Europe Update

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Corporate / Mergers & Acquisitions

Emerging trend: merger of international companies into a new Dutch top holding company

The recent trend of using Dutch top holding companies in international mergers underlines the position of the Netherlands as a neutral country with a sophisticated and flexible legal and governance system.

A key decision in an international merger is the location of the new top holding. This is especially true for a merger between equals that are listed in various countries. The recent merger between Applied Materials (USA) and Tokyo Electron (Japan) marks a trend of merging companies establishing a new global holding company in the Netherlands, while retaining their headquarters in their home countries. Earlier in 2013, the newly created Fiat Industrial/CNH (Italy/the Netherlands) and Publicis Omnicom Group (France/USA) followed the same route by establishing a top holding company in the Netherlands.

Key factors in determining a location for a top holding include neutrality, political acceptability, flexible regulations that accommodate tailor-made governance regulations, a mature market and a beneficial tax regime. The recent trend of using Dutch top holding companies in international mergers underlines the position of the Netherlands as a neutral country with a sophisticated and flexible legal and governance system. Other international companies that have already used Dutch holding structures include STMicroelectronics, Lyondell-Basell and EADS, the parent company of Airbus.

Competition / Regulation

Fast and precise: Dutch courts in cartel damages proceedings

Regardless of whether you are a cartel victim or a cartel member, the Netherlands appears to be an attractive jurisdiction for cartel damages proceedings. In two recent cartel damages rulings, Dutch courts have proven to keep up the pace.

The first ruling, by the Amsterdam Court of Appeal in the air-cargo cartel damages case, shows that Dutch courts intend to keep up the pace in proceedings. The Amsterdam District Court had ruled that the private damages proceedings had to be suspended pending the airlines' appeal against the European Commission's cartel decision before the EU Court (on the basis of Masterfoods). According to the District Court, the judgment of the EU Court regarding the nature, duration and scope of the airlines' participation in the infringement might affect the question of whether the airlines acted unlawfully in respect of the claimants, since not only is the airlines' participation in the infringement relevant in this respect, but the periods, locations and manner in which the airlines participated are also relevant, and whether their participation concerned services/shipments delivered to the claimants. The Court of Appeal did not agree and held that suspending proceedings pending an appeal before the EU Courts was

only necessary if there is reasonable doubt about the validity of the Commission decision. Consequently, the airlines will first need to specify which arguments they wish to put forward in order for the national court to decide on whether these relate to the validity of the Commission decision and thus necessitate the delay of the proceedings pending the EU Court's ruling.

That proceedings should be fast but not too expeditious is illustrated by the second ruling, by the Arnhem-Leeuwarden Court of Appeal. The Court of Appeal in this case found that the District Court got ahead of things when dismissing the passing-on defence without a proper debate between the parties. Instead, it should have limited itself to establishing liability for the damage caused. The District Court in first instance had ruled that ABB should compensate TenneT, the operator of the Dutch electricity grid, for the damages it suffered as a result of the Gas Insulated Switchgear (GIS) cartel. Although the exact amount of damages still needs to be established in follow-up proceedings, the District Court indicated that a comparison between offers made by ABB during and after the cartel – resulting in a 54% price overcharge according to a report submitted by TenneT – would make a suitable calculation method. ABB's argument that TenneT did not suffer any loss because it passed on the overcharge to its customers was rejected. Potential "benefits" gained by a cartel victim may only be offset against the damage sustained, if (i) there is a sufficient causal link between the benefits and the harmful event, and (ii) it is reasonable to deduct these benefits from the damages to be paid by the cartel participant. The Court of Appeal considered the District Court's ruling on the passing-on defence a bit too expeditious and ruled that ABB's interest to put the follow-up proceedings on hold to fully argue the passing-on defence outweighed TenneT's interest in a speedy outcome, particularly now that ABB promised to proceed swiftly.

Damages claimants have to make do with EC's public cartel decision

Don't bank on the Transparency Regulation to give you access to the Commission's confidential cartel files to substantiate your civil damages claims. A ruling by the General Court suggests that access will be rarely granted. Instead, national courts may lend you a hand by asking the Commission to transmit relevant information.

