DE BRAUW BLACKSTONE WESTBROEK

Europe update


Platon, 2012 © Richard Mosse / Courtesy of the artist and Jack Shainman Gallery, New York

Welcome to the Europe Update. We have composed a newsletter which you will receive three monthly. Your feedback on the Europe Update is welcome. You can e-mail us at info@debrauw.com.

22 APRIL 2014

- New transparency in UNCITRAL arbitrations to boost investor confidence

Corporate / Mergers & Acquisitions

Reform of audit services in the EU

The The European Parliament and the Council of the European Union have adopted an "audit reform package" that intends to improve audit quality and transparency and to prevent conflicts of interest. The most important feature of the new legislation is that it prohibits Big Four-only contractual clauses requiring that the audit be done by one of the Big Four firms. This calls for a more flexible approach from both auditors and companies.

With this audit reform package, European legislators aim to open up the market beyond the dominant Big Four firms and to remedy auditing weaknesses revealed by the financial crisis. The package consists of a **directive** and a **regulation**.

Companies and audit firms have two years to prepare for the changes ahead.

Public interest entities (PIEs), such as banks, insurance companies and listed companies, will be required to issue a call for tenders when selecting a new auditor. To ensure that relations between the auditor and the audited company do not become too close, the European Parliament agreed on a mandatory rotation rule where an auditor may inspect a company's books for up to 10 years. This may be increased by 10 additional years if new tenders are issued, and by up to 14 additional years in the case of joint audits, i.e. when a firm is being audited by more than one audit firm. The Commission had proposed mandatory rotation after six years, but the European Parliament judged that this would be a costly and unwelcome intervention in the audit market.

The audit reform package will require audit firms auditing PIEs to provide shareholders and investors with a detailed understanding of what the auditor did and an overall assurance of the accuracy of the company's accounts. Furthermore, the package introduces a cap on the fees that audit firms can earn from the provision of permitted non-audit services to PIEs, including tax advisory services that directly affect the company's financial statements or services linked to the client's investment strategy.

Both the directive and the regulation will enter into force 20 days after their publication in the Official Journal of the European Union. The directive must be adopted by EU member states within 2 years from that date and the regulation will be effective 2 years from that date. The restriction on fee income from non-auditing services is to take effect within 3 years. The Federation of European Accountants has made a set of **FAQs** available.

Financial Markets

Power-sharing between ECB and national supervisors – grey areas remain

The European Central Bank will start supervising “significant banks” in late 2014. These significant banks will also continue to be supervised by their national supervisor. The Single Supervisory Mechanism (SSM) Framework Regulation, which has just passed the consultation phase, aims to clarify how powers are divided and cooperation is organised between the ECB and national supervisors. It is uncertain whether this aim has been achieved.

The European Central Bank (ECB) will start supervising “significant banks” from 4 November 2014. Factors determining whether a bank is significant include the size of the bank, its importance for the EU economy or a participating member state – i.e. which is in the euro zone or takes part in the SSM – and the significance of its cross-border activities. All these factors are calculated on a consolidated basis. A bank is in principle significant if it is established in a participating member state and meets one of these conditions:

- The total value of the assets exceeds EUR 30 billion.
- The share of its total assets in the GDP of the participating member state where the bank is established exceeds 20%, unless the total value of the bank’s assets is less than EUR 5 billion.
- The national designated authority (NDA) informs the EC that a bank is highly significant to the domestic economy, and the ECB confirms this significance in a decision.

In addition, the three most significant banks in each of the participating member states will in principle be supervised by the ECB supervision, even if they do not meet the above criteria.

The ECB published a **draft regulation** on 7 February 2014 setting a framework for cooperation within the SSM between the ECB and NDAs. NDAs currently supervising a significant bank will continue to be involved in that supervision. The draft Framework Regulation further specifies the **SSM** as already adopted and aims to clarify how the ECB and NDAs will cooperate and share powers. It is uncertain whether this aim has been achieved. This is regrettable as clarity on these issues is of great practical importance to banks.

Below is a list of important practical issues:

English language

- The draft Framework Regulation provides that the ECB will try to enter into an agreement with the significant banks about using the English language. If agreement is reached, banks will have to get used to communicating in English with the ECB (and in practice probably also with the NDA).

