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PwC International Business Reorganisations Network – Monthly Legal Update

Edition 7, July 2016

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Welcome

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

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 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 July 2016 issue:

- PricewaterhouseCoopers Legal LLP considers the effect of Brexit on businesses operating in the United Kingdom;
- Law Square Bcbva (Belgium) discusses the main characteristics of a European Company (Societas Europaea or SE) following the first-ever conversion of a Belgian listed limited liability company into an SE; and
- PricewaterhouseCoopers Tax & Legal, Sarl (Cameroon) provides an overview of the principal new features of the revised OHADA Uniform Act Organizing Collective Proceedings for Wiping Off Debts.

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PricewaterhouseCoopers Legal LLP (UK) – The effect of Brexit on businesses operating in the UK

At a glance

On 23 June 2016, the United Kingdom (**UK**) voted to leave the European Union (**EU**) creating a significant period of uncertainty for business.

Managing this period of uncertainty whilst also planning for a variety of future outcomes presents challenges, but also opportunities.

To remain agile, we believe a rigorous assessment of potential future scenarios combined with action on short term changes in the business environment is key.

This article seeks to provide clarity around the post-vote landscape and the various likely scenarios for the UK whilst providing a framework which enables businesses to assess and plan for the future, so that we can manage risk, spot opportunities and respond quickly to a changing market.

In detail

How does "Brexit" work?

The Lisbon Treaty dictates the mechanism by which the UK can leave the EU. The Lisbon Treaty allows for up to 2 years of negotiations. If no agreement has been reached by this point, all 27 other member states either have to unanimously agree to extend the negotiation period, or Britain exits with no deal in place. As there is no template for such an event, it is likely to be a long and complex process resulting in a prolonged period of economic uncertainty.

The mechanism for an exit is Article 50 of the Treaty of European Union. The key steps in the process are:

a UK notifies European Council of intention to withdraw;

b European Council agrees by consensus the guidelines for the Commission to negotiate the withdrawal;

c final agreement needs to be agreed by both the EU members (qualified majority of 20 out of 27 members or 65% of the population) and the departing state;

d EU parliament needs to approve the deal with a simple majority; and

e under Article 50, the withdrawing country has two years to complete negotiations and any extension to this will require unanimous consent from EU members.

As well as negotiating a withdrawal, the UK will need to agree post-exit arrangements with the EU. It is unclear from the Article 50 wording whether these negotiations are included in the two year period, but the EU stance at present is no negotiations before trigger.

During this period a number of other factors could also play out – possible response from the EU in the form of onerous terms being imposed (as a deterrent for other EU sceptic countries); further votes and/or calls for renegotiations across the UK and Europe.

There is no obligation on the EU to complete a full trade or access deal with the UK post-exit, only to negotiate the terms of the exit.

Irrespective of the eventual route taken, in the short term the uncertainty around what Brexit looks like in practice will impact the UK and the global economy.

Brexit scenarios

We have identified four scenarios that could occur and that capture the different degrees of integration that the UK may have with the EU in the future. The scenarios could take different specific forms, but those considered in most of the existing evidence have broadly gathered around one of the following scenarios.

Each scenario offers or requires a strategic response in order to protect or grow the value drivers in business.

Our approach to planning is centred around a framework which considers the impact of each scenario on the value drivers and considers the nature of the impact in terms of time, value and probability.

Based on this framework organisations can then start to identify critical paths and also position themselves to respond quickly to any scenario as it emerges rather than react after it has emerged.

The potential outcomes from negotiations are as follows:

1. EEA member "Norwegian option"

The UK remains part of the EEA and keeps the four freedoms of; labour, capital, goods and services.

The UK will need to make a substantial contribution to the EU budget and comply with EU social, employment and product regulation.

2. Free trade agreement (FTA)

UK negotiates a FTA with the EU.

Tariff-free trade between the UK and the EU in goods (but not services). UK grandfathers all existing FTAs between the EU and third-party countries.

3. Bilateral agreement

The UK enters into a bilateral integration treaty with the EU.

The UK will have access to some areas of the Single Market, at the cost of adopting the relevant EU regulations.

4. No access agreement (WTO/MFN)

The UK does not establish any new trade agreements with the EU. Only WTO terms are still applied – UK goods and services would be treated in the same way as US ones in the EU.

Based on this picture of uncertain outcomes, organisations have a number of choices and decisions to make; the first of which is the strategic reaction they wish to employ in response to the situation.

Three possible strategic responses could be considered:

a Wait and see

This is based on a reactionary approach.

b Pre-emptive action

Largely designed to protect the existing business through some form of pro-active response which is aimed at shaping the outcome ahead of the final position being determined.

c Proactive shaping

This approach looks for ways in which opportunities can be developed through taking a more proactive approach.

