

# ***PwC International Business Reorganisations Network – Monthly Legal Update***

Edition 6, June 2019

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## ***Welcome***

Welcome to the sixth edition of the PwC  
International Business Reorganisations (**IBR**)  
Network Monthly Legal Update for 2019.

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 June 2019 issue:

- oehner & partner rechtsanwaelte gmbh (PwC Legal)  
(Austria) provides an overview on recent  
developments in the Austrian legislation; and
- PricewaterhouseCoopers Sociedad Civil (Uruguay)  
reports on the introduction of a new Guaranteed  
Pay Fund for employees.

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# ***oehner & partner rechtsanwaelte gmbh (PwC Legal) (Austria) – Overview on recent developments in the Austrian legislation***

## ***At a glance***

Since 1 January 2019 it is possible to form Austrian limited liability companies through a digital connection with the notary public. In this case, identification takes place through a video identity procedure and signing is effected by electronic signature.

Another important new Austrian law is the UBO Register Act (**WiReG**), which entered into force on 15 January 2018. The WiReG imposes a registration obligation on Austrian corporates and other legal entities regarding their ultimate beneficial owners.

Furthermore, since 1 January 2019, cooperatives can be reorganised by way of a demerger. Prior to that, cooperatives had only the possibility to be reorganised by way of a merger or conversion (“merging” or “establishing” conversion).

Finally, this edition includes a short overview of the existing group privilege with respect to trade law directors.

## ***In detail***

### ***Digital formation of Austrian GmbH***

Based on the Digital Notarial Form Formation Act (*Elektronische Notariatsform-Gründungsgesetz, ENG*), which has amended the Austrian Notaries Act (*Notariatsordnung*) and the Austrian Limited Liability Company Act (*GmbHG*), since 1 January 2019 Austrian GmbHs can be established through a digital connection with the notary public. It could be the starting signal for significant simplifications in the cooperation with a notary public.

## ***Overview***

### ***a The notary’s role so far***

The notary public has a central role in the set-up of a GmbH. He drafts or reviews the articles of association, notarises them and legalises the other constitutional documents (i.e. shareholder resolution, specimen signature of the managing directors, application letter to the Companies’ Register).

Until the end of 2018, a physical meeting of all parties in the presence of an Austrian notary public was necessary for the establishment of the articles of association as a notarial deed.

### ***b End of physical presence requirement***

A recent amendment to the Notaries Act and the *GmbH-Act* now gives founders the opportunity to establish the constitutional documents via a digital connection to the notary.

As of now, founders can get access to a secure digital data room, where all parties as well as the notary public can upload documents. However, a video identity procedure has to be carried out first.

Once the parties have agreed on a final version of the articles of association, the notarial deed will be drawn up by means of a video conference. For this purpose, the parties sign the articles of association by means of an electronic signature; the notary affixes his official signature via the software.

If the notarial deed is set up by using an electronic communication facility, the Notaries Act provides for the possibility to have also the ancillary documents legalised by means of electronic communication. Thus, the notary public will be able to legalise the signatures of persons not physically present on all constitutional documents in a one-stop shop video conference.

### *c Outlook*

In the long run, this amendment will make it easier to set up a limited liability company. As simplification and the use of technology is the declared aim of the legislator, we expect that further steps will soon be taken to further simplify corporate acts.

### *New Register for Ultimate Beneficial Owners (UBO Register)*

The UBO Register Act (*WiEReG*), which entered into force on 15 January 2018, imposes a registration obligation on Austrian corporates and other legal entities regarding their ultimate beneficial owners. As of 1 May 2018, all direct or indirect owners holding more than 25 % of the share capital have to be disclosed in the new register maintained by the governmental institution Statistics Austria. The data contained in the Austrian Companies' Register is automatically transferred to the UBO Register.

Generally speaking, the purpose of the register is to make the owners behind business companies and asset holding entities visible and verifiable, thus to contribute to the prevention of money laundering and terrorist financing. The *WiEReG* serves to implement the 4<sup>th</sup> EU Anti-Money Laundering Directive.

