EU Commission Adopts Non-Horizontal Merger Guidelines

On Nov. 28, 2007, the EC adopted its non-horizontal merger guidelines that concern the EC’s assessment of vertical and conglomerate mergers in EC merger control proceedings. Vertical mergers involve companies operating at different levels of the supply chain. Conglomerate mergers are between firms in a relationship that is neither horizontal (such as competitors in the same market) nor vertical (such as suppliers or customers).

Market Share
The guidelines explicitly recognize that non-horizontal mergers are less likely to harm competition than horizontal mergers among competitors, and provide substantial scope for efficiencies. The more immediate and direct the pro-competitive effects of a merger, the more likely the EC is to find that they counteract any anticompetitive effects.

The guidelines list several potential efficiencies, such as decreased transaction costs, better coordination in terms of product design, the organization of the production process and distribution and providing customers one-stop shopping opportunities.

The guidelines also accept that non-horizontal mergers pose no threat to competition, if the merged entity lacks a “significant degree of market power” in at least one of the markets concerned. The EC is unlikely to find concern in non-horizontal mergers where the market share post-merger of the merged entity in each of the markets concerned is below 30 percent, and the post-merger Herfindahl-Hirschman Index (HHI) is below 2000 (so-called “safe harbors”).

The EC will use the above market share and HHI thresholds as an initial indicator of competition concern. However, they do not give rise to a legal presumption. In practice, the EC will not extensively investigate such mergers, except where special circumstances – such as significant cross-shareholdings or indications of past or ongoing coordination – are present.

(continued)
Belgium: Losing Party to Contribute to Adverse Party’s Legal Fees

Traditionally in Belgium, each party bears its own legal fees, regardless of a trial’s outcome. This position has been questioned subsequent to a number of Supreme Court cases, as well as to the 2002 Late Payment Act. To end this legal uncertainty, on April 21, 2007, Belgian Parliament enacted a law on the reimbursable nature of legal fees.

The law entered into force Jan. 1, 2008, and equally applies to all pending cases including cases under advisement on that date. It applies to all civil, commercial and criminal cases with a number of exceptions for certain labor law related matters. Its applicability to administrative trials is still uncertain.

The law is based on the principle of awarding the prevailing party a fixed amount by means of a contribution to its legal fees. The level of contribution is based on the total amount claimed, with a basic amount, a minimum and a maximum. Depending on certain circumstances, the parties can claim for a higher or lower amount than the basic contribution.

Below is an overview (expressed in Euros) of the basic contribution, with its corresponding minimum and maximum amount.

<table>
<thead>
<tr>
<th>Amount claimed</th>
<th>Basic Contribution</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 250,00</td>
<td>150,00</td>
<td>75,00</td>
<td>300,00</td>
</tr>
<tr>
<td>From 250,01 up to 750,00</td>
<td>200,00</td>
<td>125,00</td>
<td>500,00</td>
</tr>
<tr>
<td>From 2.500,01 up to 5.000</td>
<td>400,00</td>
<td>200,00</td>
<td>1.000,00</td>
</tr>
<tr>
<td>From 5.000,01 up to 10.000,00</td>
<td>650,00</td>
<td>375,00</td>
<td>1.500,00</td>
</tr>
<tr>
<td>From 10.000,01 up to 20.000,00</td>
<td>900,00</td>
<td>500,00</td>
<td>2.000,00</td>
</tr>
<tr>
<td>From 20.000,01 up to 40.000,00</td>
<td>1.100,00</td>
<td>625,00</td>
<td>2.500,00</td>
</tr>
<tr>
<td>From 40.000,01 up to 60.000,00</td>
<td>2.000,00</td>
<td>1.000,00</td>
<td>4.000,00</td>
</tr>
<tr>
<td>From 60.000,01 up to 100.000,00</td>
<td>2.500,00</td>
<td>1.000,00</td>
<td>5.000,00</td>
</tr>
<tr>
<td>From 100.000,01 up to 250.000,00</td>
<td>3.000,00</td>
<td>1.000,00</td>
<td>6.000,00</td>
</tr>
<tr>
<td>From 250.000,01 up to 500.000,00</td>
<td>5.000,00</td>
<td>1.000,00</td>
<td>10.000,00</td>
</tr>
<tr>
<td>From 500.000,01 up to 1.000.000,00</td>
<td>7.000,00</td>
<td>1.000,00</td>
<td>14.000,00</td>
</tr>
<tr>
<td>Over 1.000.000,01</td>
<td>10.000,00</td>
<td>1.000,00</td>
<td>20.000,00</td>
</tr>
<tr>
<td></td>
<td>15.000,00</td>
<td>1.000,00</td>
<td>30.000,00</td>
</tr>
</tbody>
</table>

The court has discretionary power regarding the contribution to be awarded. It will set the contribution depending on the following, fixed by the law:

1. Financial strength of the losing party
2. Case complexity
3. Other damages awarded under contract
4. Clearly unreasonable nature of the matter

If the trial involves multiple parties, each party will not have to pay more than twice the maximum amount fixed by the law. No party will be granted more than the maximum amount fixed by the law.

