

Europe Update

DE BRAUW
BLACKSTONE
WESTBROEK

JULY 2013

Corporate / Mergers & Acquisitions

- Disclosure requirements for non-financial and diversity information
- China enters into new tax treaty with the Netherlands

Competition / Antitrust

- Commission consults on proposal for simplifying procedures under the EU Merger Regulation
- Commission fines Microsoft for noncompliance with browser choice commitments
- European Commission proposes legislation to facilitate damage claims by victims of antitrust violations

Financial Markets

- European Court extends scope of financial transactions disclosure obligations
- European Parliament adopts banking reform package
- Banking Union developments
- Stronger rules on anti-money laundering and fund transfer

Intellectual Property

- European Commission publishes draft legislation concerning EU Trademark System after leak

Corporate / Mergers & Acquisitions

Disclosure requirements for non-financial and diversity information

The European Commission has proposed an amendment to existing accounting legislation in order to improve the transparency of large companies on social and environmental matters.

Key elements of the **proposal**, dated 16 April, are:

- Companies with more than 500 employees and a balance sheet total of more than EUR 20 million or a net turnover of more than EUR 40 million have to include a non-financial statement in their annual report.
- This non-financial statement needs to include information relating to at least environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, and in particular:
 - a description of the policy pursued by the company in relation to these matters;
 - the results of these policies;
 - the risks related to these matters and how the company manages those risks.
- Large listed companies have to add a description of their diversity policies for their administrative, management and supervisory bodies to the corporate governance statement included in their annual report. This description has to include aspects such as age, gender, geographical diversity, and educational and professional background. It also has to include the objectives of the diversity policy, how it has been implemented and the results in the reporting period.
- Small and medium-sized listed companies (not exceeding two out of the following three criteria: 250 employees, net turnover of EUR 35 million or balance sheet total of EUR 17.5 million) are exempted.
- Comply or explain; companies who don't include specific information or do not have a diversity policy, need to give a clear and reasoned explanation for this in their corporate governance statement.
- The European Commission expects that the proposed amendment will not become effective before 2016 and that companies will not be required to publish their first reports in accordance with these new disclosure requirements before 2017.

China enters into new tax treaty with the Netherlands

The People's Republic of China and the Government of the Kingdom of the Netherlands signed a new double taxation treaty ("DTA") on 31 May 2013. The new **treaty** - which still has to be ratified by both countries - replaces the current treaty that entered into force in 1987 and is to a large extent modeled on the 2010 OECD Model Convention. The new treaty will further improve the economic ties between the Netherlands and Mainland China.

The DTA, together with the Netherlands participation exemption regime and extensive tax treaty network, makes the Netherlands a tax-efficient gateway into Europe and the rest of the world for companies and individuals from China. Likewise, the DTA provides a favorable basis for Dutch companies to enter or further expand their activities in China. Distinctive features of

the new DTA are:

- In accordance with the 2010 OECD model convention, the DTA provides that a building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months. Under the current double taxation agreement such site or project already constitutes a permanent establishment if it lasts more than 6 months.
- The DTA provides for a reduction of withholding tax to 5% on dividend payments arising in one state and paid to a beneficial owner of the income concerned resident in the other state, if the receiving entity holds directly an equity interest of at least 25% in the in the paying entity. In all other cases each country may only levy 10% withholding tax. The People's Republic of China's domestic rate is 10% and the Netherlands domestic rate is 15%.
- The DTA includes a specific anti-abuse provision disallowing a reduction of withholding taxes on dividends if the main motive, or one of the main motives, is to set up a specific structure to benefit from the DTA.
- The right to tax capital gains is generally allocated to the jurisdiction of the company realizing the gain, but the other jurisdiction may - subject to certain limited exceptions - tax capital gains on:
 - the shares in a company deriving more than 50% of its asset value directly or indirectly from real estate situated in that other jurisdiction; and
 - the shares in a company if the company realizing the gain directly or indirectly held at any time in the period of 12 months prior to the sale an equity interest of at least 25% in the company of which the shares are sold.

Competition / Antitrust

Commission consults on proposal for simplifying procedures under the EU Merger Regulation

The European Commission invites the public to comment on a proposal to simplify certain procedures for notifying mergers under the EU Merger Regulation. The proposal aims to make EU merger control even more business-friendly by cutting red tape and streamlining procedures.

