modernising the Luxembourg law of 10 August 1915 on commercial companies (**Law**) entered into force.

Among the various changes implemented by this reform, the Luxembourg legislator decided to regulate and provide a legal scope to the procedure of **Simplified Dissolution**, which was only a custom until the reform.

Compared to the custom, the Law provides with different or new conditions for the application of this procedure. Even if called "simplified", this procedure must be approached with caution. Indeed, there are consequences for the dissolved company itself and its sole shareholder, which must be analysed beforehand.

This article provides you with a short description of the conditions to apply the procedure of Simplified Dissolution. Then, it emphasizes the practical aspects to be considered as well as the consequences, particularly for foreign shareholders or third parties.

In detail

1. Legal and practical aspects

a Legal conditions

By the adoption of Bill no. 5730, the Luxembourg legislator enacted Article 1865bis of the Luxembourg Civil Code (**LCC**) as well as Article 1100-1 of the Law. Article 1865bis of the LCC states notably that: "*[...] The shareholder holding all of the company shares may dissolve such company at any time.*"

On its side, Article 1100-1 of the Law provides with two clear conditions: a single shareholder must hold all of the company's shares and the company must obtain certificates from the main Luxembourg authorities.

The aim of these certificates is to confirm that "*the company is in compliance with its obligations relating to the payment of social security contributions, taxes and duties at a date that may not be earlier than three months before the date of the instrument of dissolution nor later than the instrument of dissolution.*"

Through this Article, the legislator is keen to ensure that the dissolved company has no debts (or at least none within the last three months) towards the main Luxembourg authorities. This prevents the authorities from having to recover outstanding amounts from the sole shareholder (that may be located abroad).

While Article 1100-1(2) of the Law mentions only payments, one can be sure that the authorities asked to issue the certificates would never do so without checking that the entirety of the applicant's documentation is in order.

These certificates will have to be provided to the Luxembourg notary public responsible for the enactment of the dissolution deed.

b Practical aspects

A first key element to consider is the company's effective elimination. To this end, Article 1100-1(1) of the Law provides that "*companies are [...], after their dissolution, considered to be in existence for the purpose of their liquidation.*" This means that in principle, dissolution is only a transitional stage on the path to a company's elimination.

The simplified dissolution results in the legal transfer of all the company's assets and liabilities to its sole shareholder. However, some other elements are left behind. This is the case of the contracts to which the company is a party and which have no more object. This is also the case of the bank accounts of the dissolved company, which have to be closed beforehand or duly transferred to the sole shareholder. Finally, an updated accounting situation has to be drawn up. It will serve as a basis for completing and filing the tax returns. The filing will have to comply with the newly implemented procedures (e.g. mandatory electronic filing).

Another key element to consider is the time management of the simplified dissolution. With the Law requiring certificates to be obtained from three authorities, a sole shareholder wishing to dissolve its subsidiary has no option but to accept the uncertainty of not knowing how long it will take for these certificates to be issued. The experience has shown that it can go from a few days to several months.

2. Consequences

a Universal transfer of assets and liabilities

As already mentioned, simplified dissolution results in all of the dissolved company's assets and liabilities being transferred to its sole shareholder.

Thus, everything on the company's balance sheet at the time of its dissolution is taken over by its sole shareholder and falls under their responsibility.

Furthermore, the universal transfer of the assets and liabilities must be examined prior to dissolution in order to prevent its validity from being jeopardised. Take the example of a Luxembourg company holding shares in a company established under foreign law. In addition, assume the transfer of those foreign company shares require a notarial deed. In this case, if the shares are not transferred in advance, as they need to be, questions may arise as to whether the transfer of assets and liabilities following the simplified dissolution is truly valid.

In practice, best practice would be that the company analyses each asset and liability individually to determine the conditions (formalities, time and costs) of their transfers to the sole shareholder.

