Landwell PricewaterhouseCoopers Tax & Legal Services S.L. (Spain)

Administrative resolution brings to an end the uncertainty of the corporate procedure for business contributions

PricewaterhouseCoopers Tax & Legal, Sarl (Cameroon)

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PwC International Business Reorganisations Network – Monthly Legal Update

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Welcome

Welcome to the third edition of the PwC International Business Reorganisations (**IBR**) Network Monthly Legal Update for March 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 March 2017 issue:

- Landwell PricewaterhouseCoopers Tax & Legal Services S.L. (Spain) highlights the similariities and differences between carrying out business contributions by way of segregation or through a non-monetary contribution;
- PricewaterhouseCoopers Tax & Legal, Sarl (Cameroon) analyses laws relating to paperless securities system in Cameroon and the Central African Economic and Monetary Community region; and
- PricewaterhouseCoopers (Turkey) reports on recent amendments of the Turkish Commercial Code.

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Landwell PricewaterhouseCoopers Tax & Legal Services S.L. (Spain) – Administrative resolution brings to an end the uncertainty of the corporate procedure for business contributions

At a glance

The recent administrative resolution issued by the General Office of Registries and Notaries on July 22nd, 2016 clearly states that business contributions may be either carried out by segregation, this is, by block transfer of the branch of activity by universal succession or through a non-monetary contribution by means of a share capital increase, without the effect of universal succession.

Freedom in choosing such procedure to follow, according to the relevant circumstances in each case, is a matter of great importance as it is a very common transaction in practice, particularly within intragroup reorganizations.

In detail

Corporate Procedure Alternatives

Currently, in Spanish practice, business transfers may be carried out by **segregation**, as a specific type of demerger/split. This is, the **block transfer, by universal succession**, of part of the assets of a company ("segregated company"), each of which forms an economic unit, to another company ("beneficiary company"), receiving the former, as counter value, shares of the beneficiary company. The corporate procedure to be followed is regulated under article 71 and following of the Law 3/2009, of April 3rd, on Structural Modifications to commercial companies (**Structural Modifications Act**).

The main particularity of segregation versus partial split is that the shares of the beneficiary company are attributed to the segregated company but not to its shareholders.

On the other hand, business contribution can also be done as **non-monetary disbursement for the capital increase of the acquiring company. In this case, without universal succession**. Thus, Spanish regulation regarding statutory amendments, in particular, regarding share capital increases together with the regulations regarding non-monetary contributions will be applicable (i.e. articles 63 and following, and 295 and following of the Spanish Corporate Companies Act, approved by Royal Legislative Decree 1/2010, of July 2nd (**Corporate Companies Act**).

Both transactions lead to the same result but the corporate procedure and requirements to be followed significantly vary.

Legislative background

Prior to the Structural Modifications Act, segregation was a non-regulated transaction to Spanish laws. Further, there was no specific regulation for business contributions through non-monetary contributions, beyond that such on capital increases. Despite such legal gap, Spanish administrative authorities and courts stated that split's regulation could not be applied analogically to non-monetary contributions, given its different legal characterization and mainly because in the latter there is no universal succession effect.

With the enactment of the Structural Modifications Act, the figure of segregation was incorporated as a type of split, and therefore subject to the latter's regulation. Consequently, a question on whether the regulation of segregation as a structural modification meant that this procedure was **compulsory for any contribution of branch of activity**, or whether it could also be done (as until then) with the requirements and effects of an in-kind capital increase in the acquiring company.

This was discussed in the doctrine and the notarial practice, which almost unanimously, were pronounced in favour of segregation and the contribution of branch of activity as different figures subject to different legal regimes. In the absence of a rule expressly imposing the observance of the segregation procedure, non-monetary contributions should also be allowed when contributing businesses.

The main criticism to such freedom of choice was that in non-monetary contributions, the shareholders of the contributing company may be less protected as the contribution can be exclusively decided by the management body. This concern was overcome by the latest modification of the law of Corporate Companies Act in 2014, with the requirement that all transfers of assets deemed essential for the contributing company, must be previously approved by the shareholders (Article 160.f). Such essentiality of assets may derive from the equity relevance in comparison with the rest of the contributing company's equity, or given the nature of the transferred branch of activity.