The Netherlands requested access under the Transparency Regulation to the confidential version of the Commission's road bitumen cartel decision. The Netherlands argued it needed this information to further substantiate its civil damages claim against the alleged cartel members. The General Court found that the Commission rightly rejected the request on the basis of Article 4(2) of the Transparency Regulation. The Court also held that a general presumption applies under the Transparency Regulation that disclosure of documents collected in the context of competition investigations will undermine the commercial interests of the companies concerned as well as the purpose of the Commission's investigation. This general presumption applies regardless of whether the cartel proceeding is still pending or has been closed.

It is up to the party seeking access to rebut this general presumption by, for instance, claiming an overriding public interest. The General Court ruled that the Netherlands did not have an

overriding public interest because the further substantiation of a civil damages claim qualifies not as a public but as a private interest. The fact that the Netherlands is an EU member state does not make this any different since the Transparency Regulation does not grant any special status to EU member states: it applies equally to all applicants requesting access. The General Court did, however, mention that it is up to the competent national court before which the civil damages claim is brought to rule on the mechanisms for submission of the necessary evidence. It could request the Commission to transmit relevant information and documents, particularly since Article 15(1) of Regulation 1/2003 provides that national courts involved in proceedings relating to EU competition law can ask the Commission to transmit information in its possession to those courts or for its opinion on questions concerning the application of the EU competition rules.

Parental liability for competition law violations of a 50/50 joint venture upheld

It's wise to include non-wholly owned subsidiaries and joint ventures in your competition compliance programme, considering that the EU Court has confirmed the liability of parent companies for competition law violations of their 50/50 joint ventures.

According to settled case law, the conduct of a subsidiary may be imputed to a parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently on its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company. This applies because the parent company and its subsidiary form a single economic unit and therefore form a single undertaking within the meaning of the cartel prohibition laid down in Article 101 TFEU. In regard of wholly owned subsidiaries, the EU Court of Justice has taken this one step further by establishing a rebuttable presumption that the parent company exercises a decisive influence over the subsidiary.

The case law above was used by the European Commission to hold El du Pont de Nemours and Company and The Dow Chemical Company jointly and severally liable for the participation of their 50/50 full-function joint venture DDE in the chloroprene rubber cartel. It seems hard to argue that joint ventures that have been set up and function as undertakings independent from their shareholders constitute a single economic unit with their shareholders. But that is precisely what the Court of Justice did in this ruling. The Court ruled that where two parent companies each have a 50% shareholding in a joint venture which committed a competition law infringement, these three entities can be considered to form a single economic unit for the purposes of establishing liability for participation in the cartel infringement, provided the Commission has demonstrated, on the basis of factual evidence, that both parent companies did in fact exercise decisive influence over the joint venture. The ruling provides a fair warning to keep an eye on competition law when concluding joint venture arrangements and to include joint ventures in your company's competition compliance programme.

Commission issues practical guidance for cartel confessions

The European Commission has issued practical guidance for leniency applicants on how to deliver oral corporate statements. These are often preferable to written corporate statements, as they reduce the risk of disclosure in subsequent civil damages claims by cartel victims. After choosing the leniency path, it is wise to opt for oral confessions where possible.

The practical guidance specifies that an oral corporate statement should be "clear, factual and to the point, with precise and sufficiently detailed information" of the alleged cartel activity. It should not include any product and market descriptions, general market information and publicly available information, which should be submitted in writing instead. The oral statement must be recorded, and the leniency applicant has to check the accuracy of the recording as well as the Commission's transcript "within a given time limit", upon the risk of losing any beneficial treatment under the Commission's leniency notice.

The practical guidance may soon be obsolete as far as the EU is concerned due to its proposed absolute ban on disclosure of oral and written leniency statements in the Commission's draft Directive on antitrust damages. With a disclosure ban on all statements, the need for oral statements may slowly fade away. The question is, however, whether this outright ban will make it through. The European Parliament's Committee on Economic and Monetary Affairs finds the per se protection of leniency statements contrary to EU case law according to which it is up to the national courts to determine, on a case-by-case basis and in accordance with national law, whether the interests of disclosure of information outweigh the interests of protection of information voluntarily provided by the leniency applicant. The Committee recommends amending the draft Directive to enable national courts to disclose leniency statements if claimants have plausibly suffered harm as a result of the infringement, and the leniency statement is indispensable to supporting their claim and contains evidence that cannot be otherwise provided.

