

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 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 September 2015 issue:

- Réti, Antall & Partners Law Firm PricewaterhouseCoopers Legal (Hungary) report on a new Hungarian Civil Code;
- PwC Netherlands outlines proposed new laws to regulate cross-border conversions of companies within member states of the European Union or the European Economic Area; and
- PwC Legal UK analyses amendments to the Companies (Guernsey) Law 2008 following public consultation.

Contact us

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Réti, Antall & Partners Law Firm PricewaterhouseCoopers Legal (Hungary) – New Hungarian Civil Code

At a glance

Following more than a decade of drafting and consultations, on 15 March 2014 the new Hungarian Civil Code (the **New Civil Code**) entered into force in Hungary. This milestone marks a new era in the development of Hungarian civil law, which now also incorporates company law. With more than a year of experience of putting the possibilities provided by the New Civil Code into practice, we would like to highlight those cases which have been in the focus of attention of clients and legal practitioners likewise.

In detail

Introduction

Following more than a decade of drafting and consultations, on 15 March 2014 the new Civil Code entered into force in Hungary. This milestone marks a new era in the development of Hungarian civil law, which now also incorporates company law. With more than a year of experience of putting the possibilities provided by the New Civil Code into practice, we would like to highlight those cases which have been in the focus of attention of clients and legal practitioners likewise.

The New Civil Code has several possibilities to make the operation of the companies more flexible, however as the limitations on deviating from the rules of the New Civil Code are still subject to broad interpretation, a cautious approach on the modification of the company's constitutional document, internal regulations and operations is still preferable.

Anything new to keep any eye on?

Increased liability of managing directors

According to the New Civil Code, if the managing director causes damages to third parties in connection with his position as a **managing director, the managing director and the company will be jointly and severally liable toward third parties**. This means that the managing director can be held personally liable towards third parties in the first place, while previously the company was liable toward third parties following which the company could have had recourse against the managing director. In order to deal with this increased liability it is important for managing directors to take out liability insurance policies or request parent company indemnification.

Payment of interim dividend

Interim dividend payment may only take place based on the interim financial statements prepared for this purpose. Under the current regime the year end financial statements and interim financial statements could be used for a six month period for the payment of interim dividend. This will no longer be the case under the New Civil Code, each interim dividend payment will require the preparation of separate financial statements.

E-mail address of the company to be announced

Along with the first registration of changes request by the company, the company has to announce an electronic mail address to the Court of Registry which data also appears on the company extract as publicly available data. This e-mail address should be an operational one on which communication can be received, false e-mail addresses are not acceptable.

Adaptation period until 15 March 2016

The New Civil Code provides a two year adaptation period for the companies already registered to update their corporate documents according to the requirements of the New Civil Code and expressly accept the application of the New Civil Code for their operation. Before this takes place, companies may continue to apply the old Companies Act. However, if any changes to the constitutional document of these companies occur during this two year period, it will be obligatory for the companies

to switch to the application of the rules of the New Civil Code.

What's in it for my company?

Flexibility of the New Civil Code

The New Civil code incorporates company law and provides Hungarian companies with a possibility of more flexible operations, eventually tailoring the day-to-day operation of these companies to the international environment in which they work. This is made possible by the fact that the rules of the New Civil Code may be generally deviated from (contrary to the previous company law regime where deviation from the Companies Act was only possible if expressly allowed by the Act itself). It is however important to note that the more liberal regime will also have its boundaries, namely by prescribing that deviation from the New Civil Code rules is not possible if expressly excluded by the New Civil Code, or on such occasions where the deviation evidently jeopardizes the rights of the company's creditors, employees or the minority of its members.

Splitting of quotas easier

The New Civil Code no longer keeps the obligation that the contributions to the registered capital of a limited liability company should be dividable by 10.000. This means the splitting of quotas and precisely determining the ownership ratio of members became easier.

No requirement to hold members' meeting in person

The New Civil Code **no longer requires to hold at least one members' meeting in person** yearly, typically the members' meeting to approve the financial statements. This means that the entire operation of the company can be managed without holding formal members' meetings in person, voting in writing or members' meeting by electronic means eases the companies' operations, if duly regulated in the constitutional documents

New application of additional payment

A new financing possibility is also introduced by the New Civil Code by the possibility of deviating from the old rules relating to additional payment. Under the previous regime, additional payment could be ordered only for limited liability companies and only to cover debts. The additional payment previously had to be returned once it was no longer required to cover the company's losses. Under the New Civil Code, companies limited by shares also have the possibility to avail themselves of the possibility to provide additional payments and by the possibility of deviating from the rules of additional payment as set forth by the New Civil Code, this can become a **new and flexible possibility of temporary financing** of the operations of the company. It is also important to note that **additional payments** may also take place in the form of **in-kind contributions**.

