

De Entree 51
1101 BH Amsterdam
P.O. Box 92407
1090 AK Amsterdam
The Netherlands
Tel: +31 (0)20 312 2800
Fax: +31 (0)20 312 2801
info@heussen-law.nl
www.heussen-law.nl

Corporate Newsletter March 2006 Corporate Law Developments

ECJ rules that cross-border legal mergers are allowed within the EU

On 13 December 2005 the European Court of Justice ("ECJ") rendered its judgement in the SEVIC Systems AG case. This case involved a proposed merger between SEVIC Systems AG, a German stock company, and Security Vision Concept SA, a Luxembourg stock company, whereby Security Vision Concept SA would be dissolved without being liquidated and all of its assets would be transferred under operation of law to SEVIC Systems AG. When SEVIC Systems AG applied for the required registration of the merger with the competent German court, its application was rejected on the grounds that the German Umwandlungsgesetz (Law on transformations) permits mergers solely between legal entities established in Germany. Since in this case the disappearing company was incorporated under Luxembourg law, the German court ruled that it could not register the merger. SEVIC Systems AG subsequently lodged an appeal against this decision with a higher German court, which decided to request the ECJ for a preliminary ruling on the matter. In essence, the German court asked the ECJ whether the applicable German legislation – which effectively prevents any cross-border merger between a German company and a company incorporated in another EU Member State - is compatible with the freedom of establishment as provided for in Articles 43 and 48 of the EC Treaty.

In its groundbreaking decision the ECJ has now ruled that the freedom of establishment does indeed also apply to cross-border mergers. This means that if an EU Member State allows domestic mergers it must also allow mergers between a domestic company and a company incorporated in another EU Member State. The ECJ went on to state that any rule or measure restricting the freedom of establishment is only permitted if it pursues a legitimate objective compatible with the EC Treaty and is justified by imperative reasons in the public interest, such as the protection of the interests of creditors, minority shareholders and/or employees, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions.

De Entree 51
1101 BH Amsterdam
P.O. Box 92407
1090 AK Amsterdam
The Netherlands
Tel: +31 (0)20 312 2800
Fax: +31 (0)20 312 2801
info@heussen-law.nl
www.heussen-law.nl

The SEVIC case can be particularly important for The Netherlands where until recently the prevailing view has been that except for mergers involving an SE (European Company), cross-border mergers involving Dutch companies are not possible. The ECJ's ruling may lead to the conclusion that it will not be necessary to wait for the implementation by The Netherlands of the recently adopted Cross-Border Mergers Directive (2005/56/EC) in order to be able to effect a cross-border merger involving a company incorporated in The Netherlands. Whether or not this will actually result in cross-border mergers involving Dutch companies being effected will largely depend on whether or not Dutch legal and tax practitioners can find ways to deal with the practical complications of applying rules and procedures that were meant to apply to Dutch companies only to non-Dutch companies as well.

Legislative proposal for the introduction of a European Cooperative Society submitted to Dutch Parliament

The European Union considers it essential that companies and other legal entities of all types whose business is not limited to satisfying purely domestic needs, should be able to plan and carry out the reorganisation of their business on a European (Community) scale. The fact that the legal framework within which business is being conducted is still based largely on national laws forms a considerable obstacle to the creation of groups of companies from different EU Member States. After having adopted Regulation (EEC) No 2137/85 on the European Economic Interest Grouping (EEIG) and Regulation (EC) No 2157/2001 on the establishment of the European Company (SE), on 18 August 2004 the Council of the European Union adopted Regulation (EC) No 1453/2003 on the establishment of the European Cooperative Society (SCE). The latter Regulation provides cooperatives, which are generally recognised in all EU Member States, with the necessary and appropriate legal instruments to facilitate the development of their cross-border activities, through collaboration, cooperation or mergers between existing cooperatives in the different EU Member States, or through the creation of new cooperative enterprises at a European (Community) level. The Regulation must be implemented in all EU Member States no later than 18 August 2006.

De Entree 51
1101 BH Amsterdam
P.O. Box 92407
1090 AK Amsterdam
The Netherlands
Tel: +31 (0)20 312 2800
Fax: +31 (0)20 312 2801
info@heussen-law.nl
www.heussen-law.nl

On 23 November 2005 a legislative proposal for the implementation of Regulation (EC) No 1453/2003 was submitted to Dutch Parliament. The SCE with its corporate seat in The Netherlands will be quite different from a cooperative incorporated under Dutch law: a Dutch cooperative is a type of association whereas the Dutch SCE will be a legal entity whose capital is divided into shares. Consequently, the Dutch SCE will be a legal entity which will not only have similarities with a Dutch cooperative but also with a Dutch company limited by shares (Naamloze Vennootschap or NV). It is expected that the popularity of an SCE will largely depend on how flexible an SCE will turn out to be in practice.

Legislative proposal for the implementation of the Takeover Directive submitted to Dutch Parliament

On 23 December 2005 a legislative proposal concerning the implementation of the 13th EU Directive on Company Law (the Takeover Directive) was submitted to Dutch Parliament. The main objectives of the Takeover Directive - which must be implemented by the EU Member States in their national legislation no later than by 20 May 2006 - are to partially harmonise the rules on takeover bids and to protect minority shareholders in takeover situations. Since the Takeover Directive does not provide a uniform set of rules but merely prescribes minimum standards, the EU Member States may still impose more strict takeover rules.

The key features of the legislative proposal that was submitted to Dutch Parliament on 23 December 2005 are as follows:

- In order to protect the position of minority shareholders, an offeror who has obtained the right to exercise at least 30% of the voting rights in a Dutch company limited by shares (Naamloze Vennootschap or NV) with a listing in Europe shall be required to make a mandatory offer to all other shareholders of that company;
- Certain anti-takeover mechanisms will lose their effectiveness six months after an offer has been made, on the condition that the offeror owns 75% of the shares of the target company (the "breakthrough rule"). During this period the Management Board of the target company will have the opportunity to find an alternative bidder or to obtain a better price or employment guarantees;

De Entree 51
1101 BH Amsterdam
P.O. Box 92407
1090 AK Amsterdam
The Netherlands
Tel: +31 (0)20 312 2800
Fax: +31 (0)20 312 2801
info@heussen-law.nl
www.heussen-law.nl

- The holders of depositary receipts ("certificaten van aandelen") will always be entitled to exercise the voting rights attached to the relevant shares at the general meeting of shareholders.

Supervision of financial reporting of listed Dutch companies by the AFM

Under a new Act for which a legislative proposal was submitted to Dutch Parliament on 1 November 2005, the financial reporting of listed Dutch companies will fall under the supervision of the Netherlands Authority for the Financial Markets (AFM). The AFM will maintain a register with which Companies under the AFM's supervision must file their financial reports. In addition, the AFM will review the contents of the financial reports and it will approach companies with requests for further information in the following cases:

- the financial reports filed by the company were late and/or incomplete;
- the AFM requires additional information to assess the financial reports;
- the AFM believes that the financial reports are in need of adjustment.