PwC International Business Reorganisations Network – Monthly Legal Update

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Welcome

Welcome to the seventh edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for 2015.

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 December 2015 issue:

- PwC Spain reports on the new code for good corporate governance for listed companies;
- PwC Gibraltar considers the key changes made by amendments to the Companies Act 2004; and
- PwC Legal UK reports on amendments to the Business Companies Act 2004 in the BVI.

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PwC Spain – The new code on corporate governance of listed companies in Spain

At a glance

The National Securities Market Commission of Spain (the **CNMV**) approved on February 18, 2015 **a new code on good corporate governance for listed companies**. Such code replaces 2006's (which had been amended several times) and introduces a number of recommendations targeted to improve the efficiency and accountability of Spanish firms' governance and to ensure that national standards attain maximum levels of compliance with international good governance principles and practices.

The new code employs a new format based on selecting and identifying the **principles** informing each set of specific recommendations, which indeed **helps to have an overall picture of the whole set of recommendations** contributing to a better understanding of the code.

In detail

From the 2006's Unified Code to the new Good Governance Code

In broad terms, corporate governance of listed companies in Spain is regulated under two set of rules and recommendations, these are:

a the standard corporate legislation of a **compulsory** nature, mainly established under the Spanish Corporate Act approved by Royal Legislative Decree 1/2010, of July 2 (the **Spanish Corporate Act**) and Spanish Securities Market Act 24/1988, of July 28, on the securities markets; and

b a corporate governance code, the recommendations of which may be followed **voluntarily**.

The former corporate governance code so called in Spain the Unified Good Governance Code of Listed Companies (the **2006 Unified Code**) was approved by the CNMV on 22 May 2006, **as a single document incorporating the corporate governance recommendations**.

In recent years, there have been a flood of initiatives concerning good practice in corporate governance matters. Not only that, their numbers have multiplied since the start of the global financial crisis, reflecting the widespread conviction of the importance of listed companies being run in a proper and transparent manner, as a key driver of value generation in the corporate sector, improved economic efficiency and the strengthening of investor trust.

Under such scenario, the Council of Ministers of Spain agreed at its meeting on May 10, 2013 to create a Committee of Experts on corporate governance matters to propose initiatives and legislative changes as it deemed advisable to guarantee good governance in the corporate sector, and to lend support and advice to the CNMV in modifying the 2006 Unified Code.

With the advice and support of such Committee of Experts:

a on December 2014 it was approved Law 31/2014 of December 3 which entailed the introduction of several amendments on current Spanish Corporate Act in force; and

b the CNMV Board approved on February 18, 2015 a **new** code on good corporate governance (the **Good Governance Code**).

In fact, Law 31/2014 came to turn several of the reccomendations established under the 2006 Unified Code into actual law **extending their applicability to non-listed companies**, and thus making compulsory and enforceable some of the recommendations which were before of a voluntary nature and only addressed to listed companies.

Both, the new amendments to the law and the Good Governance Code aim to ensure the proper functioning of the governing and administrative bodies of Spanish companies in order to maximize competitiveness, build trust and transparency for shareholders and domestic and foreign investors, improve internal control and corporate responsibility systems, and ensure the correct internal distribution of functions, duties and responsibilities.

The recommendations

The Good Governance Code structures each of the **64 recommendations** under three general set of principles, namely:

a General arrangements;

b Shareholders' meetings; and

c Board of Directors.

The **recommendations** range from those relating to general shareholders' meetings and capital structure, to those referring to the board, its directors, including board composition and functions, selection, appointment and removal of directors and risk management policies.

The recommendations under the Good Governance Code, as in the previous one, are given on a **"comply or explain"** basis. This means that, it is up to companies to decide whether or not to follow corporate governance recommendations, but in the event that a recommendation is not followed a reasoned explanation must be given.

Although the Good Governance Code is addressed to listed companies, in practice **the recommendations can provide guidance** to all companies rendering operations in Spain.

In fact, article 540 of the Spanish Corporate Act provides that **all listed companies are obliged to prepare corporate governance reports on a yearly basis** in which the relevant company must include according to section g) thereunder, among others, an "evaluation and assessment of the level of compliance with the recommendations of good corporate governance or, where applicable, an explanation of any deviations with those". The foregoing, as to ensure that shareholders, investors and the markets in general can arrive to an informed judgment.

Moreover, according to Recommendation number 3 companies should give **clear information to the shareholders' general meeting** concerning their **degree of compliance with Good Governance Code** recommendations, supplementing the written information circulated in the annual corporate governance report.

As it was to be expected, most of the recommendations are placed on the Board of Directors. Following a recommendation over the proper development of the post of director, the remaining recommendations have an impact on the structure and membership of the Board, its functioning, its management, on the corporate social responsibility and on the remuneration of the Board members.

Hence, the Board of Directors should have the optimal size (which is established in 5 to 15 members) as to facilitate its efficient functioning, the participation of all members and agile decision-making. **Director selection policy** should:

a ensure that appointment or re-election proposals are based on a prior analysis of the Board's needs;

b favour a diversity of knowledge, experience and gender; and

c pursue the goal of having at least 30% of total Board places occupied by women directors before 2020.