Relationship between ECB and NDA

- In most cases, the ECB will take the (ultimate) decision, e.g., to issue a statement of no objection.
- It depends on the subject matter whether the ECB or the NDA is the first “counter” where the bank submits a request. For example: to notify the intention to establish a new branch office in a participating member state, the bank will have to turn to the NDA. But where it concerns provision of cross-border services to that member state, the bank will have to go to the ECB. In practice it will not always be evident which authority the bank needs to communicate with, e.g., when minor changes in the organisation have to be notified.

Legal protection

- A clear separation of powers between the ECB and NDAs is also needed if a bank wants to lodge objections or appeal against a decision. The bank will need to know whether it should follow a European or national administrative procedure. An example of a grey area is where the Dutch Central Bank (DNB) decides to issue a direction or warning to comply with a statutory rule. If the bank opposes the decision, will it have to follow Dutch administrative procedure, even if the ECB has supervisory powers in relation to that same rule? This is relevant because the original decision becomes final if objections or appeal are lodged late or not at all.
- The “European procedure” for lodging objections with the ECB is set out in the draft Framework Regulation. The rules for lodging an appeal to the General Court, which forms part of the European Court of Justice, are set out in the Treaty on the Functioning of the European Union. There is no requirement to lodge objections before lodging an appeal to the General Court, but under Dutch law this is generally the case.
- The SSM Regulation provides that (in most cases) the ECB should hear the banks before it makes a decision. The draft Framework Regulation provides that this right to be heard may be exercised in writing. There is therefore no automatic right to meet with the ECB; the ECB determines if a meeting should take place. This arrangement will not always be in the bank’s interest.

The draft Framework Regulation was submitted to market parties for consultation until 7 March 2014. The current planning is to publish the final text on 4 May 2014.

If feedback given during the consultation phase does not lead to clarification in the final version of the Framework Regulation, we recommend that banks share their views with DNB on problems and inconsistencies that have been identified. In longer-term projects, it might be useful or even essential to anticipate the ECB’s direct supervision and to try to establish timely contact with the ECB (via DNB).

Competition / Regulation

Cartel victims may take shelter under a cartel’s umbrella

According to Advocate General Kokott, cartel members may be liable for damages resulting from umbrella pricing. Umbrella pricing occurs when non-cartel members take advantage of the cartel by charging higher prices than they would have done under normal competitive conditions. If the European Court of Justice follows the Advocate General's opinion, cartel members may have to worry about not only potential fines by competition authorities and damages claims by cartel victims, but also providing compensation to customers of non-cartel members.

The Advocate General's **opinion** relates to a request for a preliminary ruling by the Austrian Supreme Court in a case where a customer of a non-cartel member is suing four companies involved in the elevator cartel for damages before the Austrian civil courts. Austrian national law categorically excludes the liability of cartel members for umbrella pricing.

The Advocate General (AG) is of the opinion that the issue of civil liability of cartel members for umbrella pricing is a matter of EU law and not national law. The principle that any individual is entitled to claim compensation for loss sustained where there is a causal relationship between that loss and an infringement of the competition rules stems from EU law itself. In regard of umbrella pricing, the AG considers that a direct causal link can be assumed if the cartel was at least a contributory cause of the umbrella pricing and two conditions are fulfilled:

- The loss resulting from umbrella pricing is reasonably foreseeable for the cartel members.
- The compensation for loss resulting from umbrella pricing is compatible with the objectives of the competition rules which have been infringed.

Concerning the first criterion, the AG states that it is common business practice in a market economy for companies to keep a close eye on market trends and to take those trends duly into consideration when making their own commercial decisions. It is therefore not unforeseeable for cartel members that companies not party to their cartel will set their prices keeping the cartel members' market behaviour in mind. As for the second criterion, the AG argues that it can hardly be maintained that recognition of civil liability of cartel members for losses resulting from umbrella pricing is incompatible with the objectives of the competition rules: to create a system of undistorted competition in the European internal market. The practical effectiveness of the competition rules is safeguarded only if both the system of public as well as private enforcement evolves as effectively as possible. Outright exclusion of umbrella pricing from the private enforcement system would not serve this purpose.

The AG closes with the comment that allowing damages claims for umbrella pricing does not result in the automatic obligation of cartel members to compensate customers of non-cartel members. It will always be necessary to carry out a comprehensive assessment of all relevant circumstances and evidence to determine whether a cartel, in any given case, has given rise to umbrella pricing. Thus, as far as the AG is concerned, cartel members should beware of even more lurking damages claims.

The European Commission's first Anti-Corruption Report

The European Commission, in its first EU Anti-Corruption Report, shows that there is no corruption-free zone in Europe and that corruption affects all EU member states. The report, adopted on 4 February 2014, is important for politicians, the public, the media and practitioners alike in taking national corruption policy forward. Companies will also find it a useful tool to review and update their bribery and corruption risk assessment.