The proposed changes could allow up to 70% of all notified mergers to qualify for review under the Commission's simplified procedure, i.e. about 10% more than today. This could result in savings for the merging companies concerned, cutting lawyers' fees by up to one half and reducing preparatory in-house work. In addition, the Commission proposes to reduce the net amount of information required to notify all mergers. This initiative is part of the Commission's

overall effort to make administrative procedures less burdensome for business, thereby stimulating growth and making Europe more competitive.

In particular, the Commission proposes to expand the scope of the Notice on a simplified procedure for treatment of certain mergers. Expanding the simplified procedure would reduce the burden for business further. The Commission suggests raising the market share threshold for treatment under the simplified procedure for mergers between firms competing in the same market from 15% to 20%. For mergers between firms active in upstream and downstream markets - such as between a producer of car parts and a car manufacturer - the Commission suggests raising the threshold from 25% to 30%. The Commission also wants to make it possible to treat a case as simplified where the combined market share of two firms active in the same market is above the 20% threshold but the increase in market share resulting from the merger is very small.

In addition, the Commission proposes to amend the Regulation implementing the Merger Regulation in order to update and streamline the merger notification forms. In particular, in cases that do not fall under the simplified procedure, merging firms would only have to submit detailed information for those markets where their market share actually exceeds the threshold for applying the simplified procedure.

Commission fines Microsoft for noncompliance with browser choice commitments

The European Commission has imposed a EUR 561 million fine on Microsoft for failing to comply with its commitments to offer users a browser choice screen enabling them to easily choose their preferred web browser. In 2009, the Commission had made these commitments legally binding on Microsoft until 2014. This is the first time that the Commission has had to fine a company for non-compliance with a commitments decision.

In its decision, dated 6 March, the Commission finds that Microsoft failed to roll out the browser choice screen with its Windows 7 Service Pack 1 from May 2011 until July 2012. 15 million Windows users in the EU therefore did not see the choice screen during this period. Microsoft has acknowledged that the choice screen was not displayed during that time.

In the calculation of the fine the Commission took into account the gravity and duration of the infringement, the need to ensure a deterrent effect of the fine and, as a mitigating circumstance, the fact that Microsoft has cooperated with the Commission and provided information which helped the Commission to investigate the matter efficiently.

European Commission proposes legislation to facilitate damage claims by victims of antitrust violations

The European Commission has adopted a proposal for a Directive on how citizens and

companies can claim damages when they are victims of infringements of the EU antitrust rules, such as cartels and abuses of a dominant market position. The proposal is set to remove a number of practical difficulties which victims frequently face when they try to receive a fair compensation for the damage they have suffered.

The proposal sets out a number of measures to facilitate damages actions. The proposal reserves a key role for competition authorities (at EU or Member State level) to investigate, find and sanction infringements. Contrary to the US system, the proposal does not seek to leave the punishment and deterrence to private litigation. Rather, its main objective is to facilitate full and fair compensation for victims once a public authority has found and sanctioned an infringement.

The proposal contains a number of safeguards to ensure that facilitating damages actions does not diminish the incentives for companies to cooperate with competition authorities under the so-called "leniency" programmes. Under the proposed reforms, leniency and immunity applications and settlement submissions would not be shared with claimants.

The text of the proposal for a Directive adopted by the European Commission and all other relevant documents are available [here](#). The proposal for a Directive will now be discussed by the European Parliament and the Council according to the ordinary legislative procedure. Once it has been adopted by these institutions, the bloc's 27 Member States will have two years to implement the provisions in their legal systems.

Financial Markets

European Court extends scope of financial transactions disclosure obligations

National banking supervisors in the EU are entitled to information about suspicious clients of banks that are not established in their territory but do provide financial services there from another EU country. This is the key message of a ruling from the European Court, dated 25 April 2013, in which the Commission was asked whether a bank had to provide information to the supervisor in the EU country of establishment only, or also to the supervisory authority in the EU country where it operates.

The ruling was made further to a request by the Spanish banking supervisor in January 2007 for information about clients of Jyske Bank Gibraltar. The request was made because names of intermediaries had emerged in numerous real estate transactions on the Spanish Costa del Sol and because these names might be connected to money laundering activities. The bank provided part of the information in June 2007, but refused to disclose information on its clients' identity and submit copies of suspicious transactions in Spain, referring to Gibraltar's banking secrecy rules. The bank argued that its only disclosure obligations were vis-à-vis the financial investigation unit of Gibraltar. The Spanish Council of Ministers then issued two public reprimands to the bank and imposed two fines of EUR 1.7 million in total, on the basis that the

bank had failed to comply with the Spanish rules on disclosure. The bank appealed this decision before the Spanish Supreme Court, which referred the case to the European Court.