The implementation of the simplified dissolution into the Law provides with legal support and comfort to the dissolved companies and to Luxembourg notaries enacting these deeds. However, there is no obligation for the notary to ensure that all assets and liabilities of the company can be transferred to its sole shareholder. In the context of a transfer of assets, parties usually enter into an agreement where they remind the characteristics of the transferred assets and confirm that they have each the capacity to respectively transfer and receive the assets. Such agreement is not required for the simplified dissolution. Consequently, the sole shareholder is the sole responsible party to ensure that all assets and liabilities are effectively transferred.

b Shareholder's liability

Transferring the entirety of the dissolved company's assets and liabilities has significant consequences for the sole shareholder, which becomes liable for them once the transfer is complete.

In the vast majority of Luxembourg companies, the shareholder has limited liability. In an S.à r.l. (private limited liability company), an S.A. (public limited liability company) or an S.A.S. (simplified joint stock company), the shareholder's liability is limited to the amount of their contribution (except in certain cases, which we will not go into here).

However, once the dissolved company's assets and liabilities have been transferred, the sole shareholder takes over all of their subsidiary's existing and future debts. Therefore, any claims against the dissolved company are made against its sole shareholder, and any subsequent amounts due are payable by the sole shareholder.

Imagine the tax authorities, while checking tax returns, take a different position from the one adopted by the subsidiary. The sole shareholder may then have to pay the amounts owed by the dissolved company to the Luxembourg tax authorities, even if the amount claimed exceeds the amount of the sole partner's contributions to their subsidiary.

This may also apply to any claims made by third parties or creditors, who would now claim the amount due from the sole shareholder.

Simplified dissolution partially revokes the limited liability previously afforded to the sole shareholder, which must therefore be aware of the obligations entered into by their subsidiary before its dissolution. The sole shareholder would become subject to the limitation periods applicable to each obligation assumed. In tax terms, this could mean that the sole shareholder is liable for up to 10 years after the tax year in which dissolution occurred.

c Foreign shareholder and third parties

While simplified dissolution is now recognised and codified in the Law and the LCC, the consequences for the sole shareholder and third parties in other jurisdictions need to be examined. An EU directive has made provision for cross-border mergers. However, in the situation at hand, not all of the conditions and formalities for a cross-border merger have been met, yet the consequences (the transfer of assets and liabilities) are the same. Therefore, it may be sensible to ensure in advance that the sole shareholder taking over all of the dissolved company's assets and liabilities is actually able to do so and is not in violation of any public-policy provisions.

3. Conclusion

On the one hand, the legislator has now codified what was previously widespread practice, borrowing from legislation that already existed in neighbouring countries. It has also shown a willingness to give guarantees to the main public creditors, by adding conditions for implementing this procedure.

However, it is sometimes harder in practice than in theory, and while we await harmonisation or potential reform in terms of issuances of the certificates, we can be forgiven for wondering whether it might not be easier to undertake standard liquidation proceedings in certain cases. It will then once again be the responsibility of the liquidator – who may be the sole shareholder – to distribute all of the dissolved company's assets and liabilities quickly after the liquidation proceedings open, and to conclude the procedure rapidly. Anyone wishing to undertake Simplified Dissolution proceedings must anticipate them thoroughly. Moreover, in some cases it might be better to avoid this method if deadline management is a key point for the company's elimination.

Therefore, it will be interesting to keep an eye on how these different methods are used in practice and to see whether a clear favourite emerges for the players involved.

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PricewaterhouseCoopers (Australia) – Regulatory agenda for 2018

At a glance

This year will witness key changes to the following areas of Australian regulation:

a **whistleblower protection** – the Whistleblower Protections Bill will consolidate and strengthen the protections and remedies accessible to eligible whistleblowers;

b **serious corporate crime** – the Combatting Corporate Crime Bill will introduce substantial changes to Australia's arsenal against serious corporate crime; and

c **anti-money laundering and counter-terrorism financing law** – the AML/CTF Amendment Act will significantly expand AUSTRAC CEO's powers and functions, deregulate low-risk industries and regulate digital currency exchange providers.

