PwC International Business Reorganisations Network – Monthly Legal Update

Edition 9, September 2017

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Welcome

Welcome to the ninth edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for September 2017.

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 2017 issue:

- PricewaterhouseCoopers Legal AG Rechtsanwaltsgesellschaft (Germany) examines a recent court case highlighting German rules on codetermination of employees and their compliance with EU law; and
- Law Square BV CVBA (Belgium) reports on a new draft bill aimed at modernising Belgian company law by making it more simple, flexible and coherent.

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PricewaterhouseCoopers Legal AG Rechtsanwaltsgesellschaft (Germany) – Landmark decision of the ECJ on German rules on codetermination of employees

At a glance

Earlier this year, in our February edition, we reported on a request of the Court of Appeal in Berlin lodged to the Court of Justice of the European Union (**ECJ**) to make a preliminary ruling on a potential incompatibility of the German rules on codetermination of employees with Article 18 and/or Article 45 of the Treaty on the Functioning of the European Union (**TFEU**).

On 18 July 2017, the ECJ issued its judgment holding that the German rules on codetermination, which state that only employees of a German company employed in Germany may elect and be elected to the company's supervisory board, are compatible with EU law. This eagerly awaited decision concurs with the opinion of the Advocate General, the European Commission and most legal scholars.

In detail

Under German law, corporations with more than 2,000 employees are required to set up a supervisory board in which half of its members must be employees or their representatives. In context of EU law, two principles resulting from these rules have raised controversy:

a only employees working in Germany are considered when determining the threshold; and

b these participatory rights in supervisory boards are granted only to those employees of the group who are employed in subsidiaries of the corporation or in affiliated companies within Germany.

Several courts have been confronted with the codetermination uncertainty. With respect to the first principle, the District Court of Frankfurt deemed the German rules to be incompatible with EU law. A different outcome was reached by the District Courts of Berlin and Munich which declared the second principle to be in compliance with EU law. All these decisions ended up being appealed.

The Court of Appeal in Berlin decided to lodge a request for a preliminary ruling to the ECJ in November 2015. As a response to this request the Court of Appeal in Frankfurt as well as the Court of Appeal in Munich suspended its proceedings in June 2016 until the ECJ gave a preliminary ruling on the request from Berlin. Interestingly, the Court of Appeal in Frankfurt linked both principles by stating that if the ECJ would consider the participatory right of becoming elected to the supervisory board compatible with EU law, it would see no reason to come to a different conclusion concerning the determination of the threshold.

The court decision

The ECJ reasoned its judgment as follows:

a Article 45 TFEU (freedom of movement for workers) entails the abolition of any discrimination between workers rendering Article 18 TFEU (non-discrimination) not applicable in the case at hand;

b with regard to Article 45 TFEU two situations need to be distinguished – the situation of employees working in foreign subsidiaries of a German company and the situation of employees in Germany leaving that employment in order to work with a foreign subsidiary; and

c as regards to employees working in a foreign subsidiary, Article 45 TFEU does not apply. Article 45 TFEU is only applicable for activities with a "factor linking them with any of the situations governed by EU law". In the case of employees who have never exercised their freedom of movement and have no intention of doing so, the existence of such a link must be denied. It is of no relevance for this assessment that the subsidiary is controlled by a parent company in another member state.

Even though, in principle, the case of employees leaving for employment in a foreign subsidiary falls into the scope of Article 45 TFEU, this situation does not infringe Article 45 TFEU. The freedom of movement is not supposed to guarantee employees the right to rely on the social conditions they enjoyed in the member state they originally came from. Furthermore, the codetermination of employees has never been harmonised by the EU. Consequently, the EU does not prohibit a member state to adopt legislation only applicable to employees working on its own territory. Hence, the scope of codetermination on German territory is solely subject to German law, since the restrictions of the German rules are based on an objective and non-discriminatory criterion. The loss of a codetermination right of an employee who moved is thus merely the consequence of Germany's legitimate choice to limit the application of its national rules to its own territory.

Implications of the decision

The ECJ's decision is expected to provide the necessary clarity and transparency for legal practice. The German legislator will not need to amend the rules on codetermination and companies can refrain from contemplating alternate structures.

Even though the ECJ did not elaborate on the matter of threshold determination, based on how its reasoning relied on the principle of territoriality, it can be assumed that it would have not decided differently on that question.

Therefore, it can be presumed that the Courts of Appeal in Berlin and Frankfurt will regard the German rules of codetermination compatible with EU law and will respectively uphold/reject the decisions of the courts of first instance.

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Law Square BV CVBA (Belgium) – Reform of the Belgian Companies Code: towards a more simple and competitive Belgian Corporate Law

At a glance

A draft bill introducing a completely new Belgian Companies Code (**new BCC**) has been approved by the Belgian Council of Ministers on 20 July 2017. We expect the bill to be adopted by the Parliament by the end of this year.

The draft bill aims at modernizing Belgian company law by making it more simple, flexible and coherent, to enable Belgium to become a more competitive and attractive place of establishment for companies.

