Implementation of the Cross-Border Merger Directive in The Netherlands

Brussels
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On July 15, 2008, the Dutch law implementing Directive 2005/56/EC of the European Parliament and of the Council of October 26, 2005 on cross-border mergers of limited liability companies (the "Directive") took effect.[1] This memorandum discusses certain provisions of the Dutch law implementation (the "New Rules").

I. CROSS-BORDER MERGERS IN THE NETHERLANDS PRIOR TO THE IMPLEMENTATION OF THE DIRECTIVE

Prior to July 15, 2008, Dutch statutory law did not expressly allow for a cross-border legal merger between a Dutch company and a foreign company, and legal scholars and practitioners disagreed whether, in the absence of statutory law, cross-border mergers between a Dutch company and a foreign company were permissible or even possible. As a result, such mergers did not occur until after the Court of Justice of the European Communities' ("ECJ") decision in *Sevic Systems AG* of December 13, 2005.

In *Sevic Systems AG*, the ECJ held that if the laws of a member state of the European Union ("Member State") allow for a merger between two companies incorporated in its jurisdiction (a domestic merger), a Member State must also permit a merger of a company incorporated in its jurisdiction with a company incorporated in another Member State, unless compelling reasons of public interest exist to prohibit that particular merger (Case C-411/03, *Sevic Systems AG*). Pursuant to the ECJ's ruling in *Sevic Systems AG*, a number of Dutch companies have been involved in cross-border mergers. Only one cross-border merger involved a stock exchange listed Dutch public limited liability company.[2]

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[1] The Directive should have been implemented in the Netherlands no later than December 15, 2007. The European Commission has commenced infringement proceedings against a number of Member States, including the Netherlands, for not implementing the Directive in time.

[2] Following Netherlands-domiciled Mittal Steel Company N.V.'s ("Mittal Steel") successful offer for Luxembourg-domiciled Arcelor S.A. ("Arcelor") in the second half of 2006, Mittal Steel merged with Arcelor in a two-step process: the first step was the downstream cross-border merger of Mittal Steel into ArcelorMittal S.A.

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II. SCOPE OF THE NEW RULES

The Directive's scope is limited to cross-border mergers between limited liability companies formed in accordance with the laws of a Member State that have their registered office, central administration or principal place of business within the European Union[3] ("EU Companies"), provided that at least two of the EU Companies are governed by the laws of different Member States ("Directive Mergers"). The Directive provides for optional application of its provisions to cross-border mergers involving a cooperative society, even in cases where a cooperative society falls within the definition of a limited liability company subject to Council Directive 68/151/EEC of March 9, 1968 (the so-called First Company Law Directive). The Directive does not apply to cross-border mergers involving a company whose object is the collective investment of capital provided by the public and which operates on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of the company (so-called "UCITs," or, for the purpose of this memorandum, "Investment Companies").

In accordance with the Directive, the New Rules apply to Directive Mergers involving a Dutch public limited liability company (*naamloze vennootschap*), a Dutch private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) or a European Cooperative Society (SCE) with its registered seat in the Netherlands (*Europese coöperatieve vennootschap met zetel in Nederland*).[4] In addition, and although not required by the Directive (Article 3(3)), the New Rules apply to Dutch Investment Companies (*beleggingsinstellingen*).

As a consequence of the Directive's and the New Rules' limited scope, the ECJ's ruling in *Sevic Systems AG* remains applicable to cross-border mergers between other types of legal entities and partnerships formed in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the European Union.[5] Therefore, if Dutch law permits a merger between two legal entities

("ArcelorMittal"), a Luxembourg subsidiary of Mittal Steel, and the second step was the downstream domestic merger of ArcelorMittal into Arcelor. The two-step merger process was completed on November 13, 2007.

[3] In addition to the Netherlands, the European Union currently includes the following Member States: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. The Directive and the New Rules also apply to those three member states of the European Economic Area that are not members of the European Union, *i.e.*, Iceland, Liechtenstein and Norway.