The selection of strategic responses will be shaped by an organisations risk appetite, financial capital and capabilities.

The top 12 issues we are hearing from clients

The areas identified cover all aspects of business which demonstrates the potentially wide ranging impacts. The spectrum ranges from strategy through operations and finance and ultimately are reflected in the structure and legal aspects of a business. The areas identified are:

a immigration;

b strategic scenario planning;

c resource to deliver;

d treasury management;

e optimising and managing liquidity;

f cost management;

g stakeholder communication;

h real estate;

i mergers and acquisitions;

j negotiation support;

k pensions; and

l people and organisation.

Commentary

Clearly Brexit is an area of great uncertainty. However, we will continue to monitor the market very closely and as the path forward becomes clearer, we will be on hand to guide businesses through the challenges and the opportunities.

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Law Square Bcbva (Belgium) – First-ever conversion of a Belgian listed limited liability company into a European Company (Societas Europaea or SE)

At a glance

Law Square recently assisted Econocom Group, a leading European digital service provider listed on Euronext NYSE in Brussels and part of the Bel Mid and Tech 40 indices, with its conversion from a public limited liability form into a European Company (**Societas Europaea** or **SE**). Econocom Group's shareholders approved the conversion on 18 December 2015.

In this article, we recap the main characteristics and advantages of the SE and we look into some of the challenges encountered in the course of the conversion.

In detail

Main characteristics of the SE

The European legislator introduced the SE on 8 October 2001* with the aim to create an autonomous, supranational company form enabling companies to conduct operations in more than one Member State of the European Union (**EU**). The SE was implemented in the Belgian Companies Code by Royal Decree of 1 September 2004.

In a nutshell, the SE is a public limited liability company with a minimum capital of 120.000 euro that is geographically linked to at least two EU countries.

* Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) - COM/2010/0676 final

How can an SE be set up?

There are four ways to set up an SE:

a by the merger of two or more public limited companies from at least two different EU countries;

b by the setting up of a holding company for public and private limited companies with registered offices in at least two different Member States of the EU or which have had subsidiaries/branches in EU countries other than the country where they are registered for at least two years;

c by creating a joint subsidiary – subject to the same conditions as for the holding company; and

d by the conversion from a public limited company – if it has a registered office in one EU country and has had a subsidiary in a different EU country for at least two years.

It is therefore not possible to set up an SE from scratch – but an SE may itself set up a subsidiary in the form of an SE.

Worker involvement

A "special negotiating body" representing the employees of the companies involved must be created for the purpose of negotiating with the management of the said companies in view of reaching an agreement on employee involvement in the SE. This must be done before the SE can be registered.

The special negotiating body's members are elected or appointed in proportion to the number of employees employed by the said companies in each Member State of the EU.

If no agreement is reached with the workers, a set of standard principles will in principle be applied.

Governance

An SE can choose between a one-tier system (with only one management body) and a two-tier system (with a management body and a supervisory body).

Some of the advantages of setting up an SE

The SE offers numerous advantages for larger companies:

a it allows them to match their legal form with their group's multiple geographical locations;

b it enables them to boast a strong marketing image which can be quite a prestigious asset to access international markets, both inside and outside the EU;

c it increases their credibility in vying for large projects, including European and international public tenders;

d because it has no apparent "nationality", it is also quite useful for groups of companies of different "nationalities" who want to partner in new business endeavours as it creates a European identity and avoids discussions on which "nationality" to give to the company (although the company's seat will inevitably be in only one country and subject to that country's law). Eurotunnel is a good example of this: it's a European Company that was incorporated in Belgium between a French "société anonyme" and an English "private limited company";

e it facilitates cross-border restructurings; and

f it provides flexibility by greatly simplifying the transfer of the company's registered seat to another European country.

That being said, the corporate legal form of an SE in Belgium has nevertheless only been chosen (to our knowledge) by a mere 17 companies (including Econocom) since its entry into force in Belgian law in 2004. Not what you would call a runaway success!

The main challenges encountered

A number of aspects of the SE Regulation remain somewhat confusing to implement under Belgian law. For example, the concept of the two-tier system, as defined in the SE Regulation, does not exist under Belgian law. The two-tier system under Belgian company law includes the board of directors and a management committee, but does not include a "surveillance body"; and vice versa: neither system provided for the SE allows for a management committee as this body is foreseen under Belgian company law. Belgian companies are not familiar with the concept of "surveillance body" and usually prefer to stick with what they know. The two-tier system has therefore only been chosen by a very limited number of companies.

Other grey zones include: the content of the transformation report, the application of gender quotas, discrepancies between the SE Regulation and the Belgian Companies' Code, the timing of the start of the workers' consultation process, the application of multiple national rules in the designation and election of the members of the special negotiating body, the qualification of the transformation as market-sensitive information, etc.