The report explains the current status in each member state by addressing the questions:

- What anti-corruption measures are in place.
- Which measures are working well.
- What could be improved and how.

The report shows that both the nature and level of corruption, and the effectiveness of measures taken to fight it, vary from one member state to another. It also shows that corruption deserves greater attention in all member states. Based on its findings, the report goes on to recommend improvements to each of the national laws and enforcement policies used in the fight against corruption.

The recommendations in the report include the following:

- Better accountability and integrity standards.
- Control mechanisms in public authorities.
- Dealing with conflicts of interests by officials.
- How to address corruption at the local level and in state-owned companies.
- The effectiveness of courts and police, and protection mechanisms for whistleblowers.
- Limiting bribery risks in foreign countries, and making lobbying more transparent.
- Developing innovative e-tools to enhance transparency.

For the Netherlands, the report recommends extending the categories of assets that must be declared by elected officials. It also recommends that the Netherlands focus its efforts on prosecuting corruption cases in international business transactions by increasing the capacity to proactively investigate foreign bribery.

A specific Euro barometer survey was also carried out to understand the level of perception of corruption and the experience of corruption. Key findings are as follows:

- 75% of the companies say that corruption is widespread in their country.
- 43% of European companies see corruption as a problem when doing business. It is most likely to be considered a problem when doing business with companies in the Czech Republic (71%), Portugal (68%), Greece and Slovakia (both 66%).
- Almost half of the companies agree that the only way to succeed in business in their country is to have political connections.
- Favouring friends and family in business (43%) or public institutions (43%) are considered the most widespread corrupt practices, followed by tax fraud and non-payment of VAT (42%).
- 32% of the companies that have participated in public tenders/public procurement say corruption prevented them from winning a contract, and this view is most widely held among construction (35%) and engineering sector companies (33%). At least half of the companies in Bulgaria (58%), Slovakia (57%), Cyprus (55%) and the Czech Republic (51%) say this.

The report is based on data from existing anti-corruption monitoring mechanisms (GRECO, OECD, UNCAC), as well as information from EU member states' public authorities, civil society, independent experts and academic research. Indicators of perception of, and experience with, corruption (e.g., the Euro barometer on corruption) were taken into account.

The main goal of the report is to initiate a broad debate about anti-corruption measures and to elicit feedback on the report from the member states, the European Parliament, national parliaments, private sector and civil society. The feedback will be taken into account and analysed for a second report and perhaps new corruption indicators will be added. The next EU Anti-Corruption Report will be issued in two years.

Companies and practitioners will find this report valuable in becoming more aware of the diverse anti-bribery and corruption laws and policies in different member states. Companies operating in these countries will find the report, alongside the Euro barometer survey, a useful tool to review and update their bribery and corruption risk assessment.

Intellectual Property / Infomation Technology

ECJ helps IP owners battle online sales of counterfeit goods

Good news for rightsholders in the battle against the online sale of counterfeit goods. The ECJ recently ruled that customs authorities can seize and destroy counterfeit goods purchased for personal use by individuals in the EU from non-EU websites. This is possible even if the website is not targeted at the EU.

Under the **Customs Regulation**, customs may take action against goods entering the EU that are suspected of infringing certain intellectual property rights. Can they also seize a single parcel that is bought by a private person for personal use on a non-EU website? This was the key element of the question referred to the ECJ concerning a dispute between **Blomqvist and Rolex**. Blomqvist is a Danish citizen who ordered, as it turned out, a counterfeit Rolex watch for personal use from a Chinese website. When the watch arrived, Danish Customs seized the watch and suspended its release. In a dispute between the two parties about the suspension of the release and destruction of the watch, the Danish Supreme Court referred preliminary questions to the ECJ with regard to the applicability of the Customs Regulation to this situation. In this case, it was not the buyer who infringed intellectual property rights since the watch was bought for personal use.

ECJ ruling

The ECJ held that under the Customs Regulation it is possible to act against counterfeit goods, even if there is not any ‘distribution to the public’, within the meaning of the Copyright Directive, and any ‘use in the course of trade’, within the meaning of the Trade Marks Directive and the Community Trade Mark Regulation. When consumers buy these goods for personal use, in general there is no infringement of an intellectual property right. However, within the scope of the Customs Regulation, the ECJ ruled these goods can be classified as infringing. It is not necessary for the goods to have been the subject, prior to the sale, of an offer for sale or advertisement targeting consumers of an EU member state.