[4] The New Rules do not apply to Dutch cooperative societies (*coöperaties*).

[5] *Sevic Systems AG* does not apply to non-EU Companies, such as corporations governed by the laws of the State of Delaware.

governed by Dutch law that are not governed by the New Rules,[6] a cross-border merger between similar legal entities incorporated in different Member States (one of which is Dutch) must be permissible.[7] Nevertheless, a (direct)[8] cross-border merger between a Dutch company and, for example, a Delaware corporation (or another non-EU limited liability company) remains impossible (or impermissible) under Dutch law.

In addition to "mergers by acquisition" and "mergers by formation," the New Rules provide for so-called "inbound triangular mergers."[9] In an "inbound triangular merger," shareholders of the disappearing entity receive shares in a Dutch affiliate[10] of the surviving Dutch entity. The New Rules permit such a merger only if the affiliate and the surviving entity are both Dutch companies. Since the Directive does not provide for such a merger, it remains unclear whether other Member States must recognize inbound triangular mergers (with the surviving entity being a Dutch company). Finally, the question arises whether, pursuant to *Sevic Systems AG*, Dutch law should permit and recognize triangular mergers involving non-Dutch parents—so-called "outbound triangular mergers."

III. APPLICABLE LAW AND APPRAISAL RIGHT FOR SHAREHOLDERS

While the Directive does not seek to harmonize national laws governing cross-border mergers in the European Union, the Directive determines which Member State is entitled to regulate each aspect and stage of a Directive Merger. Article 4 of the Directive provides that a company involved in a Directive Merger must comply with the provisions and formalities of its national laws and that a Member State may adopt provisions designed to appropriately protect minority shareholders who oppose the Directive Merger. In addition, a Member

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6 Dutch law currently permits domestic mergers between associations (*verenigingen*), cooperative societies, foundations (*stichtingen*) and mutual insurance associations (*onderlinge waarborgmaatschappijen*). In principle, only legal entities of the same legal form can merge, thus requiring one or more of the merging entities to convert into another legal form before the legal merger can take effect.

7 Pursuant to *Sevic Systems AG*, Member States may only prohibit Directive Mergers in individual cases where compelling reasons exist for such prohibition.

8 Of course, a two-step merger involving a EU Company from another Member State that permits cross-border mergers with non-EU companies (such as Delaware corporations) may result in a cross-border merger with a non-EU company.

9 In addition, the New Rules provide for a downstream cross-border merger in which a parent merges into its wholly owned subsidiary. The Directive, however, only provides for upstream parent-subsidiary mergers in which a wholly owned subsidiary merges into its parent (Article 2(2)(a) of the Directive).

10 For purposes of the triangular merger, an affiliate should provide, by itself or with one or more other (Dutch) affiliates, the entire issued share capital of the surviving entity.

State may authorize its national authorities to oppose a Directive Merger only on similar grounds of public interest that apply to domestic mergers.[11]

Accordingly, the New Rules provide that a Dutch company participating in a Directive Merger remains, to the fullest extent possible, subject to the provisions of the Dutch Civil Code ("DCC") that apply to domestic mergers. In addition, the New Rules provide for a rather broad and unqualified appraisal right for those shareholders of a disappearing Dutch company in an outbound cross-border merger who voted against the merger (as opposed to those who abstained from voting on the merger). If that right is invoked, the cross-border merger cannot be effected until such shareholders and the disappearing company have reached an agreement on the amount of the compensation or until such amount is set by an independent expert appointed by the chairman of the Enterprise Chamber of the Amsterdam Court of Appeals, unless the surviving company has accepted liability for the payment of such compensation.