Despite the foregoing, some registrars still had a non-unanimous criterion and they deny registration of business contributions done through non-monetary contributions.

Finally, the **administrative resolution number 8573 of the General Office of Registries and Notaries dated on July 22nd, 2016** (**Administrative Resolution**) solved such matter, bringing to an end the existing uncertainty in this regard. It clearly states the possibility of choosing between the two corporate procedures to proceed with business contributions. This solution is aligned with other European countries that have expressly regulated segregation as a type of demerger, as a structural modification.

Corporate Procedures Comparison

Similarities

First, in both corporate procedures, the equity of a company to be transferred must compound an **autonomous economic unit**, understood as a set of patrimonial elements (both assets and liabilities), determining an economic exploitation that are capable of operating by their own means.

Second, the subsistence of the segregated/contributing company with **no reduction of the segregated/contributing company's share capital**, but only an alteration in the make-up of its equity, since it receives shares of the beneficiary company for an amount equivalent to the branch of activity transferred.

Third, the company that segregates/contributes a branch of activity, **receives as counter value, shares of the share capital of the beneficiary/acquiring company**.

Fourth, from a labour perspective, **both procedures imply company's succession**. This is, with the change on the company's ownership, the beneficiary/acquiring company will assume all rights and obligations of the segregated/contributing company in this regard. Therefore, employees' position will be sufficiently guaranteed, as per being also obliged to communicate such change to the employees' representatives (Article 44 of the Spanish Statute of Workers).

Finally, from a Spanish perspective, **both procedures may be applied to cross-border business contributions**, provided that all requirements as per all applicable regulations are complied with.

Differences

The main difference between both transactions lays precisely in the corporate procedure to be followed, their requirements and effects, mainly related to the way in which the elements composing the branch of activity are transferred. In this regard, compliance with such specific formalities provided for in each regulation ensures that all interests at stake are adequately protected at all times.

On the one hand, segregation, as a structural modification, has a **special regime for block transfer and thus, a regulated procedure**. The Structural Modifications Act **applies universal succession**, instead of the singular transmission of each of the elements composing the branch of activity (e.g. not necessary to apply for third parties' consent). To ensure that this simplification does not harm the shareholders of the companies involved nor third parties (creditors, employees etc.) the law establishes a procedure requiring approval of the segregation by the shareholders, a report of the company's management, a segregation balance sheet that shall be audited when the company is obliged to audit its financial statements, specific disclosure requirements regarding rights of information and publicity for shareholders, creditors and employees, waiting a creditors opposition period etc.

Moreover, additional protection is given through a particular liability regime. The beneficiary company shall assume the obligations inherent to the branch of activity received, and in the absence of compliance from any of such obligations, the segregated company will respond jointly and severally, but only for the prior obligations to the segregation.

On the other hand, the non-monetary contribution, as a generic business restructuring, follows the **standard and generic procedure for non-monetary capital increases**. Hence, rules contained in the Corporate Companies Act regarding non-monetary contributions and share capital increases will apply for the contributing and acquiring company, respectively.

Besides, in order to assure that third parties rights are sufficiently guaranteed and in the absence of the effect of universal succession, each of the assets composing the economic unit must be singularly transferred. As such, the change of title has to be agreed with all creditors and counterparties and for each contract in force. Otherwise, as long as third parties and creditors do not give their consent, business contributions will not be enforceable against them but only valid internally between concerned companies.

As stated above, shareholders' of the contributing company must approve the contribution when the economic unit shall be deemed as an essential asset.

Finally, the value of the contribution will be guaranteed through a particular regime that will depend on the corporate form of the acquiring company. In private limited liability companies, the contributing company as well as the directors of the acquiring company and its shareholders', will be liable, jointly and severally, before the acquiring company and its creditors in case the valuation does not correspond to the market value. On the other hand, in corporations, a valuation report issued by an independent expert will be required.

And now, what?

