Corporate & Commercial clientmemo

05 January 2006

Dear Client,

This newsletter is to alert you to a recent ruling of the European Court of Justice. As a result of this ruling, Dutch companies have new opportunities to participate in mergers with companies from other Member States.

## EU Court facilitates cross-border mergers

Until recently, the prevailing view was that the only means by which a Dutch company could enter into a merger with a company of another EU Member State was through the creation of a European Company (SE). The situation has now changed with the issuing on 13 December 2005 of a ruling by the European Court of Justice ("ECJ") stating that legal barriers preventing cross-border mergers can be contrary to the freedom of establishment. This ruling constitutes an important breakthrough for Dutch companies wishing to participate in a cross-border restructuring by means of a merger.

The ECJ ruling

In 2002, the German company SEVIC Systems AG entered into a merger contract with Security Vision Concept SA, a company established in Luxembourg, under which the latter company would be dissolved without liquidation and all of its assets transferred to SEVIC Systems. Since German law only provided for mergers between legal entities established in Germany, the application for registration of the merger in the German national commercial register was refused.

In its ruling of 13 December 2005, the ECJ decided that the relevant German legislation constituted an unjustified restriction on the freedom of establishment as provided for by Articles 43 and 48 of the EC Treaty, stating that the freedom of establishment covers all measures permitting or facilitating access to another Member State and the pursuit of an economic activity there, and that cross-border mergers therefore fall within the scope of those articles. The ECJ further held that a measure restricting the freedom of establishment is only permitted if it pursues a legitimate objective and is justified by imperative reasons in the public interest such as the protection of creditors, minority shareholders and employees, or the preservation of the fairness of commercial transactions and the effectiveness of fiscal supervision. Such measures must be evaluated on a case-by-case basis.

Meanwhile, the Directive of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies entered into force on 15 December 2005. This directive must be implemented in national legislation by the end of 2007. The ECJ pointed out that an EU directive, whether or not yet implemented, cannot justify the existence of national legislation that in all cases prevents cross-border mergers and therefore constitutes an undue restriction on the freedom of establishment.

New possibilities for Dutch companies

The Dutch Minister of Justice has always made it clear that a Dutch company cannot participate in a cross-border restructuring by means of a merger (other than one creating an SE). This position now seems to have been overruled by the ECJ's decision, which can be seen as offering Dutch companies new and more favourable opportunities. There are also a number of important advantages to being able to enter into a cross-border merger without having to create an SE.

The most significant of these include the following:

- The absence of a statutory requirement to negotiate with representatives of employees about employee involvement in the newly created SE, a process which involves complex and lengthy negotiation procedures. While Dutch law does not provide for such procedures in relation to a merger between two Dutch companies, a company established in the Netherlands can now enter into a cross-border merger without such negotiations. When the Directive on cross-border mergers is implemented in Dutch law, however, it is likely that measures relating to negotiations with representatives of employees about employee involvement with regard to the merged company will be introduced in the relevant legislation.

- The absence of any need to set up a new company.
- The freedom of maintaining the head office and the registered office of the relevant company in different Member States. In the case of an SE, the registered office and head office must always be located in the same Member State.

Conclusion

Through its ruling in the SEVIC case, the ECJ appears to have met the need for co-operation and consolidation between companies from different Member States and given such companies a tool for restructuring business throughout Europe by way of mergers.

Please click here for the ECJ ruling.

For more information please contact:

Frits Oldenburg (T + 31 20 71 71 898)
Martin Grablowitz (T + 31 10 22 40 217)

Privacy | General conditions

If you would like to unsubscribe from this client memo please use the unsubscribe option on the newsletter website. You can also send an e-mail to unsubscribe@clientmemo-nautadutilh.com. Please make sure that you put the word 'unsubscribe' in the subject field of your e-mail.