European Parliament adopts banking reform package

The European Parliament voted in favour of the new Capital Requirements Directive (CRD IV). CRD IV incorporates Basel III and consists of a directive and a regulation that include the following measures:

- Capital requirements are being tightened: banks must set aside a relatively higher core capital as a cushion against unexpected losses. Additional capital requirements apply in the form of a capital conservation buffer, the anticyclical buffer, and the systemic risk buffer. The latter does not originate from Basel III.
- Banks must maintain specific capital for a temporary deterioration in the creditworthiness of a counterparty in a derivatives contract.
- An international standard for uniform liquidity rules is introduced
- A mandatory leverage ratio is intended to apply as per 1 January 2018.
- The EU wants to simulate lending to small and medium-sized businesses. To encourage this, the nominal risk that banks must assign to these loans is reduced.
- Bankers' bonuses are restricted to the amount of the annual salary. Only under specific circumstances can the bonus be increased to twice the annual salary.
- Banks have to disclose profits, taxes paid, and subsidies received country by country, as well as turnover and number of employees.

The texts adopted by the European Parliament are available on its [website](#). The new rules still have to be formally adopted by the Council. The expected date for CRD IV to take effect is 1 January 2014.

Banking Union developments

The European Parliament is expected to vote in September 2013 on the *single supervisory mechanism*, which allows the European Central Bank to exercise direct supervision on banks in the Eurozone. European banking supervision is the first step towards a banking union.

The EU Council and European Parliament have reached agreement on the proposal, but Germany has expressed objections to the final text, as no clear distinction is made between the ECB's monetary policy and its financial supervision.

De Brauw has prepared a [legal alert](#) about the banking union. Please contact one of your regular contacts at De Brauw if you would like to receive alerts going forward.

Stronger rules on anti-money laundering and fund transfer

All persons dealing in goods or providing services for cash payment of EUR 7,500 or more will need to carry out customer due diligence, maintain records, have internal controls and file suspicious transaction reports. Also, providers of gambling services will have to conduct customer due diligence for single transactions of EUR 2,000 or more. These measures are included in the new [proposals](#) the European Commission has published in order to strengthen rules against money laundering and terrorist financing.

The proposals include a Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, which clarifies and reinforces the rules on customer due diligence and introduces new provisions to deal with politically exposed persons. The proposal also include a Regulation on information accompanying transfers of funds, pursuant to which payment service providers will be obliged to request information from the payer and the payee for identification purposes.

These proposals are in line with the [recommendations](#) of the Financial Action Task Force. The recommendations were implemented in the Netherlands on 1 January 2013 by an amendment of the Act on the Prevention of Money Laundering and Terrorist Financing.

Intellectual Property

European Commission publishes draft legislation concerning EU Trademark System after leak

On 27 March 2013 the European Commission officially published this draft legislation concerning the European Trademark System after the text has been leaked a few days before.

We reported directly on this draft legislation in this [legal alert](#), in which we highlighted a few of the expected changes. The complete text of the draft Regulation and draft Directive are now available on [the site of the European Commission](#). Please contact one of your regular contacts at De Brauw if you would like to receive alerts going forward.

Contact

If you have any questions or require further information regarding this newsletter please contact:

Amsterdam

Martijn Snoep | +31 20 577 1365 | martijn.snoep@debrauw.com

Kees Peijster | +31 20 577 1906 | kees.peijster@debrauw.com

Brussels

Jaap de Keijzer | +32 2 545 1105 | jaap.dekeijzer@debrauw.com

Douwe Groenevelt | +32 2 545 1101 | douwe.groenevelt@debrauw.com

Beijing

Geert Potjewijd | +86 10 5965 0501 | geert.potjewijd@debrauw.com

London

Ernest Meyer Swantée | +44 20 7337 3513 | ernest.meyerswantee@debrauw.com

New York

Mark Rebergen | +1 212 259 4101 | mark.rebergen@debrauw.com

Singapore

Dieter Wolff | +65 9396 1540 | dieter.wolff@debrauw.com