In detail

1. Whisteblower protection regime

Detecting corporate and financial misconduct often relies on individuals who are willing to report, usually at their own personal risk. However, Australia's existing whistleblower protection regime is piecemeal in structure, leading to gaps and complexity. Further, the regime does not presently extend to tax misconduct.

To reduce these personal risks and encourage reporting, the Federal Government plans to consolidate Australia's existing whistleblowing protection regime in the *Corporations Act 200*1 (Cth) (**Corporations Act**). Similar amendments will be made to the *Taxation Administration Act 1953* (Cth) (**Tax Act**) to protect whistleblowers who disclose misconduct in the tax sector.

If passed, the reforms are extensive, and are intended to apply to disclosures made on or after 1 July 2018 (including disclosures about events occurring before this date). Below, we set out a summary of the intended key features of the consolidated whistleblower protection regime.

a Qualifying disclosures

The whistleblower protection regime protects eligible whistleblowers who make disclosures about regulated entities with respect to certain disclosable matters. Such a disclosure is known as a 'qualifying disclosure'.

i Regulated entity

Regulated entities will include all corporations captured by the *Corporations Act*. Banks, life insurers, general insurers, superannuation entities and trustees of superannuation entities will also be covered by the consolidated whistleblower protection regime.

ii Disclosable matter

Conduct that may fall within the parameters of a qualifying disclosure includes actual or suspected misconduct or an improper state of affairs or circumstances with regards to a regulated entity, a contravention of any law overseen by ASIC and/or APRA and the Australian Federal Police (**AFP**), conduct that places the public or financial system in danger, and an offence against any law of the Commonwealth that is punishable by imprisonment for 12 months or more.

iii Eligible whistleblower

A qualifying disclosure can be made by an individual who is, or has been, in a relationship with the regulated entity about which the disclosure is made and will include former employees. Additionally, this could include family members of employees.

An individual is eligible as a whistleblower if their relationship to a regulated entity falls into any of the prescribed categories. The following could be eligible:

- officers and employees;
- relatives and dependents of eligible whistleblower;
- certain classes if the regulated entity is a superannuation entity;
- any other individuals prescribed by the regulations;
- associates; and
- supplies, and their employees, of goods or services (paid or unpaid).

b Eligible recipients

An eligible recipient is any person to whom a qualifying disclosure may be made. The range of eligible recipients will be expanded to include a manager or supervisor of the whistleblower. In some situations (e.g. where there is danger to public health and safety), a Member of Parliament or journalist may be considered eligible recipients following any emergency disclosure made to them. Additionally, disclosures to lawyers for the purposes of obtaining legal advice is included.

Under the Tax Act, eligible recipients are generally internal to the entity about which the disclosure is made, or have a relationship with that entity that is relevant to its tax affairs.

c Emergency disclosure

The amendments to the Corporations Act establish a new concept of ‘emergency disclosure’. This permits disclosure to a third party when:

- the whistleblower has previously made a qualifying disclosure to ASIC and APRA;
- he or she has reasonable grounds to believe that there is an imminent risk of serious harm or danger to public health or safety or to the financial system if the information is not acted on immediately; and
- after a reasonable time has lapsed since the disclosure was made, the whistleblower provides the eligible recipient with a written notification that includes sufficient information to identify the previous qualifying disclosure and states that he or she aims to make an emergency disclosure.

Emergency disclosures will not be available with respect to tax misconduct.

d Protections and remedies for whistleblowers

If passed, the level of protection for whistleblowers will be increased in a number of ways:

- requirement to have a whistleblower policy: public companies, large proprietary companies and registrable superannuation entities must have whistleblower policies. These must be made accessible to officers and employees;
- no requirement to reveal identity: whistleblowers no longer need to reveal their identities when making a disclosure, unless it is made to the Australian Taxation Office (**ATO**) or the AFP, or a legal practitioner for the purposes of obtaining legal advice in relation to the tax whistleblower protections regime. Further, a whistleblower’s identity cannot be disclosed to a court or tribunal without a court order, or the individual’s consent;