This ruling is good news for rightsholders as it strengthens their position. It gives them not only more opportunities to act against the online sale of counterfeit goods from non-EU websites under the Customs Regulation, but it also gives them more opportunities to act against the purchase by a consumer.

ECJ: hyperlink no infringement, even when embedded

The ECJ recently rendered its eagerly awaited decision in the Svensson case. The Court held that the provision on a website of clickable links to works freely available on another website does not constitute an 'act of communication to the public' and therefore is not a copyright infringement. Only when the additional requirement of reaching a new public is met does the provision of a hyperlink require the copyright holder's authorisation.

The ECJ held that there was no new public because the public targeted by the initial communication consisted of all potential visitors to the site: the site was freely accessible without any access restrictions. This is different where a clickable link circumvents restrictions on the site on which the protected work appears or where the work is no longer available to the public on the site on which it was initially communicated. Users are considered a new public when the link constitutes an intervention without which those users would not be able to access the works transmitted.

The above even applies when Internet users click on the link at issue and the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site. Also in that case, only the work on the original site constitutes a communication to the public for which authorisation is required.

The ECJ also held that EU member states do not have the right to give wider protection to copyright holders by legislating that authorisation for hyperlinking to freely available content on a website is required.

Practical relevance

Since **Svensson** allows hyperlinking to freely available content, copyright holders are advised to restrict public access, for example, by way of subscription, installing a paywall or controlling access through protection software.

Litigation / Dispute Resolution

Mediation now ICC default option for alternative dispute resolution

The ICC has launched new mediation rules replacing the ICC's ADR Rules. The new rules set mediation as the default alternative resolution technique, offering a higher degree of support for disputing parties and an efficient and cost-effective means of resolving their disputes.

Mediation can be an efficient and cost-effective means of resolving disputes. The ICC's new mediation rules, which came into effect on 1 January 2014, replace the ICC Amicable Dispute Resolution (ADR) Rules which had been applicable since 2001.

The new **ICC Mediation Rules** provide a clear and flexible framework for the conduct of mediation proceedings. The accompanying **Mediation Guidance Notes** offer the parties practical advice on how ICC Mediation proceedings can be organised as to maximise the chances of successfully resolving their dispute.

The most striking change is the setting of mediation as the default option for dispute resolution. The old rules were tailored to fit all amicable dispute resolution techniques including mediation, conciliation and other techniques. The reason for this change is that since 2001, more than 90 per cent of the proceedings held under ICC ADR rules were converted to mediation. Parties may still agree to conduct other forms of ADR, such as conciliation or neutral evaluation, under the Mediation Rules.

Selection of mediator

As under the old ADR rules, the ICC International Centre for ADR will select the mediator, unless otherwise agreed by the parties. The Centre has developed an open network from which it can select mediators. Selection depends on the subject matter of the dispute, the place of mediation, the language of the mediation and the nationalities of the parties.

Confidentiality

Unless otherwise agreed by the parties or as required by applicable law, mediations under the new rules are private and confidential. The same applies to settlement agreements reached as a result of mediation.

Fee structure

In the new rules, the fee structure of mediation has been modified. There is a non-refundable filing fee of USD 2,000. The Centre may request a deposit to cover the administrative expenses, based on the value of the dispute. If the mediation takes place in the context of an ICC arbitration, the filing fee paid for the mediation will be deductible from the Centre’s administrative expenses. Mediator fees are generally assessed on the basis of the time reasonably spent by the mediator and an hourly rate fixed by the Centre, which will generally amount to between USD 400 and USD 600. The parties may also agree to a fixed fee with the mediator.

Mediation and arbitration

The ICC Mediation Rules have been designed to work in conjunction with the ICC Arbitration Rules. The Mediation Guidance Notes encourage arbitrators to consider the use of ‘mediation windows’, i.e. a pause or a stay in the arbitration proceedings. The parties may agree that they would like a sole arbitrator or a member of an arbitral tribunal to assist in negotiating a settlement of their dispute by acting as a mediator. The parties may further agree that, in the event the dispute is not resolved by mediation, the mediator may return to the role of arbitrator. Because of the potential risk that a subsequent award made by the arbitrator is susceptible to being challenged or that its enforceability is impaired, the ICC Mediation Rules allow a mediator to act as an arbitrator in the same dispute only when all of the parties have consented to this in writing.