The leniency path may thus be winding: even though it will provide cartel participants with the benefit of no or reduced fines, the leniency statements themselves may increase the risk of having to pay damages claims. Competition Commissioner Almunia recently underlined that there can be no trade-off between public and private enforcement of competition law: competition authorities should not compensate companies with reduced fines only because they have "voluntarily" paid damages to some of their cartel victims.

Buckle up: Commission speeds up its merger notification procedure

The Commission starts off the new year with a lean and mean filing regime by simplifying its merger review procedure and reducing the information required in its filing forms. This provides you with a speedier and more cost-efficient merger filing process. But beware of the new, more elaborate request for supporting documentation.

The European Commission's merger simplification package entered into force on 1 January 2014 and streamlines the merger review procedure by including more transactions under the

simplified procedure and reducing the information burden on companies having to notify their transactions. The scope of the simplified procedure is widened by:

- raising the market share thresholds for mergers between competing companies from 15% to 20%
- raising the market share thresholds for mergers with vertical links from 25% to 30%
- introducing a new criterion according to which mergers will also qualify for simplified review when they result in only a small increment in market share.

As a result, more companies will be able to notify their transactions through a short filing form with less detailed information requirements. At the same time, the Commission will be able to clear more mergers without an in-depth investigation of their effects amongst customers, competitors and other parties.

The Commission also wants to alleviate the information overload in its merger notification forms by:

- facilitating notifying parties, when requesting waivers, by clearly identifying what information qualifies for a waiver request in the standard notification forms
- introducing a “super-simplified notification” for joint ventures entirely active outside the EEA limited to providing a description of the transaction, the business activities and the turnover figures
- increasing the market share thresholds for what constitutes an “affected market”, which require more extensive information, from 15% to 20% for horizontally affected markets and from 25% to 30% for vertically affected markets.

So far so good as to decreasing the information burden for notifying parties and speeding up the process. However, the more elaborate request for supporting documentation may increase the notifying parties’ workload since it now includes:

- minutes of board meetings at which the transactions were discussed
- analyses, reports, studies, presentations etc. that assess a transaction’s rationale (including documents where the transaction is discussed in relation to potential alternative acquisitions)
- analyses, reports, studies, presentations etc. from the last two years for the purpose of assessing any of the affected markets.

But forewarned is forearmed. It is advisable to draw up documentation creation guidelines already to reduce the risk of having to provide assailable internal documents as a result of future transactions. Similarly, maintaining a register to keep track of internal documents relating to the potential transaction is recommended as it will facilitate producing this documentation once you need to file.

Financial Markets

Council approves banking supervision by the ECB

The European Central Bank will start directly supervising 150 of the Eurozone's largest banks and be closely involved in the supervision of other banks from September 2014.
The Council of the European Union, in October, adopted the legislative package creating this European Single Supervisory Mechanism. The legislative procedure has now been completed and the relevant regulations are expected to be published shortly.

European Central Bank starts new supervisory role with Comprehensive Assessment

The European Central Bank recently started its Comprehensive Assessment of banks which will be subject to its supervision as part of the Single Supervisory Mechanism. In connection with its assessment, the ECB will carry out an asset quality review and a stress test. The timely provision of information requested is expected to put considerable strain on banks.

The European Central Bank (ECB) started its Comprehensive Assessment in November 2013, in preparation for its new role of supervising Europe's 100 largest banks as part of the Single Supervisory Mechanism. An asset quality review and a stress test form part of this assessment. The timely provision of information requested is expected to put considerable strain on banks.

On 4 November 2013, the European Regulation establishing the Single Supervisory Mechanism entered into force. The regulation is an important step in the overhaul of Europe's banking supervision, and sees the ECB assuming a central supervisory role in cooperation with national competent authorities of member states. The ECB will fully exercise its new supervisory role from 4 November 2014.

In advance of the Single Supervisory Mechanism, the ECB began its Comprehensive Assessment of more than 100 European banks in November 2013. The assessment is unprecedented in size and scope, and includes an asset quality review and a stress test. In executing its assessment, the ECB works closely with the competent national banks. The ECB will publish all findings of the Comprehensive Assessment before November 2014.

The newly introduced asset quality review is expected to begin in January 2014. Focusing on an individual bank's assets believed to be the least transparent and the most risky, the asset quality review contains both on-balance and off-balance sheet exposures as well as the banking and trading books.