The Board further should have a **balanced membership**, with a large majority of non-executive directors and an appropriate mix of proprietary and independent directors, with the latter occupying, as a general rule, at least half of board places.

In addition, companies should **disclose** certain **information of the directors** on their websites and keep it regularly updated regarding a.o. background and professional experience, directorships held in other companies, etc..

On the other hand, the directors **should meet up at least eight times** per year, and the **directors' absences should be kept to a strict minimum** and quantified in the annual corporate governance report. In the event of absence, **directors should delegate their powers** of representation with the appropriate instructions.

Under current scenario, where increasing tax and regulatory rules are arising, it is not always easy for directors to make decisions, provided the degree of complexity of such matters. The recommendations also establish that companies should provide suitable channels for directors to obtain the advice they need to carry out their duties, including **refresher programmes** when the circumstances advise so.

Finally, and in order to achieve the recommendations summarized above, the Board in full should conduct an **annual evaluation**, adopting, where necessary, an action plan to correct weakness detected while implementing those.

The most important novelty of the Good Governance Code relates to **corporate social responsibility** as previous 2006 Unified Code didn't provide anything at this respect. Pursuant to the Good Governance Code companies should accordingly take time to analyse how their business impacts on society and vice versa. In this way, taking as reference their own value chain, companies shall identify social issues that lend themselves to shared value creation.

Thus, companies should deploy an appropriate corporate social responsibility policy, as a non-delegable board power, and report transparently and in sufficient detail on its development, application and results.

Further, the recommendation at this respect establishes the minimum content of such policy which shall be written down on a report. These are:

a The goals of its corporate social responsibility policy and the support instruments to be deployed.

b The corporate strategy with regard to sustainability, the environment and social issues.

c Concrete practices in matters relative to: shareholders, employees, clients, suppliers, social welfare issues, the environment, diversity, fiscal responsibility, respect for human rights and the prevention of illegal conducts.

d The methods or systems for monitoring the results of the practices referred to above, and identifying and managing related risks.

e The mechanisms for supervising non-financial risk, ethics and business conduct.

f Channels for stakeholder communication, participation and dialogue.

g Responsible communication practices that prevent the manipulation of information and protect the company's honour and integrity.

And now, what?

In general terms, the recommendations of the Good Governance Code are increasingly being followed not only by listed companies but also for non-listed ones. Even public and non-profit companies are implementing some of them voluntarily.

Under this scenario, the bylaws of several non-listed companies are being modified as to upgrade them with these recommendations and to increase transparency. Most of the changes are linked to their Board's membership, the information disclosure linked to their back ground, etc..

The foregoing is also due to the aim to attain a better brand image towards potential and current clients, providers, shareholders and investors, as it has a direct impact on the market where companies operate.

Definitely, the recommendations prove as a set of guidelines which most certainly serve as a **key driver to improve any company's functioning**, ensuring that all its internal policies and procedures are **aligned with recent trends** in the economic market of Spain and its neighbour countries.

Thus, aligning the companies' current policies, procedures and practices to the recommendations of the Good Governance Code to the extent feasible and appropriate would prove useful to all companies as it would mean conducting their business in a "healthier way".

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PwC Gibraltar – Companies Act 2014: the amendments explained

At a glance

Below we set out the key changes made by the amendments to the Companies Act 2014 ('the amendments'), which were released during the summer of 2015 and concern the accounting requirements of Gibraltar companies. The amendments ensure that the Companies Act 2014 (the **Act**) complies with the EU Accounting Directive.

In detail

Applicable date

The amendments apply to financial periods beginning on or after 1 January 2016.

Revision of company size limits

The amendments increase the small, medium and large company size limits, as well as introducing the micro-entity company regime.

The micro-entity limits

Net turnover	£632,000
Total assets	£316,000
Average employees	10

Even though the amendments introduce the micro-entity regime, it does not reduce the accounting filing requirements for companies who find themselves in this bracket. Furthermore, our understanding is that the Gibraltar Society of Accountants will not be adopting FRS105 relating to micro-entities and therefore the accounting standards used by micro-entities will be the same as the accounting standards applicable to small companies.

The small company limits

Net turnover	£10.2 million
Total assets	£5.1 million
Average employees	50

The increase of the small company limits may result in more companies being exempt from the audit requirement. However, directors must remember to also consider the taxable income limit in the Income Tax Act 2010 which currently stands at £1.25 million, which also has an effect on whether companies require a statutory audit. Furthermore, the new company size limits allow companies that fall within the 'small' bracket to only file a balance sheet at Companies House.

Revision of group size limits

In addition to the increase of the company size limits, the amendments also increase the group size limits which govern whether groups are required to prepare consolidated accounts.

The large group limits

Net turnover	£36 million
Total assets	£18 million
Average employees	250

The result of the large group size limits increasing would mean that less groups would be required to prepare consolidated accounts if they do not exceed the 'large group' criteria. The above figures represent the 'net' limits which is the respective results after the elimination of intra-group transactions on consolidation.