After the Administrative Resolution, companies may freely decide the procedure to follow on the basis of the circumstances of each individual case and of the concerned companies' priorities and interests when contributing a business.

Thus, whether the complexity of the branch of activity to be transferred effects universal succession, segregation may be the procedure to be considered (i.e. businesses in regulated sectors where authorizations and/or licenses are required or businesses with significant number of relationships with third parties, particularly with many creditors and debtors or with a significant bank financing).

On the other hand, the contribution of a branch of activity via capital increase may be, to a certain extent, more complex due to the absence of universal succession but, in principle, the procedure may be less cost and time consuming.

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PricewaterhouseCoopers Tax & Legal, Sarl (Cameroon) – The adoption of paperless securities systems under Cameroonian and CEMAC law

At a glance

This article analyses both Law no. 2014/007 of 23 April 2014 establishing the terms and conditions for the adoption of paperless securities systems in Cameroon and Regulation no. 01/14/CEMAC/UMAC/CM introducing a registration system for transferable securities and other financial instruments in the Central African Economic and Monetary Community (**CEMAC**) region.

In detail

Following the enactment of the Law of 23 April 2014 establishing the terms and conditions for the adoption of paperless securities systems in Cameroon (**Cameroonian Law**), on 25 April 2014, the Ministerial Committee of the CEMAC region adopted Regulation no. 01/14/CEMAC/UMAC/CM introducing a registration system for securities and other financial instruments in the CEMAC region (**CEMAC Regulation**).

The coexistence of these two laws relating to the introduction of paperless securities systems calls for a close examination of their respective content and scope. Accordingly, we have addressed a number of the issues relating to paperless securities systems in a question and answer format below.

What is meant by a paperless securities system?

Article 1, paragraph 2 of the Law of 23 April 2014 establishing the terms and conditions for the adoption of paperless securities systems in Cameroon provides:

"*The paperless securities system replaces paper securities certificates with a procedure whereby securities are held in registered accounts in electronic format*".

This definition by the Cameroonian legislator, which reiterates the requirement to hold securities in registered accounts provided for in Article 744-1 of the revised OHADA Uniform Act, is also set out in Article 2 of the CEMAC Regulation, which stipulates that:

"*Regulation no. 06/03-CEMAC-UMAC of 12 November 2003 regarding the Organization, Operation and Monitoring of the Central African Market, establishes a general rule whereby transferable securities and other financial instruments or similar securities issued in connection with a call for public capital must be held in registered accounts (...)*".

From these definitions, it can be concluded that the introduction of paperless securities systems involves:

a the requirement to hold securities in registered accounts; and

b the end of paper securities certificates.

Which securities are affected by the adoption of paperless systems?

Under the Cameroonian Law, all listed or non-listed securities issued by public or private entities in Cameroon are affected by the adoption of paperless systems.

This law clearly defines securities (*valeurs mobilières*) as either representing a stake in a company's registered capital (shares) or debt securities (bonds), issued by public or private corporate bodies, transferable by book entry, conferring identical rights per category and granting access to the share capital of the issuer or to a general claim to its assets or related rights.

Decree no. 2014/3763/PM of 17 November 2014 establishing the implementing conditions of the Cameroonian Law provides a more detailed definition of securities in Article 3, paragraph 2, stipulating that:

"*(...) The following are deemed to be securities:*

a negotiable debt instruments issued by governments, decentralized territorial authorities or any other public body that may be traded on regulated markets;

b units or shares in UCITS;

c other financial instruments issued by governments, decentralized territorial authorities or any other public body that may be traded on organized markets".

Under the CEMAC Regulation, the securities affected by the adoption of paperless systems are those issued in connection with a call for public capital on the Central African stock exchange (*Marché de la Bourse des Valeurs Mobilières de l'Afrique Centrale* – **BVMAC**).

However, the CEMAC Regulation includes in its definition of securities and other financial instruments, securities issued by public or private corporate bodies conferring identical rights per category, which are freely transferable and grant access, either directly or indirectly, to a portion of the share capital of the issuing corporate body or to a general claim to its assets.