Prior to reviewing the data, the ECB will validate banks' data integrity, and verify and remedy this data where it finds that this is required. Following a strictly sampled portfolio, the asset quality review then assesses the adequacy of banks' asset valuation. Where necessary, the ECB uses the findings to readjust asset risk valuations. This readjustment may carry notable consequences, since it directly impacts banks' solvency. Moreover, a readjustment may negatively influence perception of the bank's dependability.

Preparations for the exercise are already in force, as national banks are discussing how the necessary information should be provided. The asset quality review may, however, pose

considerable legal difficulties to participating banks. The review requires that banks provide a significant amount of financial data from all of their worldwide operations. This large-scale data collection and transfer may encounter multiple regulatory obstacles, such as banking secrecy, confidentiality of financial information and privacy laws. It is important that banks start their assessment of these laws in time.

Intellectual Property / IT

CJ: one can sue before any EU court for online infringement

The CJ ruled that the relevant criterion for establishing jurisdiction in online copyright infringement cases is whether copies of the infringed works areaccessible online in the member state of the court addressed. This is a considerably lower threshold than the criterion that the website activity be directed at that member state, as established in earlier case law.

In Pinckney v Mediatech a copyright infringing CD was made by a company in Austria and sold by several companies in the UK on a website which was also accessible in France. The French copyright owner sued the Austrian company in France. Questions regarding the jurisdiction of the French court ended up in Luxembourg before the Court of Justice ("CJ"). The CJ ruled that in the case of a copyright infringement committed on or via a website, the court will be able to hear the action if the website is accessible in that court's jurisdiction. This is an approach that deviates from earlier case law. According to prior rulings, the claimant had to prove that the website was specifically targeted at consumers in the member state where protection was being requested. The sole limitation is that the national court of the country of access can only award damages suffered in that jurisdiction.

This ruling will make it easier for national courts of the member states to establish jurisdiction when a copyright infringement takes place on or via a generally accessible website. Copyright owners as a consequence will be able to sue the entities in the courts of any member state from where the infringing contents are accessible. This should be especially useful in proceedings where provisional (injunction) measures are requested or in main proceedings when the infringer is based outside the EEX since in those cases it might be possible to obtain a cross-border measure. This is likely to apply to online infringement of other IP rights as well.

De Brauw's EU Data Retention Guide – minimising business and litigation risks

Iron Mountain and De Brauw have co-published the EU Data Retention Guide to help you better understand the legal requirements and records management best practices that are essential for minimising business and litigation risks.

We are all faced with an ever-increasing volume of records, including emails and traditional paper documents. And legislation and regulation covering records management is so complex and far-reaching that compliance can become a major challenge, and a drain on your resources. This makes a mandatory retention policy indispensable for minimising business risks and the chance of costly litigation caused either by destroying information before, or

retaining it beyond, the end of its legally required retention period.

The EU Data Retention Guide gives you an overview of the regulations governing record retention and relevant legal issues. The quick references help you cut through the complexity and get a clear picture of different record types and their business functions, as well as the legislation that affects them. It also offers practical suggestions to meet challenges.

The EU Data Retention Guide includes:

- delivering effective and compliant records management
- best practice to implement a compliant records management programme
- legal issues that affect your records management
- a comparative view of record retention periods across Europe

You can download your personal copy at:

- The EU Document Retention Guide 2013
- The Netherlands Document Retention Guide 2013

Litigation / Dispute Resolution

ECJ: causal link between professional website and consumer contract not required

ECJ rules that consumers may sue the other party to a contract before their home courts under the Brussels I Regulation, even if no causal link exists between the means used to direct the commercial or professional activity to the consumers' member state, and the conclusion of the contract.

On 17 October 2013, the Court of Justice of the European Union ("ECJ") handed down its decision in case C-218/12 Lokman Emrek / Vlado Sabranovic. The decision broadens the scope of consumer protection under Art. 15 (1)(c) in connection with Art. 16 (1) Regulation 44/2001 (Brussels I Regulation).