- reasonable grounds to suspect: disclosures will be protected where there have been 'reasonable grounds to suspect' a breach of law, as opposed to disclosures needing to be in 'good faith';
- inadmissibility of evidence against whistleblower: the regime ensures that information disclosed is not admissible in evidence against the whistleblower in any prosecution; and
- anti-victimisation measures: the prohibition against victimisation of whistleblowers is expanded by adding a civil penalty option for prosecution for victimisation, including liability for employers who contribute to victimisation through any act or omission. A broad definition of 'detriment' is introduced, which includes dismissal of an employee, alteration of an employee's position to his or her disadvantage, and harassment or intimidation of a person.

e Requirement to have a whistleblower policy

The existing whistleblower provisions in the Corporations Act do not require companies to have internal systems to deal with whistleblower disclosures.

If the Bill is passed, it will require public companies, large proprietary companies and proprietary companies that are trustees of registrable superannuation entities to have an internal whistleblower policy with information about:

- the protections available to whistleblowers;
- how and to whom an individual can make a disclosure;
- how the company will support and protect whistleblowers;
- how investigations into a disclosure will proceed;
- how the company will ensure fair treatment of employees who are mentioned in whistleblower disclosures; and
- how the policy will be made available and any other matters prescribed by regulation.

Whistleblower policies must include information about protections that are available to whistleblowers, as well as protections provided in the tax whistleblower regime. Failure to comply with this requirement is an offence of strict liability, with the current penalty proposed being 60 penalty units ($12,600).

f Penalties against company or entity for contravention of whistleblower protections

Contraventions of the whistleblower protection regime carry a maximum penalty of $200,000 for an individual, and $1 million for a corporation. Compensation will also be payable for victimisation of whistleblowers.

Under the current law in the Corporations Act, the prosecution must prove the elements of the offence of disclosing the identity of a whistleblower on the criminal standard, beyond a reasonable doubt. The amendments will render it a civil penalty contravention to reveal a whistleblower's identity, thereby allowing the prosecution to make out the elements of the contravention to the lower civil standard of proof.

2. Serious corporate crime

Corporate crime costs Australia an estimated $8.5 billion each year, yet successful prosecution has been rare. Proposed new rules will strengthen Australia's approach to serious corporate crime.

The Combatting Corporate Crime Bill was introduced into the Senate in December 2017 and referred to Senate Legal and Constitutional Affairs Legislation Committee, with a report due in April 2018. We review the following three expected developments:

- the offence of bribery of a foreign public official is to be broadened;

- new offence of failure of a body corporate to prevent bribery of a foreign public official by an associate; and

- a new Commonwealth Deferred Prosecutions Agreement regime, in relation to certain serious corporate crimes.

Consequential amendments are also proposed to the Income Tax Assessment Act 1997 (Cth), to ensure deductions cannot be claimed for a loss or outgoing incurred in making a bribe.

a Bribery of a foreign public official

It is an offence under the *Criminal Code Act 1995* (Cth) to bribe a foreign public official. The proposed amendments (detailed in the below table) will broaden the offence, with the aim of removing undue impediments to successful prosecution.

Key concepts and details

Concept	Details of amended offence	Details of existing offence
Business of personal advantage	Applies to bribery to obtain or retain an advantage. Advantage is broadly defined as an advantage of any kind not limited to property.	Existing offence applies only to bribery to obtain or retain business. The change broadens this to include non-business advantages.
Improper Influence	Based on the concept of improper influence of a foreign public official. Broader notion than "not legitimately'" due.	Existing offence requires bribe were not "legitimately due". This has enabled bribes to be disguised as, for example, agent fees.
Candidate	Bribery of foreign public officials includes candidates running for public office.	Currently offence extends to foreign officials influenced in the exercise of their public duties. Candidates running for office falls outside scope
Exercise of official duty	N/A	Existing offence applies only where foreign public official influences in exercise of official duties. This element is removed in the amended offence.

b Failure of a body corporate to prevent bribery of a foreign public official by an associate

The Combatting Corporate Crime Bill also proposes to introduce a new strict liability offence of failure by a body corporate to prevent foreign bribery by an associate.