The provisions on the appraisal right—recognizing that Article 4 of the Directive explicitly permits minority protection rights—raise a number of questions with respect to their applicability in practice (which, to a large extent, may turn on the laws governing the surviving company) and their compatibility with primary and secondary EU law.[12] Since the appraisal right applies solely to outbound cross-border mergers (as opposed to inbound cross-border mergers or domestic mergers), the question arises whether the *blanket* appraisal right amounts to a restriction on the free movement of capital (Article 56 EC) that can be justified under the stringent requirements developed by the ECJ in its "golden share" jurisprudence.[13] In addition, the question arises whether and to what extent such payments to certain shareholders are permissible under secondary EU law; in particular, the capital maintenance rules imposed by Council Directive 77/91/EEC of December 13, 1976 (the so-

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[11] The third recital of the Directive provides that no restrictions on the freedom of establishment or the free movement of capital may be imposed by, or pursuant to, national law, except where: (i) these can be justified in accordance with the case-law of the ECJ and, in particular, by requirements of general interest; and (ii) these are both necessary for, and proportionate to, the attainment of such overriding requirements.

[12] In addition, the exercise of the appraisal rights by a significant majority of the opposing minority could *de facto* overrule the majority's decision to proceed with the merger.

[13] See Case C-367/98 *Commission v Portugal* [2002] ECR I-4731; Case C-483/99 *Commission v France* [2002] ECR I-4781; Case C-503/99 *Commission v Belgium* [2002] ECR I-4809; Case C-463/00 *Commission v Spain* [2003] ECR I-4581; and Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641. From the Dutch legislative history, it appears that the Dutch government found it necessary to introduce an appraisal right because a cross-border merger (contrary to a Dutch domestic merger) cannot be annulled (Article 17 of the Directive), and Dutch law provides for certain minority protection that foreign law may not provide (see Secondary Chamber, legislative session 2006-2007, 30 929, nr. 3, pp. 16 – 17).

called Second Company Law Directive), as amended by Council Directive 2006/68/EC of September 6, 2006.

Finally, the New Rules do not authorize Dutch national authorities to oppose a Directive Merger.[14]

IV. PREPARATORY MERGER PROCEDURE AND MERGER DECISION

A. MERGER PROPOSAL

In accordance with the Directive, the New Rules require that the management board of a Dutch company participating in a Directive Merger draw up a common proposal of merger ("Merger Proposal"). The Merger Proposal must specify, among other things, the following information: (i) the type, name, registered office and governing law of the surviving company, as well as the governing law of each participating company; (ii) any special conditions concerning the right of shareholders of the surviving company to share in profits; (iii) any special advantages granted to the experts who examine the draft terms of the Directive Merger or to members of the supervisory bodies of the merging companies; (iv) where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participate in the company resulting from the Directive Merger are determined; (v) likely employment implications of the Directive Merger, (vi) information on the valuation of the assets and liabilities which are transferred to the company resulting from the Directive Merger; (vii) reference dates of the merging companies' accounts used to establish the terms of the Directive Merger; (viii) any other item of information required by the national laws of the other companies participating in the Directive Merger; and (ix) the effective date of the Directive Merger or the criteria for determining such date.

The New Rules do not permit cash payments in excess of 10% of the nominal value or, in the absence of a nominal value, of the accounting par value of the securities or shares representing the capital of the surviving company, in cases where the laws of at least one of the Member States concerned allows such cash payments. Such cash payments are prohibited under the Dutch domestic merger rules, and, absent a statutory provision to the contrary, the domestic merger rules apply to Directive Mergers.

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[14] With respect to a European Company with its registered seat in the Netherlands, the Dutch legislature opted for an opposite approach: the Dutch Minister of Justice may veto an outbound merger or transfer of the registered seat for "reasons of general interest," while there are no appraisal rights for those shareholders who voted against the outbound merger or transfer of the registered seat.

B. EXPLANATORY MEMORANDUM

In addition to the Merger Plan, the management board of a Dutch company participating in a Directive Merger must provide an explanatory memorandum explaining and justifying, among other things, the legal and economic aspects of the merger (including the implications of the merger for shareholders, creditors and employees) and detailing the criteria for determining the share exchange ratio and any cash payment offered in the merger.