Conclusion

From our experience, it seems that the lack of publicity and insufficient knowledge about the SE legal structure deters companies from taking the plunge. Some clients are also wary of having to set up a special negotiating body to ensure negotiations on employee involvement or to choose between a one-tier or two-tier corporate governance system.

But although the SE can at first sight appear challenging to set up, the procedure is really not as daunting as many think it to be. In addition, the SE remains in many parts still subject to local company law and is hence not such an unfamiliar monster to manage.

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PwC Legal (Cameroon) – Principal new features of the revised OHADA Uniform Act Organizing Collective Proceedings for Wiping Off Debts

At a glance

The revised OHADA Uniform Act Organizing Collective Proceedings for Wiping Off Debts (**Uniform Act**) is intended to improve the speed and efficiency of collective proceedings and bring the proceedings for wiping off debts in line with international best practices. Its aims of helping companies recover and enabling those in critical situations to undergo liquidation proceedings remain unchanged.

In detail

The Organisation for the Harmonisation of Business Law in Africa (**OHADA**) zone's legal landscape has once again evolved as part of the process to update corporate law provisions applicable in the area.

The revised version of the Uniform Act, which had been under review by the Permanent Secretary for some time, was approved by the Council of Ministers on 10 September 2015.

The revised Uniform Act features definitions of a number of key terms in order to make the document easier to understand, interpret and apply, as well as a broader scope.

Through this reform, the OHADA legislator aims to encourage company leaders to seek assistance as soon as difficulties are identified and increase the attractiveness of out-of-court proceedings.

This article provides an introduction to the principal new features of the revised Uniform Act recent following its recent entry into force.

Principal new features

Change in the provisions applicable to legal representatives

In addition to the judicial bodies involved in the implementation of certain collective proceedings, other parties such as an expert (expert) and a receiver (syndic) are called upon. The revised Uniform Act now sets out in detail the legal rules applicable to legal representatives.

Extension of the duties of legal representatives

Once the preventive settlement proceedings have been initiated, the expert prepares a report for the President of the competent court on the financial and economic situation of the company and the prospects for redress considering the deadlines and cancellations granted or liable to be granted by the creditors and any other measures contained in the preventive composition agreement. The receiver carries out certain technical duties, represents the general body of creditors, represents the debtor in the event of legal redress and may, in certain cases, have a supervisory role.

Eligibility for and conditions for exercising the role of legal representative

Pursuant to Article 4, paragraph 1 of the revised Uniform Act: "*In order to be appointed as an expert for preventive settlement, a receiver for preventive settlement, or a receiver for preventive settlement, legal redress or liquidation of property, the person concerned must been registered on the national list of legal representatives.*"

Obligations common to all legal representatives

Legal representatives must carry out their duties in compliance with the applicable law and professional rules.

Remuneration of legal representatives

The criteria for calculating remuneration include time spent on the case and the difficulties encountered, the number of creditors, and revenue generated by the debtor in the financial year preceding the start of collective proceedings.

New collective proceedings

The new features of the revised Uniform Act include proceedings introduced by the OHADA legislator, in particular conciliation, mediation and simplified collective proceedings.

Given the greater number of people subject to the provisions of the revised Uniform Act, these different proceedings are available to any private corporate body, public corporation in the form of a private corporate body, corporate body carrying out an activity that is subject to a special regime, and any natural person carrying out an independent, civil, commercial, handicraft or agricultural professional activity.

Conciliation

Conciliation proceedings, which are governed by Article 5, paragraph 1 et seq. of the revised Uniform Act, have been introduced as an alternative to the preventive settlement proceedings that existed in the former Uniform Act. These two proceedings are categorized as preventive since they may only be applied in the event that the debtor is not yet in a situation of cessation of payments but is experiencing serious difficulties.

The aim of conciliation is to reach an out-of-court agreement and prevent a situation of cessation of payments, but is experiencing serious difficulties.

Differences between conciliation and preventive settlement

The introduction of conciliation proceedings may initially seem unnecessary, particularly given that the former Uniform Act already provided for virtually identical proceedings with the preventive settlement process.

However, unlike preventive settlement, the initiation of conciliation proceedings is not required to be made public. It is confidential and consensual.

Conciliation aims to financially or operationally restructure the debtor in part or in full through private negotiations and an agreement between the debtor and its creditors, or at least its main creditors, with the support of a neutral, impartial, independent third party. It allows the company head to maintain control while simply benefiting from the assistance of the conciliator, who helps him identify solutions with his creditors.

Mediation

Article 1, paragraph 2 of the Uniform Act provides that: "*Without prejudice to the application of the procedures referred to in paragraph 1 above, any company may, before the cessation of payments, request the initiation of mediation proceedings pursuant to the legal provisions of the State concerned.*"

Simplified collective proceedings

Simplified preventive settlement, simplified legal redress and simplified liquidation proceedings have been expressly provided for small companies.