The ICC Mediation Rules do not prescribe how the mediation should take place. The separate guidelines, the Mediation Guidance Notes, provide practical guidance on how ICC mediation proceedings can be organised and conducted in order to maximise the chances of successful resolution of the dispute. The Notes also give recommendations on the preparation for mediation sessions, the use of case summaries, and the relationship between mediation and arbitration proceedings.

By adopting these new ICC Mediation Rules, the ICC gives an impetus for the use of mediation. Choosing the ICC as mediation institute can be recommended in particular for the resolution of cross-border disputes, as the ICC has ample experience in dealing with international cases while also respecting cultural differences.

During the last few years, the number of ICC mediations has noticeably increased. It is to be expected that the adoption of the new ICC Mediation Rules will strengthen this development which, in turn, may help the ICC to bolster its position as one of the world's premier arbitration and mediation institutes.

New transparency in UNCITRAL arbitrations to boost investor confidence

The United Nations Commission on International Trade Law has taken an important step towards ensuring transparency in investor-state arbitrations conducted under International Investment Agreements providing for the protection of investments or investors. The new transparency rules will take effect on 1 April 2014 and apply if it concerns an investment agreement concluded after that date. The new rules provide an unprecedented level of public accessibility and transparency of the dispute while carefully balancing the interests of the disputing parties. Investors seeking stronger investment protection and far-reaching transparency will benefit from this development.

Certainly, a new global trend on transparency in investor-state arbitration has been set. Public awareness of contraventions by the states involved will offer investors a far higher degree of accountability. Also, investors will be able to properly weigh their risks and assess their position in relation to different states. Thus, for those investors seeking stronger investment protection and transparency, awareness of this development may open important new business opportunities, as they may decide to start investment projects that – due to the financial risks involved – they would not have envisaged without this newly acquired knowledge and gain in confidence.

An investor-state arbitration is a dispute resolution process arising out of an International Investment Agreement: a treaty entered between two or more states aimed at promoting and protecting foreign investment in the respective territories of those states. The **new transparency rules** do not apply to commercial arbitrations. In the case of UNCITRAL investor-state arbitrations initiated pursuant to a treaty concluded before 1 April 2014, UNCITRAL's new transparency rules only apply if the parties agree to their application. UNCITRAL is also preparing a convention envisaging the application of the transparency rules to disputes arising under existing investment treaties.

Under the previous versions of the UNCITRAL arbitration rules, disputes between investors and states were often not made public. The new rules introduce a procedural means to ensure that throughout the arbitral proceedings the relevant legal documents and hearings are accessible not only to the parties but also to the public. This allows a broader visibility of the risks that investors may run when investing in a certain state, which, in turn, will prevent excessive contraventions by that state.

Confidentiality is often seen as a key feature of commercial arbitration. Investor-state disputes, however, involve considerable issues of public interest and taxpayer funds. Transparency and accessibility to the public is therefore fundamental to this type of arbitration, unlike commercial arbitration.

Under the new rules, a substantial amount of information must be made available to the public. This includes the names of the parties, the treaty under which the claim is made, the economic sector involved, as well as various documents produced during the arbitration by the parties. Also, all written submissions provided by third parties and the transcripts of hearings must be publicly accessible. The rule that hearings must be open to the public is also innovative. In view of the protection of the interests of the disputing parties, the rules allow an exception to public accessibility of documents and hearings in the case of confidential information or where the integrity of the arbitral process is at stake.

UNCITRAL will maintain a central repository where all the information and documentation that is made publicly available will be digitally stored.

The new transparency rules are also available for use in investor-state arbitrations initiated under rules other than the UNCITRAL arbitration rules, or in ad hoc proceedings.

The UNCITRAL transparency rules offer far wider public accessibility than the ICSID and the PCA Arbitration Rules as well as the ICC Rules and arbitrations under NAFTA.

Contact

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

Amsterdam

Martijn Snoep | T +31 20 577 1365 | E martijn.snoep@debrauw.com
Jolling de Pree | T +31 20 577 1355 | E jolling.depree@debrauw.com
Patrick Ploeger | T +31 20 577 1955 | E patrick.ploeger@debrauw.com
Bernard Roelvink | T +31 20 577 1905 | E bernard.roelvink@debrauw.com

Beijing

Geert Potjewijd | T +86 10 5965 0501 | E geert.potjewijd@debrauw.com
Gaby Smeenk | T +86 10 5965 0502 | E gaby.smeenk@debrauw.com

New York

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

Singapore

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