C. OPINION BY AN INDEPENDENT EXPERT

Pursuant to Article 2:328(1) DCC, a certified accountant, to be appointed by the management board of the merging Dutch company, must provide an opinion, among other things, (i) stating whether, in his or her opinion, the exchange ratio is fair and reasonable; (ii) describing the method or methods used to arrive at the proposed exchange ratio; (iii) stating whether such method or methods are adequate in the relevant case; (iv) indicating the values arrived at by using each such method; (v) giving an opinion on the practical importance attributed to such methods in arriving at the value decided upon; and (vi) describing any special valuation difficulties that have arisen in the relevant case.[15]

D. PUBLICATION REQUIREMENT

Under the New Rules, a Dutch company participating in a Directive Merger must publish a notice in the Dutch Official Gazette providing the following information: (i) the legal form, the name, and the statutory seat of each merging company; (ii) designation of each merging company's commercial register and their respective registration numbers; and (iii) an indication of each company's arrangements relating to the exercise of creditors' rights and minority shareholders' rights and the addresses where creditors and minority shareholders can obtain complete information regarding those arrangements free of charge.[16]

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15 In addition, pursuant to Article 3:328(2) DCC, the certified accountant must issue a report with respect to certain of the items that are discussed by the management board in the explanatory memorandum.

16 Article 2:314 DCC requires that the Merger Proposal (and accompanying documentation) be made available at the Dutch Trade Registry. Within a period of one month of publication of the public announcement, creditors of the merging companies are entitled to oppose the merger by filing a statement of opposition at the relevant district court. If a statement of opposition is filed, the merging companies must provide security for or otherwise guarantee payment of the claim, unless each creditor's claim is sufficiently secured or the financial condition of the surviving company (post-merger) does not provide less security for satisfaction of the claim than before the merger.

E. APPROVAL BY THE GENERAL MEETING OF SHAREHOLDERS

Pursuant to Article 2:330 DCC, the general meeting of shareholders of a Dutch company ("General Meeting") can adopt the decision to merge with a simple majority of the votes cast if less than half of the issued share capital is present or represented at the General Meeting. A two-thirds majority of the votes cast is required if less than half of the issued share capital is present or represented at the General Meeting. However, the articles of association of a Dutch company may impose a higher majority and/or a quorum requirement.

In addition, the New Rules provide that the General Meeting of a Dutch company may make its approval of the Directive Merger conditional on its (subsequent) approval of the employee participation arrangements in the surviving company.

V. COMPLETION AND EFFECTUATION OF THE DIRECTIVE MERGER

Essentially, pursuant to Articles 10 - 12 of the Directive, three steps must be taken to complete and effectuate a Directive Merger.

A. PRE-MERGER CERTIFICATE

The first step is the issuance of a pre-merger certificate by each merging company's "home" Member State authority (be it a court, civil law notary or other authority) attesting to the proper completion of all required pre-merger acts and formalities.

In the Netherlands, Dutch civil law notaries are entrusted with the task of issuing such certificates (with respect to the Dutch companies involved). Pursuant to the New Rules, the Dutch civil law notary may not issue the certificate until compensation has been paid to the minority shareholders of the disappearing Dutch company who invoked the appraisal right, if there were any, or the surviving company has explicitly accepted liability for the payment of such compensation.

B. SCRUTINY OF THE LEGALITY OF THE DIRECTIVE MERGER

The second step is the surviving company's "home" Member State's authority's scrutiny of the legality of the Directive Merger.

Therefore, if a Dutch company is involved in an outbound merger, the Dutch part of the merger-procedure ends with the pre-merger certification by the Dutch civil law notary.

If, however, a Dutch company is involved in an inbound merger, the Dutch civil law notary must scrutinize the fulfillment of all applicable formalities and will certify in the (notarial) deed of merger that those formalities have been fulfilled. The notary will

specifically certify that each disappearing company has approved the Directive Merger and that any employee participation arrangements have been appropriately adopted.