This offence can only be committed by a corporation, and corporations can be convicted even if the relevant associate is not successfully convicted (for instance, where conduct of the associate occurred outside Australia and, if engaged in Australia, would have constituted an offence).

A new definition of associate is intended to provide clarify by reference to the associate's role or position relative to the body corporate. A person is an associate of another person (including a corporation) if the first-mentioned person is any of the following:

- an officer;

- an employee;

- an agent;

- a contractor;

- a subsidiary (as defined within Division 6 of the Corporations Act, and includes a corporation incorporated outside Australia); or

- controlled by the other person or performs services for or on behalf of the other person.

Strict liability applies to most elements of the offence. This would mean that corporations cannot avoid liability through wilful blindness or a defence of mistaken fact. The only way for a corporation to avoid liability is to have in place adequate procedures and policies to prevent the commission of the offence by an associate. The AFP and the Commonwealth Director of Public Prosecutions (**CDPP**) have published a joint guideline outlining the framework corporations can follow when self-reporting suspected instances of foreign bribery and related offences.

The maximum penalty for breach will be the greatest of the following:

- $21 million;
- 3 times the value of the benefit obtained by the associate, if that benefit can be calculated; or
- 10 per cent of the annual turnover of the body corporate for the 12 months commencing the month after the associate committed first bribed.

c *Commonwealth Deferred Prosecution Agreements (DPAs)*

The new DPA scheme will enable the CDPP to negotiate a form of cooperation agreement with corporations allegedly involved in serious corporate crime. In exchange, the CDPP would not institute criminal proceedings against the corporation for those specified alleged offences.

A DPA will only be available with respect to 'primary offences', as well as lesser 'secondary offences' arising out of the same course of conduct.

The primary offences, which are contained in various federal legislation, include:

- money laundering and terrorism financing;
- contravention of sanctions;
- market misconduct offences; and
- bribery of public officials.

There are mandatory and optional content DPA requirements. The Government's adoption of a semi-prescriptive approach to DPAs is to ensure consistency in administering the scheme.

A non-exhaustive list of conditions that a corporation entering a DPA may have to comply with include:

DPA Condition	Mandatory?
Preparation of an agreement statement of facts regarding each offence identified in DPA	Yes
Financial penalty	Yes, may be excluded if CDPP is satisfied that there are exceptional circumstances and penalty against interests of justice
Last day for which DPA will be in force	Yes
Requirements to be fulfilled by the person under DPA	Yes
Circumstances that constitute material contravention of the DPA	Yes
Consequences of failure to comply with DPA	-
Compensation for victims, forfeiture of likely benefits and donation to charity or other third party	-
Implementation of compliance program	-

Cooperation in any investigation or prosecution relating to a matter specified in the DPA	-

The DPA scheme will only be available to corporations, as it is designed to address serious corporate crime and encourage self-reporting. However, there will be a high threshold for approval of a DPA, and all DPAs must be reviewed by a former judicial officer. The high threshold ensures that DPAs do not become 'get out of goal free' cards.

Approved DPAs will be published within 10 business days on the CDPP website. In certain cases, such as where publication would pose a threat to public safety or prejudice an ongoing trial or investigation, the CDPP may choose to partially publish a DPA (for instance, by omitting names), or not to publish the DPA at all.