The Uniform Act defines small companies as: "*In accordance with this Uniform Act, any individual enterprise, company or other private corporate body with twenty (20) employees or fewer, and revenue of up to fifty million (50,000,000) CFA francs, excluding tax, in the twelve (12) months preceding the referral to the competent court.*"

These simplified collective proceedings are not compulsory. Debtors who wish to initiate them must ensure that they meet the relevant conditions then submit a declaration to the competent court in order to have the requested collective proceedings initiated.

The new money privilege

The revised Uniform Act does not specifically define "new money privilege". The new money privilege introduced by the revised Uniform Act provides that, in determining the order in which creditors of both immovable and movable property are paid, those who agree to contribute new capital to help the company recover will be given priority in the event that collective proceedings are initiated.

Hence, the OHADA legislator secures repayment as early as possible for creditors granting new money. The new money privilege, which did not exist in the former Uniform Act, now takes priority over legal fees, costs incurred for storing the debtor's property and highly preferred wages.

Main amendments to the Uniform Act

Legal redress and property liquidation

Certain aspects of these collective proceedings have been modified.

Rules for referral to the competent court

The OHADA legislator has included in the documents to be attached to the declaration of cessation of payments a statement from the debtor indicating that it is not party to a current conciliation agreement or a preventive settlement composition and, where necessary, a document stating the people who plan to grant it new funds or provide it with a new good or service.

Improved framework for collective proceedings through the introduction of time limits

The revised Uniform Act also places a limit on the period during which legal redress proceedings can be converted into liquidation proceedings when the redress composition no longer satisfies the required conditions.

The time period for verifying claims has been extended from three months to four months following the second publication in a newspaper empowered to publish legal notices of the decision to initiate proceedings.

New features in terms of the roles and powers of the bodies governing legal redress and property liquidation

The official receiver may appoint a maximum of five (5) assignees (*contrôleurs*) from among the creditors to assist him in monitoring the collective proceedings.

Assignees have also been given greater powers. As a result, in the event that the receiver fails to fulfil his duties, any creditor appointed as an assignee may act in the collective interest, provided that formal notice sent to the receiver remains unheeded after a period of twenty-one (21) days.

Changes specific to legal redress proceedings

In proceedings for legal redress, the debtor must submit a composition proposal. Article 27 of the Uniform Act provides that: "*The debtor shall, at the same time as the declaration provided for in Article 25 above, or no later than sixty (60) days following the decision pronouncing proceedings for legal redress, lodge a composition proposal.*" The previous period of fifteen (15) days for lodging the composition proposal for legal redress has therefore been revised.

Changes specific to property liquidation proceedings

Specific changes include a new provision concerning the duration of property liquidation proceedings, which was not provided for in the former Uniform Act.

The maximum time period for such proceedings has now been set by the OHADA legislator. Pursuant to Article 33, paragraph 3: "*In the decision pronouncing the liquidation of property, the competent court shall set the period, of a maximum of eighteen (18) months following initiation of the proceedings, following which the closure of the proceedings will be reviewed.*

If the proceedings cannot be pronounced closed at the end of this period, the competent court may extend this period once by six (6) months, after hearing the receiver's explanations, by special, substantiated decision. At the end of this period, the competent court pronounces the closure of the property liquidation, either automatically or at the request of any interested party."

Main changes to asset penalties and offences

Asset penalties

Pursuant to Article 183, paragraphs 1 and 2, former senior managers may be held liable for a company's debts. This provision also applies in the event that a former senior manager continued to be involved in the company's management as a de facto executive, even if his withdrawal from the company was made public, or when the situation leading to an inadequacy of assets was created while the former senior manager was still in office.

Offences

The OHADA legislator has revised the constituent elements of bankruptcy with irregularities deemed a breach of the law (*banqueroute simple*) and fraudulent bankruptcy (*banqueroute frauduleuse*).

Accordingly, every natural person in a situation of cessation of payments where, having been declared three (3) times in a situation of cessation of payments within a period of five (5) years, these proceedings were closed for inadequacy of assets, shall be guilty of bankruptcy with irregularities deemed a breach of the law.

Recognition of collective proceedings initiated outside the OHADA zone

The Uniform Act includes provisions of international law that enable collective proceedings initiated outside the OHADA zone to be recognized in OHADA countries. It sets out rules governing principal proceedings and so-called "concurrent" proceedings. The Uniform Act takes inspiration from the model law on international insolvency, adopted in 1997 under the auspices of The United Nations Commission on International Trade Law (UNCITRAL).

Entry into force of the provisions of the revised Uniform Act

The Uniform Act entered into force on 24 December 2015.

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