C. EFFECTIVENESS AND REGISTRATION OF THE DIRECTIVE MERGER

The third (and final) step is the effectiveness and registration of the Directive Merger.

If a Dutch company is the disappearing company, the effectiveness and registration is exclusively a matter of the laws governing the surviving company.

If, however, a Dutch company is the surviving company, the merger is completed through the execution of the (notarial) deed of merger. The Directive Merger itself is effective on the (calendar) day following the day of execution of the deed of merger. Upon the effectiveness of the Directive Merger, all assets and liabilities of the merging companies have transferred to the surviving company by operation of law. The surviving Dutch company must notify the Dutch Trade Registry of the Directive Merger within one month of the execution of the deed of merger. Pursuant to the New Rules, the Dutch Trade Registry must promptly notify the commercial registers where the disappearing companies were registered of the effectiveness of the Directive Merger.

The New Rules provide, in accordance with Article 17 of the Directive, that a completed Directive Merger cannot be nullified or voided.

VI. EMPLOYEE PARTICIPATION

Pursuant to Article 16(1) of the Directive, the laws governing the surviving company determine, in principle, the extent of employee participation in the surviving company. Therefore, if the Dutch surviving company is, or will become, subject to the Dutch "large company" rules, employees (based in the Netherlands) have significant participation rights.[17]

[17] A Dutch public or private limited liability company is, in principle, subject to the large company rules if for a three-year period, each of the following conditions is satisfied: (i) its issued capital and reserves exceed a threshold (currently EUR 16 million for public limited liability companies and EUR 13 for private limited liability companies); (ii) it or a "dependent" company (*e.g.*, a subsidiary) has, pursuant to law, established a (Dutch) works council; and (iii) it employs, together with its dependent companies, 100 or more employees in the Netherlands. If a company is subject to the large company rules, a company must implement a two-tier governance structure whereby the supervisory board, in principle, appoints the management board and the general meeting of shareholders appoints the supervisory board. The supervisory board controls the appointment process of the supervisory board; there is a limited role for shareholders and relatively important involvement of the (Dutch) works council. In the event of a vacancy on the supervisory board, the supervisory board makes a "binding nomination," which

However, in accordance with Article 16(2) of the Directive, if (i) at least one of the companies involved employs more than 500 persons and operates an employee participation system, or (ii) the surviving company's jurisdiction does not provide for a level of participation rights equal to the level of participation rights applicable in the jurisdiction of the disappearing company, a Directive Merger may involve a (possibly lengthy) consultation and negotiation process and ongoing employee participation rights.

As a result of such rules, in an outbound scenario, if a Dutch company subject to the large company rules merges into, for example, an Italian company, the surviving Italian company (that, as a matter of Italian law, does not provide for any employee participation) may have to adopt a corporate governance system that preserves the employee participation rights of the disappearing Dutch company. As a result, surviving companies governed by the laws of jurisdictions that do not provide for employee participation arrangements like those in Austria, Germany or the Netherlands (*e.g.*, Belgium, Italy, the United Kingdom) may be required to "import" such employee participation rights.

Similarly, as a result of such rules, in an inbound scenario, if a German *mitbestimmte Aktiengesellschaft* (AG) merges into a Dutch company that is not subject to the large company rules, the surviving Dutch company may be required to adopt the German employee participation rules, *i.e.*, have one-third or one half of the positions at its supervisory board directly appointed by representatives of its employees (as opposed to a non-binding nomination arrangement under the large company rules). Also, even if the surviving Dutch company is subject to the large company rules, it may be required to "import" the more employee-friendly German rules.[18]

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the general meeting of shareholders may overrule with a simple majority provided that such majority represents at least one-third of the issued share capital; the nominee is automatically appointed if the general meeting of shareholders does not overrule the "binding nomination." For one-third of the slots on the supervisory board, the supervisory board must nominate persons recommended by the (Dutch) works council; the supervisory board can reject nominations by the works council but, in case of disagreement with the works council, must obtain approval from the Enterprise Chamber of the Amsterdam Court of Appeals.