Board type of management

If the members of your company group operate on mainly similar constitutional documents, it is possible to tailor the Hungarian company's operation to group standards. For example, under the New Civil Code the board type of management of companies is possible or even legal persons can be appointed in the management of the company. This means, that the Hungarian company's statutes can be reviewed from the perspective of the group standards and these standards can be considered to be incorporated in the statutes and daily operation of the Hungarian company.

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PwC Netherlands – Cross-border conversion

At a glance

Based on European case law, it is possible to convert a Dutch limited liability company into a company under the laws of another member state of the EU or EEA. Although cross-border conversions are allowed within these member states, there are currently no specific European rules or regulations with regard to cross-border conversions.

On 31 January 2014, the Dutch legislator published the Preliminary Bill on cross-border conversions of capital companies in order to meet the need for national legislation.

The main purposes of the Preliminary Bill are to create more certainty as to which rules should be applied in order to validly effect a cross-border conversion and to protect the interest of creditors, shareholders and employees.

The Preliminary Bill sets out the conditions which must be met in order to validly effect a cross-border conversion. In addition, it contains the legal procedure which must be followed from a Dutch legal perspective in order to implement a cross-border conversion.

In detail

At present, it is possible to effectuate cross-border conversions of companies within member states of the European Union (**EU**) or the European Economic Area (**EEA**) based on European case law. In 2014 the Dutch legislator published a preliminary bill on cross-border conversions of capital companies.

Conversion of companies

In our current international restructuring practice, it is desirable to be able to convert a Dutch public company (**NV**) or a Dutch private limited liability company (**BV**) into a company under the laws of another member state of the EU or EEA (outbound conversion) or to convert a company from an EU or EEA member state into a Dutch NV or BV (inbound conversion). In the absence of European regulations, the Dutch legislator decided to come up with the preliminary bill on cross border conversions of capital companies (the **Preliminary Bill**).

European case law

In 2008 the Court of Justice of the EU ruled that the transfer of the registered office of a company within the EU or EEA should be possible, provided that the inbound member state accepts the inbound migration, unless a compelling reason of public interest interferes (the **Cartesio-case**). In 2012 the Court of Justice of the EU confirmed the Cartesio-case and ruled that an EU member state must permit an inbound cross-border conversion provided that national law of the inbound member state permits the conversion of domestic companies into another legal entity (the **Vale-case**). Due to these cases, the mobility of companies within the internal market of the EU and EEA has increased significantly.

Under Dutch law it is possible to convert a domestic company into another domestic legal entity pursuant to Section 2:18 of the Dutch Civil Code. Therefore, the Netherlands may not prevent a Dutch legal entity to be converted into a EU or EEA company and vice versa.

Preliminary Bill

Although based on European case law cross-border conversions of companies are allowed within member states of the EU or EEA, this has not been arranged for in specific European rules. The adoption of a European directive on the cross-border transfer of registered offices has been proposed by the European Parliament but has been suspended. This leads to uncertainty on the procedure which is to be followed. Therefore, the Dutch legislator has created the Preliminary Bill to create more certainty as to which rules applies in order to validly effect a cross-border conversion from a Dutch legal perspective and to protect the interest of creditors, (minority) shareholders and employees.

The Preliminary Bill sets out the conditions which must be met in order to validly effect a cross-border conversion of a Dutch NV or BV into a capital company from an EU or EEA member state and vice versa. In addition, the Preliminary Bill contains the legal procedure which must be followed from a Dutch legal perspective in order to perform an inbound and an outbound cross-border conversion.

Outbound cross-border conversion

The procedure of an outbound cross-border conversion commences with a proposal of the board of directors of the company to perform a cross-border conversion. The board of directors must provide explanatory notes with the proposal, which documents must be deposited with the trade register of the Dutch Chamber of Commerce and published in the Dutch State Gazette. A two month opposition period is part of the procedure. After the opposition period a resolution must be taken to perform a cross-border conversion and finally the civil law-notary will issue a notarial certificate stating that all formalities in the Netherlands for a valid cross-border conversion have been met.

Inbound cross-border conversion

In order to perform an inbound cross-border conversion a notarial deed of conversion is required taking into account that all the requirements to incorporate a BV or NV must be met. In addition, the prospective authorities of the outbound member state must declare that all the formalities to perform a cross-border conversion have been met.

Consultation

The Dutch legislator has published the Preliminary Bill for consultation. The consultation period has ended on 18 April 2014. Even though the Preliminary Bill is limited to the conversion of a Dutch NV or a Dutch BV and therefore does not include other Dutch legal entities, such as the cooperative, it does provide in the need for a national regulation.

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PwC Legal UK – Report on amendments to the Companies (Guernsey) Law 2008

At a glance

This report summarises some of the key changes introduced by an Ordinance which amends certain provisions of the Companies Law in Guernsey.

The proposed changes were in response to an industry consultation and to maintain Guernsey's competitiveness as a financial centre.