Two years criteria

As with the Companies Act 2014's predecessors, an entity would need to exceed two criteria for two consecutive years to breach the company or group size. The amendment also clarifies the two consecutive years criteria, which does not apply if the financial period in question is the company's first financial period.

Filing deadline

The time period allowed for filing private company accounts at Companies House has been reduced from thirteen months to twelve months after a company's financial year end.

Additional company information

Additional financial statement disclosures required by the amendments include:

a that the company is registered in Gibraltar;

b the company name and registered number;

c the legal form of the company;

d the registered office address; and

e where applicable; that the company is being wound-up.

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PwC Legal UK – Report on amendments to the BVI Business Companies Act 2004

At a glance

This report summarises some of the changes introduced by the Bill which amends certain provisions of the companies law in the BVI.

The proposed changes were largely in response to the need to modernise and provide certain clarifications on the current Act in force and demonstrate the BVI Government's commitment in combating money laundering and terrorist financing.

The changes introduced by the Bill cover a range of areas including but not limited to the following:

a mandatory requirement for companies to file a register of directors with the Registrar;

b arbitration in the BVI to settle company / shareholder disputes;

c more flexibility when determining value of non-cash consideration for issue of shares; and

d deeds: pre-signed signature page.

In detail

On 12 November 2015, the British Virgin Islands (**BVI**) published amendments to its Companies Act 2004 (the **Act**) in the form of the Business Companies (Amendment) Act 2015 (the **Bill**). The Bill intends to:

a modernise the Act and to help clarify existing provisions of the Act to preserve its effectiveness;

b demonstrate the BVI Government's commitment to combating terrorist financing and money laundering; and

c recognise the increased use of BVI companies and BVI law in cross-border transactions.

The Bill is expected to come into force early next year, with the exact date to be determined once the commencement date is announced.

This report highlights some of the changes introduced by the Bill. For additional details on the proposed changes (e.g. in relation to liquidation and secured creditors etc.) please access the full text version of the Bill which is available on **www.bvifsc.vg**.

Director registers to be filed with the registrar

Further to certain recommendations issued by the inter-governmental Financial Action Task Force on Money Laundering, the Bill will compel BVI companies to file copies of their register of directors with the BVI Registrar of Corporate Affairs (the **Registrar**).

a Any change in the Register must be notified to the Registrar by filing an updated version of the register.

b Companies incorporated before the Bill, must file their registers before 31 December 2016.

c Newly incorporated companies will need to file within 14 days after the appointment of their first director.

Note that the Registrar will not make details of the register available to the public and will only disclose information to regulatory authorities pursuant to their statutory powers.

Arbitration in the BVI to settle company / shareholder disputes

The Bill introduces an express provision allowing a company's articles of association to permit the use of arbitration in the BVI to settle disputes involving the company or its shareholders.

This provision will bring the Act in line with the recent overhaul of the laws relating to Arbitration in the BVI (i.e. the Arbitration Act 2013).

More flexibility when determining value of non-cash consideration for issue of shares

Directors will no longer need to determine the actual value of non-cash consideration (the **NCC**) received in a share issue provided that directors are satisfied that the value of the NCC is at least equivalent to the value of shares being issued. This marks a shift from the current position whereby directors have to provide a more precise value of the NCC to confirm that the NCC value is equal to or exceeds the value of the shares issued.

No requirement for distribution / redemption when surrendering shares for nil consideration

Although the Act does not prohibit the ability to surrender shares for no consideration, it does provide that such surrender may still be subject to distribution and redemption provisions as set out in the Act which has caused issues for companies. The Bill will amend the Act to expressly remove the possibility of distribution and redemption provisions applying in such circumstances.

Express power for Court to order shareholders' meeting

The Bill provides enhanced rights to shareholders in circumstances where a valid shareholders' meeting has been called but has failed to take place due to certain actions of the directors.

Under the Act, shareholders with 30% or more of the total voting rights can demand that the directors call a shareholders' meeting. However, the Act does not provide any requirements as to timing and other such details of the meeting. As such, directors are given a degree of flexibility which could in effect, enable them to prevent the meeting from happening.

As a result, the Bill now provides the Court with the express power to order a shareholders' meeting to be held if the meeting has been validly requested by the shareholders but has not taken place due to the failure of the directors.

Deeds: pre-signed signature page attached to a document considered valid

The Bill provides clarity on the execution requirements of deeds governed by BVI law; namely that a deed will be considered as validly executed if a pre-signed signature page is attached to a document at closing of a transaction. This is subject to obtaining the signing party's authority of this arrangement.

Internal register of charges to be updated when changes occur

The Bill introduces a new requirement for BVI companies to notify their registered agent of any changes to their internal register of charges. This provision only applies if the register is held at the registered agent's office.

Registered agents to follow instructions contained in director's resolution

There is a requirement under the Bill for registered agents to follow any instructions contained in a resolution of the company's directors. This removes the uncertainty over who registered agents should take instructions from.

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