It is clear from this definition that there is a great deal of similarity between the CEMAC Regulation and the Cameroonian Law with regard to the definition of securities.

Article 3, paragraph 2 of the CEMAC Regulation specifies that:

"*(...) The following financial instruments are considered to be transferable and other similar securities:*

a capital stock and debt securities issued by a public limited company;

b treasury bills, bonds, or any other financial instruments issued by the Bank of Central African States, a CEMAC Member State or an establishment of such State;

c units or shares in UCITS;

d units issued by special purpose entities;

e any other financial instrument issued in connection with a call for public capital".

Who is involved in the move to paperless securities systems?

The adoption of paperless securities systems requires the involvement of a number of parties, which must be carefully managed.

Issuers of securities

These can be public or private corporate bodies which issue transferable securities or on whose behalf they are issued.

However, unlike the Cameroonian Law, which applies to all issuers of listed or non-listed securities based in Cameroon, the CEMAC Regulation only applies to issuers of securities operating on the BVMAC stock exchange.

Issuers may include governments, decentralized territorial authorities, public bodies, joint-stock companies and undertakings for Collective Investment in Transferable Securities (**UCITS**).

Issuers of securities may directly hold and manage the accounts of the securities they issue provided they are in registered form. However, they may also appoint a representative to hold and manage their securities accounts, within the limits of the powers granted by the issuer.

If securities are issued in bearer form, the issuer must use the services of a custodian.

Account keeper/custody account keeper

These are authorized or certified intermediaries, tasked with carrying out electronic securities transactions.

Account keepers or custody account keepers must be certified by the Cameroon financial markets commission (*Commission des Marchés Financiers* – CMF) or by the *Commission De Surveillance Du Marché Financier De L'afrique Centrale* (**COSUMAF**), depending on whether they are active in Cameroon or on the BVMAC stock exchange.

According to Article 15 of decree no. 2014/3763/PM of 17 November 2014 establishing the implementing conditions of the Cameroonian Law, custody account keeper duties should be performed by investment service providers specially authorized for such purposes.

Under the CEMAC Regulation, account keepers are issuing corporate bodies, financial intermediaries and other institutions authorized for such purposes by the COSUMAF.

Similarly, the following are deemed to perform the role of account keeper:

a the Bank of Central African States;

b the Public Treasuries of the CEMAC Member States; and

c any other public body duly authorized by the financial regulatory authority.

The Central Custodian

The Central Custodian is the body responsible for controlling, monitoring and supervising paperless securities transactions.

It oversees the custody, settlement-delivery and administration processes for securities in accordance with Cameroonian Law.

Under the CEMAC Regulation, the Central Custodian is the guarantor for the securities involved in its transactions. It records all the securities issued in its accounts. Similarly, the Central Custodian ensures, at all times, that the securities accounts on its books are balanced and that the rules on securities account keeping and securities accounting practices applicable to custodians are complied with.

In Cameroon, Central Custodian services are currently provided by the *Caisse Autonome d'Amortissement* (CAA).

Under the CEMAC Regulation, Central Custodian services are provided by the *Caisse Régionale de Dépôt des Valeurs* (CRDV).

The Cameroonian Financial Market Commission/Central African Supervisory Commission

Under the Cameroonian Law, the Cameroon financial markets commission ensures the smooth functioning of paperless securities transactions. It is also responsible for granting authorization to the Central Custodian and custody account keepers.

Under the CEMAC Regulation, the COSUMAF is responsible for granting authorization to corporate bodies, custody account keepers and the Central Custodian.

The COSUMAF is the supervisory, regulatory and monitoring authority for the Central African financial marketplace. It is also in charge of defining how the CEMAC Regulation should be implemented.

What are the repercussions of the adoption of the paperless securities systems?

Proof of ownership of securities

Securities issued in Cameroon and those issued in connection with a call for public capital on the BVMAC stock exchange must be registered in an account opened in the name of their owner.

However, unlike the CEMAC Regulation, the Cameroonian Law expressly requires the issuer or the custody account keeper to provide the owner, the owner's representative or the securities holder, with a statement indicating the number and details of the securities it holds on their behalf.