The changes introduced by the Ordinance covers a broad range of areas including but not limited to the following:

- A cell of a PCC may now convert into a stand-alone company, in anticipation of a sale or initial public offering
- PCCs can now be regulated under Guernsey's protection of investors legislation
- Companies can now register an alternative name in non-Roman alphabet, characters or script

Certain exemptions from formalities for "small companies"

In detail

On 19 June 2015 the Companies (Guernsey) Law, 2008 (Amendment) Ordinance 2015 (the "**Ordinance**") was published which proposed changes to the Companies (Guernsey) Law, 2008 (the "**Law**"). These changes have arisen following significant industry consultation and with an intention of addressing certain practical issues to ensure that Guernsey remains competitive as an offshore financial centre.

The Ordinance was ultimately approved by the States of Guernsey on 29 July 2015 and entered into force on 3 September 2015.

Some of the key changes introduced by the Ordinance are set out below. A full copy of the Ordinance can be found on www.guernseylegalresources.gg by visiting the "Recent Changes" section of the website.

1. Protected Cell Companies (PCCs)

Converting a cell into stand-alone company

A cell of a protected cell company ("**PCC**") may now convert into a stand-alone company. This will enable, amongst other things, an asset holding PCC

(which is seeking to sell an asset) to convert the relevant cell into a stand-alone company in anticipation of a sale or for an initial public offering.

No obligation to prepare consolidated accounts

PCCs may now prepare separate accounts for each cell and the core. There is no longer a requirement for PCCs to prepare consolidated accounts of both the core and the cells. This will be of particular interest to multi-fund PCCs which may have different shareholders across its cells.

Exemption from audit

PCCs and individual cells of incorporated cell companies ("**ICCs**") can exempt themselves from being audited. The process around appointing an auditor and for waiving audit requirements has also been simplified, most notably; a company can pass a resolution to be exempt from audit indefinitely.

Protection of investors legislation

PCC structures will be able to be regulated as investment licensees under Guernsey's protection of investors legislation. This will enable the use of a PCC as a fund manager allowing the fund manager to carry out regulated activities at a cell level and to

segregate liability as between the cells avoiding 'cross contamination' risks.

2. Company directors and secretaries

Director disclosure of interest in transaction

Directors will no longer be required to quantify the monetary value of their interest in a transaction entered into by a Guernsey company as part of their disclosure obligation. The nature and the extent of the interest will still have to be disclosed.

Indemnifying directors of overseas subsidiary

Subject to certain exceptions, the Ordinance will also prevent Guernsey companies from indemnifying the director of an overseas subsidiary for negligence, breach of duty or breach of trust.

Director share issue and restrictions

When issuing shares, directors are no longer obliged to resolve that the terms of the issue are fair and reasonable to all existing members. Note that the obligation that the terms of issue are fair and reasonable to the company remains.

Statutory restrictions on directors being able to issue shares in a company with multiple share classes will be lifted. Note that such restrictions may still be imposed through articles or shareholder resolutions or any relevant listing rules.

Court application for disqualified officeholders

If a director or secretary has been disqualified in a less politically stable environment, they may now apply to court to have the prohibition against them being a director of a Guernsey company lifted if the court determines it "just" to do so.

Acts of appointed secretaries

Any acts of secretaries will be validated where it was later discovered that (i) the appointment of the secretary was defective; (ii) they were ineligible to be appointed; or (iii) they had ceased to hold office. This provision now mirrors the equivalent provision for directors under the Law.

Functions of company secretary

The Ordinance now states that the functions of a company secretary are those assigned to him by the company's articles, albeit the Law still contains a list of basic duties. In practice, it is likely that these basic duties will be relied upon in the absence of an agreement of the secretarial functions between the company and the secretary.

3. Shareholders, voting and quorum

Voting provisions and quorum

There are a number of voting provisions that will be modified. For example, even in respect of a unanimous resolution, non-voting shareholders will not be entitled to cast a vote. The quorum for a variation of class rights is now made subject to a company's articles.

4. Other company provisions

Directors' report exemption

Certain companies may now be exempt from the requirement to prepare a directors' report if an appropriate waiver resolution is passed. This will benefit holding companies and those with a small number of shareholders.

Exemptions for "small companies"

The Ordinance also contains the power for further regulations to be introduced exempting small companies (e.g. those with less than 10 members) from certain formalities in respect of holding meetings and passing resolutions.

Recovery of distribution – 2 year cap

Where the company did not satisfy the solvency test at the time of distribution, a company can only seek recovery of a distribution from that member within two years.

Conversion of shares into stock

The prohibition against a Guernsey company being able to convert shares into stock will be lifted

Registering an alternative name

A Guernsey company will now be able to register an alternative name which can be expressed in non-Roman alphabet, characters or script. This will be of particular interest to clients in the Middle East and Asia.

Who to contact

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