3. Anti-money laundering and counter-terrorism financing

The *AML/CTF Amendment Act amends the Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and is expected to take effect from 1 April 2018. Companies should take this opportunity to review and update their AML/CTF programs as the amendments apply to them. A more detailed summary of these new amendments can be found in our Legal Talk – Insights here.

a Expanding the AUSTRAC CEO's powers and functions

	Current Law	New Law
Infringement Notices	Infringement notices can only be issued by the AUSTRAC CEO for a narrow range of offences.	AUSTRAC CEO able to issue infringement notices for a greater range of regulatory offences.
Remedial Directions	AUSTRAC CEO is not able to issue a remedial direction to a reporting entity to compel retrospective compliance with a breached obligation.	AUSTRAC CEO able to issue a remedial direction to reporting entity to retrospectively comply with a breached obligation.
General Powers	AUSTRAC CEO does not have a general power to perform any tasks that are necessary or incidental to his or her functions.	AUSTRAC CEO to perform any tasks that are necessary or incidental to his or her functions.
Search and seizure powers	Police and customs officers search and seizure pwoers relate to breaches of current reporting requirements for physical currency and bearer negotiable instruments only.	Police and customs officers to be given general search and seizure powers at the border.
Expanded rule-making powers	-	AUSTRAC CEO's rule-making powers across a varietyof issues to be expanded.

The AUSTRAC CEO will have powers to issue infringement notices for a wider variety of regulatory offences and cancel the registrations of remitters under the Remittance Sector Register who are no longer conducting remittance activities, in a bid to ensure that registration certificates are not given to third parties who may wish to avoid scrutiny.

The amendments will broaden the AUSTRAC CEO's power to issue remedial directions, including directions requiring reporting entities to rectify past breaches of civil penalty provisions (for example, a reporting requirement). However, the AUSTRAC CEO can only issue a remedial direction relating to a past breach occurring up to two years from the date of that breach, and if it is an appropriate and proportionate response to that breach. It is anticipated that this power will allow AUSTRAC to more effectively ensure reporting entity compliance and diminish financial intelligence gaps.

Overall, the scope of the AUSTRAC CEO's functions will be significantly expanded, with the inclusion of a power for the CEO to do all things necessary or convenient for the fulfilment of his or her duties.

b Providing regulatory relief to industry

The AML/CTF Amendment Act introduces the notion of a 'corporate group' (alongside the "designated business group"), enabling multi-business corporate groups to share AML/CTF resources and achieve regulatory efficiency.

Further, the amendments will bring about regulatory relief to those in the cash-in-transit sector, insurance intermediaries and general insurance providers, on the basis that such sectors had been assessed to pose only a low money laundering and terrorism financing risk (save for motor vehicle dealers who act as insurers or insurance intermediaries).

c Regulating digital currency exchange providers

Digital currencies have grown in popularity in recent times. Often, they lie outside the scope of regulatory oversight, which can present opportunities for money laundering or terrorism financing. The new regime will apply AML/CTF regulation to businesses which exchange digital currencies for money (e.g. Bitcoin exchanges). Specifically, digital currency exchange providers will be required to:

- enroll on the new Digital Currency Exchange;
- establish and maintain an AML/CTF program to identify and manage associated risks;
- verify customer identities;
- report suspicious activities and transactions involving physical currency that exceeds $10,000 or more (or foreign equivalent) to AUSTRAC; and
- keep particular records relating to transactions, customer identification, and their AML/CTF program for seven years.

Under the amendments, if a person provides digital currency exchange services without first being registered on the Digital Currency Exchange Register, he or she will face a penalty of imprisonment for two years or $105,000, or both.

These amendments will fill regulatory gap with respect to businesses involved in providing digital currency exchange services, in the hopes of mitigating the money laundering and terrorism financing risks often associated with the digital currency sector.

d Important to maintain an up-to-date AML/CTF program

A decision handed down by the Federal Court1 late last year highlights the importance of maintaining an up-to-date AML/CTF program. The Court found that an AML/CTF program which does not conform to the AML/CTF Act and Rules is effectively the same as not having a program in operation at all when it comes to establishing liability for a breach of s 81 of the AML/CTF Act – this section provides that a reporting entity must create and maintain an AML/CTF program.

In light of above legislative changes, particularly the AUSTRAC CEO's expanded powers and functions, companies should review and update their AML/CTF programs to ensure compliance with the AML/CTF Act and Rules.

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