[18] Under the (Dutch) large company rules, the works council may recommend persons for all slots on the supervisory board (and, with respect to one-third of the slots, specific rules apply as described in footnote 17). From the Dutch legislative history, it appears that the Dutch government takes the view that, in a comparison of the Dutch employee participation rights under the large company rules with any such rights in any other jurisdiction, the Dutch rights will be considered superior (since there is a right of recommendation with respect to all slots, as opposed to a more stringent right, as in Germany, with respect to only one-third or one half of the slots); therefore, absent the consent from the respective shareholders to more stringent arrangements, the Dutch rules will be controlling (see Secondary Chamber, legislative session 2006-2007, 30 929, nr. 3, p. 24). Thus, the Dutch government applies a numerical, as opposed to a substantive,

Finally, a (contemplated) decision to merge may require trade union and (European) works council information and/or consultation obligations pursuant to law, collective bargaining agreements or other arrangements (*e.g.*, workers' or trade union consultation codes).

VII. TAX ASPECTS

The EU rules on the tax treatment of cross-border mergers are set forth by Council Directive 90/434/EEC of July 23, 1990, as amended by Council Directive 2005/19/EC of February 17, 2005 (the "Tax Directive"). Under the Tax Directive, mergers involving limited liability companies of two or more Member States are "tax neutral" if certain conditions are met.

In line with the Tax Directive, Article 14b of the Dutch 1969 Corporate Income Tax Act provides that a merger of a limited liability company resident for tax purposes in the Netherlands, with a company covered by the Tax Directive and tax resident in another Member State, will not be deemed a taxable event in the Netherlands if certain conditions are met (the "Merger Exemption").

For purposes of the Merger Exemption, if a Dutch company is the disappearing company, the transferred assets and liabilities from the Dutch company must remain subject to Dutch taxation. As a result, a tax-free transfer is only allowed for these assets and liabilities that, following the merger, can be allocated to a permanent establishment (in the Netherlands) of the surviving foreign company. The surviving company must maintain the book value of the transferred assets and liabilities (*i.e.*, a roll-over, and no step-up of, the tax basis). The disappearing Dutch company will be subject to Dutch corporate income tax on any capital gains deemed realized from the transfer of assets and liabilities that, following the merger, cannot be allocated to a permanent establishment (in the Netherlands) of the foreign surviving company. If the Dutch company is the surviving company and the disappearing foreign company has a permanent establishment in the Netherlands, a tax-free transfer is available for those assets and liabilities that can be allocated to such permanent establishment. Further, the surviving Dutch company must maintain the book value of these assets and liabilities.

In addition, in order to qualify for the Merger Exemption, the merger may not be aimed predominantly at avoiding or deferring taxation, *i.e.*, it should be driven by (legitimate) business reasons. Furthermore, the surviving and disappearing company should meet certain other conditions (*e.g.*, both companies must be subject to the same tax regime and must have no losses to be carried forward).

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test. It is questionable whether the Dutch courts, and, ultimately, the ECJ will consider this view to be compatible with EU law.

If the conditions of the Merger Exemption are not met, the disappearing and surviving company can file a joint request for a tax-free merger. The Dutch tax authorities typically issue a set of conditions aimed at securing their tax claim under which the tax-free merger may then proceed.

Finally, the Merger Exemption, in principle, is of limited relevance for "holding structures" in which the disappearing Dutch (top-holding) company benefits from the Dutch participation exemption, which exempts dividends and capital gains derived from qualifying participations (*i.e.*, share interests of 5% or more in companies that do not qualify as low taxed portfolio companies). In such a case, any gain realized by the disappearing Dutch company on the transfer of its qualifying participations (to the foreign surviving company) is tax exempt in the Netherlands.

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