### **Overview of the obligations related to the new register**

#### *a Who has to register*

In general, the registration obligation applies to all companies and legal entities with registered offices in Austria as well as to trusts or trust-like structures managed from within Austria. The companies had to make their initial notifications by 15 August 2018 (as the starting date had been postponed from 1 May due to technical deficiencies). Newly established legal entities have to complete registration with the UBO Register within 4 weeks from incorporation or (in case of trusts) from establishment of their place of management in Austria. Data already disclosed in the "core register" (i.e. the Companies' Register) is basically exempt from the registration obligation. The legal entities (i.e., the management boards) are not only obliged to identify and verify their beneficial owners, but also have to review such data annually (see below at g).

A company has to notify also changes in its shareholder structure affecting the beneficial owner(s) as well as changes of personal data within 4 weeks from gaining knowledge of such change.

#### *b What has to be registered*

Subject to registration are the beneficial owners, i.e. all natural persons that ultimately own or control a legal entity.

In the first place, beneficial ownership is indicated with respect to natural person(s) who directly hold an interest of more than 25 % in the legal entity (direct beneficial owner). Equally registrable indirect ownership is given, if a corporate shareholder (parent) holds an interest of more than 25 % in the respective company and is in turn (directly or indirectly) controlled by a natural person.

Control is deemed to be exercised through an ownership interest of more than 50 % in a corporate entity. Besides, also any other criteria of control as are relevant for the consolidation of financial statements have to be taken into account, such as control through a shareholders' agreement, the exercise of dominant influence, or the power to appoint the majority of board members.

Where no such ultimate beneficial owner is identifiable, the members of the management board have to be registered as beneficial owners.

The information to be entered includes name, date of birth, nationality, place of residence as well as type and volume of the beneficial interest or the share quota or the function of the relevant natural person

#### *c Special rules and exceptions*

With respect to private foundations, subject to registration are the founder(s), members of the foundation council (management board) and any beneficiaries receiving distributions of more than € 2,000 in a calendar year; similar rules apply to trusts.

Exempt from the registration obligation are associations in general, but also *GmbHs* and partnerships (*OG* or *KG*) with only individuals as shareholders or unlimitedly liable partners, respectively, as those individuals are disclosed in the Companies' Register anyway.

The afore-mentioned exceptions and thresholds apply only in cases of doubt; notwithstanding, any natural person ultimately exerting a dominant influence on the company (entity) has to be registered as the UBO.

#### *d Means of registration*

Registration has to be done electronically via the Business Service Portal (*Unternehmens-serviceportal*, USP). Apart from the legal entity itself, also professional advisors, such as attorneys-at-law, tax advisors or notaries, can perform registration on behalf of the obliged entity.

#### *e Who can access the UBO Register?*

All persons that are obliged to carry out money laundering and terrorism financing checks according to § 9 *WiEReG* as well as any person demonstrating a legitimate interest shall be granted access to the UBO Register. Besides, all registered legal entities are entitled to review the registered data concerning themselves via USP (free of charge). Furthermore, an extended register excerpt containing additional data can be retrieved. A user fee is charged for registration as well as access to the database.

#### *f Penalties for violation of the registration obligation*

Failure to register, the registration of incorrect data, as well as accessing the register without entitlement all constitute financial misdemeanours and may trigger fines up to € 200,000 or other coercive measures.

#### *g Annual due diligence obligations*

Entities are obligated to perform a comprehensive due diligence review regarding their shareholder and control structure, at least on a yearly basis in order to identify whether the data reported is still accurate and complete. Entities may choose a specific date to conduct their due diligence (e.g. in the course of preparing the annual financial statement). However, the time between the due diligence reviews must not exceed one year (12 months).