Important changes include the reduction of the number of company types and the abolishment of capital requirements in the private limited liability company.

The large set of corporate reorganisation possibilities for Belgian companies will be maintained while further fine-tuned in terms of procedure to be followed. Furthermore, the new BCC broadens the possibilities for cross-border restructurings, by expressly allowing cross-border demergers and cross-border conversions of companies (inbound and outbound).

In detail

Proposed reform of the Belgian Companies Code – overview of the most important changes

The draft bill proposes a very thorough reform of the Belgian Companies Code. Below is an overview of some of the most important proposed changes.

1. The reduction of the number of company types

Belgium currently has a large number of types of companies.

In the new BCC, only the following company types will remain:

a the ordinary partnership, without or with legal personality;

b the limited partnership (**CommV/SComm**);

c the private limited liability company (**BV/SRL**);

d the cooperative company (**CV/SC**);

e the public limited liability company (**NV/SA**); and

f the European company (**SE**) and the European cooperative company (**SCE**).

Currently, the public limited liability company NV/SA is the most frequently used legal entity form, even for smaller companies.

In the new BCC, the private limited liability company BV/SRL will become the new “by-default” company type for small and large businesses (including subsidiaries of multinational companies). The NV/SA will be mainly destined for very large businesses with several shareholders and for listed companies.

The cooperative company, which is currently often used because it allows for easy entry and exit of shareholders, will be reserved for companies with a “real” cooperative purpose (i.e. companies having as purpose the promotion of the economic and / or social activities of its shareholders).

The Economic Interest Grouping (**ESV/GIE**), the agricultural company (**LV/S.Agr**), the unlimited liability cooperative company (**CVOA/SCRI**) and the frequently used partnership limited by shares (**Comm.VA/SCA**) will be abolished.

2. Abolishment of capital requirements for the private limited liability company

The share capital, considered as an outdated concept which does not really protect the creditors, is abolished for the private limited liability company.

Although there will no longer be a "minimum share capital" (currently set at EUR 18,550), the founding shareholders must ensure that the company has sufficient equity upon incorporation. This needs to be justified in a detailed financial plan.

Furthermore, the provisions for distribution of profits are extensively modified and are made subject to a double test:

a *net assets test*: first, the general shareholders' meeting should establish that the company's net assets remain positive after the distribution (similar to the currently applicable requirements); and

b *liquidity test*: second, the company's management body must establish that, after the distribution, the company will continue to be able to pay its debts as they become due for a period of at least 12 months; this decision of the management body must be justified in a report which must be reviewed by the company's statutory auditor.

We hereby take the opportunity to reach out to colleagues of the network who have the same liquidity test for dividend distributions in their jurisdiction, in order to exchange views and to share knowledge.

Finally, it will be possible for private limited liability companies to distribute profits of the ongoing financial year, so-called "interim dividends" (now, this is only possible for the public limited liability companies).

3. Introduction of multiple-vote shares

The new BCC introduces the possibility to issue multiple-vote shares. It will be possible to disconnect the link between the contribution paid for a share and the voting rights attached to a share. For listed companies, restrictions apply: maximum 2 votes per share, and only for fully paid up shares that have been held by the same shareholder for an uninterrupted period of 2 years.

We hereby take the opportunity to reach out to colleagues of the network who have the same possibility in their jurisdiction, in order to exchange views and to share knowledge on multiple-vote shares in practice.

4. New types of securities for the private limited liability company

The prohibition for private limited liability companies to issue warrants and convertible bonds will be abolished. Also other type of securities developed in legal practice, such as reverse convertible bonds, will be possible.

5. Cap on director's liability

The new BCC introduces a general cap on the liability for directors.

The amount of the liability cap will depend on the turnover and balance sheet total of the company and would range between EUR 125k and EUR 13m.

6. Removal of some impediments

Some rules and restrictions which give rise to practical difficulties are removed.

For example, it will be possible for private and public limited liability companies to have only one shareholder.

Furthermore, the shareholders' absolute right to dismiss the directors of an NV/SA at any time, without cause and without severance pay, will no longer be mandatory law.

7. Statutory seat will determine applicable company law

Currently, the applicable company law is determined based on the location of the real seat of the company (effective place of management).

In the new BCC, the statutory seat will be decisive.

The means that Belgian company law will apply to companies having their statutory seat in Belgium, irrespective where the real seat is located.

The statutory seat can be located in Belgium upon the incorporation of the company, but the seat can also be moved into Belgium under the procedure of the inbound cross-border conversion (with continuation of legal personality). Also outbound cross-border conversions are expressly provided for in the new BCC.

Impact of the reform

The impact cannot be overestimated. Given the extensive upcoming changes, the new BCC will affect every single Belgian company in various ways. Consequently, it will lead to the need of a reassessment of every company's corporate organization in light of the challenges arising and opportunities created.

Timing

The new code will be applicable for an existing company as of the start of the financial year beginning one year after the publication of the new BCC in the Belgian Official Gazette.

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