Securities issued in Cameroon and those issued in connection with a call for public capital on the BVMAC stock exchange must be transferred by inter-account transfer. Consequently, securities do not need to be represented in paper form.

This new securities transfer method also impacts the rules for establishing proof of ownership of securities, which is now evidenced by their registration in an account held in the name of their owner.

However, the CEMAC Regulation expressly provides that ownership of securities held in indirectly registered form (*nominatif administré*) and managed by an authorized intermediary is evidenced through corresponding entries in the authorized intermediary's register.

Securities held in indirectly registered form are securities held in an account managed by an authorized financial intermediary opened at the request of their owner.

Deadlines for ensuring compliance with securities regulations

Under the Cameroonian Law, after the two (2) year period elapsed following the enactment of the Law (i.e., as from 23 April 2016), it was no longer permitted to issue securities in paper form in Cameroon. The Law also states that owners of securities issued prior to its enactment have four (4) years in which to comply, i.e., by 23 April 2018 at the latest.

Under the CEMAC Regulation, issuers and account keepers are granted a period of twenty-four (24) months, from 1 May 2014 (the date on which the Regulation entered into force) in which move to paperless systems.

Penalties for failing to ensure compliance with securities regulations

In the event that holders of securities fail to comply with the foregoing, the issuers of the securities concerned are required to sell the rights corresponding to the non-registered securities on the stock exchange within three (3) years following the entry into force of the CEMAC Regulation, i.e., 30 April 2017 at the latest. Only stopped securities are exempt from this compulsory sale procedure, which must be completed within twenty-four (24) months.

It should also be underlined that the net proceeds from such compulsory sales of securities are transferred by the Central Custodian to a financial institution in the CEMAC region and are made available to assignees upon presentation of the corresponding securities, subject to a thirty-year limitation period or ordinary legal provisions which allocate them to the State.

In addition, securities are deemed null and void after the sale of the corresponding rights.

Finally, the CEMAC Regulation provides that as from the thirteenth (13th) month following that in which it entered into force, i.e., 1 June 2015, the holders of bearer securities may only exercise the rights attached to these securities after they have been transferred to an authorized financial intermediary or, where applicable, an issuing corporate body, for the purposes of registration. Furthermore, within this same deadline, holders of registered securities certificates that have not been filed with an authorized financial intermediary may only exercise their rights after such certificates have been presented to the issuing corporate body.

Under the Cameroonian Law, failure to observe the prescribed deadlines for moving to paperless securities systems shall entail the owners of securities losing their entitlement to exercise the rights attached to their securities.

In addition, the issuers of securities whose owners have lost their entitlement to exercise the rights attached to said securities are required to sell the rights corresponding to such securities and transfer the proceeds from the sale to a special securities account or the account of their assignees within an additional period of one year.

Finally, the owners of the sold securities or their assignees shall have a period of thirty (30) days in which to claim such proceeds. Failure to do so will result in the proceeds from the sale being transferred to the Deposit and Consignment Funds (*Caisse des Dépôts et Consignations*).

What is the legal scope of the CEMAC Regulation and the Cameroonian Law?

As has been shown throughout this analysis, Law no. 2014/007 of 23 April 2014 establishing the terms and conditions for the adoption of paperless securities systems in Cameroon and Regulation no. 01/14/CEMAC/UMAC/ CM introducing a registration system for securities and other financial instruments in the CEMAC region do not have the same scope of application.

The Cameroonian Law has a wider scope of application since it applies to all corporate bodies that issue securities in Cameroon, while the CEMAC Regulation only applies to corporate bodies that issue securities on the BVMAC stock exchange.

Consequently, corporate bodies that issue securities in the CEMAC region and which are subject to the obligation to move to paperless securities systems, are required to refer to domestic legislation when carrying out securities transactions other than on the BVMAC stock exchange.

Therefore, in Cameroon, the Cameroonian Law prevails in this matter.

The high level of consistency between the Cameroonian Law and the CEMAC Regulation make it easier to understand the paperless securities systems process.