If any changes are identified in the course of the due diligence review, such changes have to be filed to the authority within 4 weeks. By contrast, if the information in the UBO Register is still accurate and complete, there is no need of action. However, the Austrian authority recommends confirming the data by filing an unchanged report.

In order to comply with the due diligence obligations, it is required to obtain evidencing documentation covering:

- i basic information (such as e.g. the name of the respective entity, its legal form, its registered number and address); and
- ii information about the shareholder and control structure (such as e.g. excerpts from the relevant commercial register, articles of association, list of shareholders, certificate of shareholders, etc.).

Copies of the relevant documentation have to be kept on file at least for 5 years after the respective beneficial ownership has ended.

### *Austrian legislator enables demergers of cooperatives – Austrian Cooperative Demerger Act*

The Austrian Cooperative Demerger Act (*Genossenschaftsspaltungsgesetz, GenSpaltG*), which entered into force on 1 January 2019, provides the possibility for cooperatives to be reorganised by way of a demerger. Prior to that, cooperatives only had the possibility to change their legal structure by way of a merger or a conversion (“merging” or “establishing” conversion).

Although the content of the *GenSpaltG* is largely based on the Austrian Demerger Act (*Spaltungsgesetz, SpaltG*) applicable to corporations (stock corporations, limited liability companies), some significant differences exist.

#### **Differences between Demerger of Cooperatives and of Corporations:**

##### *a Same type of liability*

Even though the *GenSpaltG* in principle permits all types of demerger, the following restrictions apply: The new/absorbing company must be a cooperative with the same type of liability as that of the transferring cooperative.

Exception: In the event that:

- i the assets are absorbed by a corporation (stock corporations, limited liability companies); and
- ii no shares are to be granted, the transferring cooperative may alternatively also spin off parts of its assets to a corporation.

##### *b Auditor’s expert opinion on the market value*

Beside others, the auditor has to confirm that all cooperatives involved have a positive market value. If such confirmation is not possible, the demerger is inadmissible. Thus, unlike a demerger of a corporation, a waiver of the auditor’s expert opinion is not possible.

##### *c Demerger resolution*

Deviating from a demerger of a corporation, in principal the demerger resolution requires (basically) only a 2/3-majority of the votes cast at the general meeting. Under certain circumstances two general meetings are required.

##### *d Special right of termination & “right to choose”*

If the share quota of members change after the demerger, each affected member has the special right either to terminate his cooperative membership or to participate in any surviving cooperative, if the affected member has not agreed to the demerger.

##### *e Exceptions*

Non-profit building associations can be established either in the legal form of a stock corporation, a limited liability company or a cooperative. Such associations are not covered by the new law.

### *Group privilege of the trade law director*

#### *a. Trade law director vs. corporate law director*

Generally the Austrian law provides for two kinds of directors:

- i The corporate law director is authorized to represent the company vis-à-vis third parties. Furthermore, he is in charge of the internal management of the company.
- ii The trade law director, on the other hand, is responsible for compliance with trade regulations and is therefore liable vis-à-vis the authorities.

#### *b. Appointment of a trade law director*

A trade law director has to fulfil the below mentioned personal requirements, which are more strict with respect to *regulated trades* compared to *free trades*.

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- i Absence of *reasons for exclusion*, i.e. in particular no conviction of a (financial) criminal offence or insolvency in the past.
- ii Residence in a EU/EEA Member State.
- iii Certificate of proficiency: In case the entity aspires to exercise a *regulated trade*, the prospective trade law director has to certify his qualification.
- iv Reliability: For specific trades, the authority verifies the personal integrity.

Furthermore, the prospective trade law director must have the power to exert control on the employees and issue binding orders.

If a *regulated trade* is to be registered, the prospective trade law director has to be either a corporate law director (and consequently authorized to represent the company) or employed for at least 20 hours a week.

**c. Facilitation due to group affiliation**

Within a group, one employee may be appointed trade law director of several group companies, if he is an employee of at least one group company.