Background
This case involved a car salesman who had a garage in France close to the German border. His website advertised a German cell phone number. Pursuant to Art. 15 (1)(c) Brussels I Regulation, jurisdiction in consumer contracts is governed by the special protective rules of Art. 16 and 17 Brussels I Regulation, whenever the other party has directed his professional activities to the member state of the consumer's domicile. Art. 15 (1)(c) Brussels I Regulation further requires that the contract should fall within the scope of such activities. If these requirements are met, the consumer can sue before the courts of his domicile under Art. 16(1) Brussels I Regulation.
A German customer argued that, as a consumer, he could sue before the courts of his domicile pursuant to Art. 15 (1)(c) in connection with Art. 16 (1) Brussels I Regulation. Since it appeared that the contract had not been concluded as a result of the online business activities, the question arose as to whether Art. 15 (1)(c) Brussels I Regulation presupposes the existence of a causal link between the means employed to direct the commercial activity to the

member state of the consumer's domicile, namely the internet site, and the conclusion of the contract with the consumer.

Judgment

The ECJ held that Art. 15 (1)(c) does not require the existence of a causal link between the means employed to direct the commercial activity to the member state of the consumer's domicile, and the conclusion of the contract. Requiring this causal link (e.g., prior consultation of the Internet site) would raise difficult questions of proof. That type of burden of proof would tend to dissuade consumers from bringing actions before the courts of their domicile. As a result, the protection of consumers, which Art. 15 and 16 of the Brussels I Regulation seek to achieve, would be weakened. However, if and when that causal link is in fact established, it would constitute strong evidence which may be taken into consideration by the national court to determine whether the activity of the professional trader is 'directed at' the member state of the consumer's domicile.

Parties to consumer contracts should be aware that Art. 15(1)(c) Brussels I Regulation does not require the consumer in another member state to have been induced into entering into the contract by the website operated by the trader. Therefore, a causal link between the information presented on the seller's website and the consumer's decision to enter into the contract is not a condition for allowing the consumer to bring a claim in his or her home country.

For more detailed information, please see the ECJ's ruling and the Opinion of the Advocate General.

ECJ: Consumer may sue foreign party and its domestic contract partner in one action

The Court of Justice recently ruled on a question referred by an Austrian court about the Brussels I regulation. Brussels I confers jurisdiction on the courts for the place where the consumer is domiciled. The ECJ interpretation of Brussels I was that if the other party to a contract – a travel agent located abroad – has used an intermediary – a travel operator located in the home country – the consumer may bring joint proceedings against both parties in his home country. The general aims of Brussels I would be undermined if the consumer were to be obliged to pursue parallel proceedings in two different courts.

Background

In Maletic v lastminute.com GmbH v TUI Österreich GmbH, an Austrian consumer had booked a package holiday to Egypt on the website of a travel agent registered in Germany. The website stated that this party solely operated as a travel agent and that the journey would be carried out by a tour operator with its registered office in Vienna, Austria.

The consumer lodged a claim before an Austrian court against both the travel agent and the tour operator. Pursuant to Article 16(1) Regulation 44/2001 (Brussels I), a consumer may bring proceedings against "the other party" to a contract either in the courts of the member state in which that party is domiciled or in the courts of the place where the consumer is domiciled. The

question then arose whether in the relationship between the consumer and the tour operator jurisdiction would be governed by Brussels I or by national Austrian law.

The ECJ's decision

Before clarifying the concept of "the other party to a contract" the ECJ reminded the parties that Brussels I is only applicable to legal relationships having an international character. The international character is not derived solely from the place of residence of the parties, but can follow equally from the other circumstances of the case.

According to the ECJ, even if a single transaction, such as the online booking and payment for a package holiday, could be divided into two separate contractual relationships, i.e., one with the travel agent and one with the tour operator, the second contractual relationship cannot be classified as internal to Austria since it was inseparably linked to the first contractual relationship which was made through the website of a German company. The general aims of Brussels I would be undermined if the consumer were to be obliged to pursue parallel proceedings in two different courts, by way of connected actions against the undertakings involved in the booking and the arrangements for the package holiday. The issue thus fell within the scope of Brussels I. Since the contract at stake was concluded between a professional and a consumer, Article 16 (1) Brussels I was applicable. Accordingly, the ECJ interprets the concept of "the other party to a contract" under that Article as including the contracting partner of the operator with whom the consumer concluded the contract and being domiciled in the same member state as the consumer himself.

This decision points out that commercial parties should be aware that if they use the services of an intermediary, the intermediary's place of registration may be taken into account when deciding on the international character of contracts concluded with consumers via that intermediary.

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