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PricewaterhouseCoopers (Turkey) – Recent Amendments on Turkish Commercial Code

At a glance

The provisions of the Turkish Commercial Code No.6102 (**TCC**) were amended by the Law making amendments on Certain Laws for the Improvement of Investment Environment No. 6728 (**Omnibus Law**) which was published in the Official Gazette on 9th August, 2016 to encourage the investments in terms of both local and foreign investors in Turkey.

The new amendments are regulated based on particular subjects and procedures of commercial companies which are specifically stipulated under the following topics:

a establishment;

b exemptions from stamp tax;

c liquidation; and

d checks are also regulated in detail.

In detail

A state of emergency has been declared by the Turkish Government months ago following the recent events occurred in Turkey. Accordingly, some measures have been taken by the government to develop the economy, decrease the financial difficulties for investors and improve the investment environment in Turkey. For this purpose significant amendments on TCC have recently been adopted to encourage both local and foreign investors as well as the legal entities in Turkey.

To clarify and elaborate the new adoptions, the amendments on TCC can be divided into 4 main categories:

a establishment;

b exemptions from stamp tax

c liquidation; and

d checks.

Establishment

This new amendment introduced a new alternative for the establishment process of the companies.

For instance, the articles of associations may be issued and signed or ratified either before the Turkish Notary Public or manager/deputy manager of Trade Registry Office pursuant to Article 66 and Article 67 regarding the Omnibus Law.

As per Article 66 of the Omnibus Law, the real & legal person may put his/her signature under the trade name by making a written statement before the head or deputy head of the Trade Registry Office without the requirement for notarization. Before this alternative, notarization was a must which was causing high notarization costs. That being said, this alternative might be useful for the investors to decide on how to proceed with the preparation of certain documents at the time of the establishment.

This alternative is applicable for all company types i.e. joint stock companies, limited liability companies etc., however it may take some time to have a settled practice on the applicability of these provisions before the Trade Registry Offices in Turkey.

Exemptions from Stamp Tax

By the Omnibus Law, the content of the stamp duty exemption is extended and some of the agreement types and valuable financial documents are added into such exemption.

The major matters of the amendments for the investors are elaborated as follows:

a The valuable documents which are subject to the proportional tax and issued more than one copy, are subject to the stamp duty calculated over only one copy. The stamp duty was triggered over each copy signed, prior to this amendment.

b Certain documents such as share purchase/transfer agreements, the documents related to credit transfer and the assignment of claims arising out of credits are now being considered exempt from stamp duty with newly introduced provisions. As those documents are within essential documents for investors, the amendments are considered as a significant improvement.

c Stamp duty rate to be applied for real estate preliminary sales agreements has been recently reduced to "0" (zero) according to the Council of Ministers' Decision dated on 31/1/2017 and numbered 2017/9759, in addition to above developments which is also good news for investors willing to purchase a property in Turkey.

Liquidation

The liquidation process has an obligatory waiting period in Turkey so as to protect the creditors.

This waiting period was one year before the enactment of Omnibus Law which is then shortened to 6 months as per Article 68/1 (c).

By this amendment, it is also easier to liquidate a company established in Turkey and this may be crucial for the investors assessing the exit procedures at the time of entering into the market.

Checks

Checks related amendments do not entirely change the provisions and the systems, yet it is obvious that these are the result of developing technologies and the environment.

The definition of checks are widened along with this amendment. In other words, it is referred in this amendment to barcodes – data matrix – serial codes given to checks by banks as an item to be included into checks within the scope of their definition under Article 780 of TCC. The data matrix system shall be controlled by Risk Centre of Union of Banks of Turkey as per Article 70/3 of Omnibus Law.

Therefore, the checks will have a data matrix content in Turkey which will ease the access to the relevant information and control of their validity in a more technological, secure and improved way.

Conclusion

In line with the recently introduced provisions, it was aimed at improving the investment environment in Turkey and some of them have been implemented effectively. Therefore, those improvements may turn out to be an opportunity for investors nowadays since such amendments provides less red tape and procedural easiness and practicability before the official authorities.

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