Consequently, an employee can also be appointed trade law director of (only) an affiliated company, even without being trade law director of his employer company.

This provides a significant relief for groups such as pharma enterprises, since not every entity of the group has a qualified employee or director resident in the EU and meeting the technical requirements. Moreover, it is not necessary for the applicant to prove that the prospective trade law director has the power of direction with respect to the employees.

In order to benefit from this privilege, the applicant company has to evidence its affiliation with the other group company, which is the employer of the prospective trade law director.

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# *PricewaterhouseCoopers Sociedad Civil (Uruguay) – Introducing the Guaranteed Pay Fund for employees*

## *At a glance*

On 24 October 2018, the Legislative Power passed a law through which a Guaranteed Pay Fund is established and administered by the Social Security Office (**BPS** for its acronym in Spanish).

Its main objective is to guarantee pay for employees in the event of employer's insolvency.

This article provides an overview of the key aspects of the recently approved law, which will be effective on the first day of the month that follows its publication.

## *In detail*

### **1. Background**

As stated in the explanatory report, the Executive Power seeks to continue advancing towards employment protection, and a key element of it is the protection of employee's pay.

### **2. Overview**

The fund is administered by the BPS.

It covers the eventuality of employer's insolvency.

It is intended for employees working in the private sector.

### **3. Payments covered**

Wages or salaries generated over the six months that follow the date of the last pay.

Leaves, holiday pays, bonuses generated in the last two years, all subject to section 1.0.

Severance pay.

Ten percent (10%) fine over preceding pays.

These payments must be approved either by insolvency proceedings or final judgement by a court competent in labor affairs.

\*Payments that the employee failed to collect in due time (and therefore expired) are not covered.

### **4. Guaranteed maximum**

Payments will be guaranteed for a maximum of 105,000 UI, that is, US\$ 419,790. Having said that, if employees were paid a part after the insolvency proceedings, that amount must be taken into account for the maximum limit.

## 5. How are payments made?

BPS will pay the employee upon verification of employer's insolvency and validation of the credit.

In the event an employee with an outstanding credit passes away, it will be transferred to their successors, spouse or cohabiting partner, who shall prove the relationship they had with the deceased.

## 6. New special contribution

A new special contribution for social security (**CESS** for its acronym in Spanish) is introduced. It will be equivalent to 0.025% on income subject to taxation by CESS, sum that will be destined to the fund.

It is worth stating that, for the purpose of CESS, the law does not specify who the taxable person is.

BPS shall pay the employees with both money from the Guaranteed Pay Fund (regardless of the type of pension the employer receives) and recoveries from the credits subrogated by the beneficiary employees.

The Executive Power shall have the authority to reduce the contribution fee or suspend it temporarily in case the Guaranteed Pay Fund has enough resources to pay the employees.

If the fund did not have enough resources, the State could provide them in order to hedge the risk until the new special contributions are sufficient to settle the payments.

## 7. New powers for BPS

Apart from administration and fund collection, BPS shall be in charge of:

- a Informing the prosecution about activities that lead to the presumption of a fraud in the context of criminal matters.
- b Subrogating to the rights of the employees and the actions they may file in connection with the nominal amounts paid plus any other additional amounts as foreseen in the present law.
- c Appearing in court in representation of employees who have an outstanding credit with the same rights they have.

## 8. Out of the scope of application

The following individuals are out of the scope of application:

- a Employees who are related to the employer or the members of the directorate of the company by virtue of either affinity or consanguinity up to a third degree.

- b Senior managers or employees with a great decision power over major activities of the company.
- c Employees that create a work cooperative with the objective of providing continuity to the project they were rendering services for (subject to certain conditions).

## 9. Effective date

As previously stated, the law will go into effect on the first day of the month that follows its publication and it will guarantee the credits earned during the one hundred and eighty days after said date.

Nevertheless, as provided in articles 4 and 14, the regulation of the law by the Executive Power is pending and should be settled during the ninety days after its enactment.

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