The law tries to reconcile, based on social considerations, different and contradictory aims such as, among others, due compensation for legal fees versus easy access to justice; or the predictability of legal fees versus flexibility.

(PC)

On Jan. 1, 2008, the new Belgian–U.S. treaty for the avoidance of double taxation and the prevention of fiscal evasion entered into force. It was signed Nov. 27, 2006, and replaces the 1970 treaty and 1987 protocol.

The treaty’s principal purposes are to reduce or eliminate double taxation of income earned by residents of either country from sources within the other country, and to prevent avoidance or evasion of the taxes of the two countries.

These objectives are achieved principally through each country’s agreement to limit, in certain specified situations, its right to tax income derived from its territory by residents of the other country.

For example, the treaty contains provisions under which each country generally agrees not to tax business income derived from sources within that country by residents of the other country, unless the business activities in the taxing country are substantial enough to constitute a permanent establishment.

Similarly, the treaty contains certain exemptions under which residents of one country performing personal services in the other country will not be required to pay tax in the other country, unless their contact with the other country exceeds specified minimums. It also provides that, subject to certain rules and exceptions, interest and royalties derived by a resident of either country from sources within the other country may be taxed only by the residence country.

In situations in which the country of source retains the right under the treaty to tax income derived by residents of the other country, the treaty generally provides for relief from the potential double taxation through the allowance by the country of residence of a tax credit for certain foreign taxes paid to the other country.

Certain provisions regarding cross-border contributions to, and benefit accruals of, pension plans are added. These rules are intended to remove barriers to the flow of personal services between the two countries that could otherwise result from discontinuities under the laws of each country, and are similar to provisions included in other recent U.S. treaties and protocols, including the U.S. Model Income Tax Convention of Nov. 15, 2006.

The treaty generally provides that students, trainees, teachers and researchers visiting the other treaty country are exempt from host country taxation on certain types of payments received. The treaty adds a mandatory arbitration procedure. Unless a taxpayer or other “concerned person” (a person whose tax liability is affected by the arbitration determination) does not accept the arbitration determination, it is binding on the treaty countries with respect to the case.

It also contains a detailed limitation-on-benefits provision that reflects the anti-treaty shopping provisions included in the U.S. model treaty and more recent U.S. income tax treaties. The new rules are intended to prevent the inappropriate use of the treaty by third-country residents.

**Dividends**

Dividends paid by a company that is a resident of a treaty country, to a resident of the other country, may be taxed in that other country. Dividends also may be taxed by the country in which the payor company is resident, but the rate of tax is limited.
Under the treaty, source-country taxation of dividends (taxation by the country in which the dividend-paying company is resident) generally is limited to 15 percent of the gross amount of the dividends paid to residents of the other treaty country. A lower rate of 5 percent applies if the beneficial owner of the dividends is a company that owns directly at least 10 percent of the capital stock of the dividend-paying company. The term “beneficial owner” is not defined in the treaty, and therefore is defined under the internal law of the country imposing tax (the source country).

Zero Rate for Direct Dividends

The treaty provides that the withholding tax rate is generally zero for certain direct dividends. The zero-rate provision is broader than the provision in other recent U.S. treaties, because the required ownership threshold is reduced to 10 percent for dividends paid by a company that is a resident of Belgium. (Certain other requirements described below also must be satisfied.)

The requirements for the zero rate differ based on whether the dividend-paying company is a resident of the United States or of Belgium. If the company paying the dividend is a resident of the United States, the zero rate is available only if the beneficial owner of the dividend is a company that owns directly or indirectly owned shares representing at least 80 percent of the dividend-paying company’s voting power for the 12-month period ending on the date on which entitlement to the dividend is determined.

If the company paying the dividend is a resident of Belgium, the zero rate is available only if the beneficial owner of the dividend is a U.S. resident company that has directly owned shares representing at least 10 percent of the capital of the dividend-paying company for a 12-month period ending on the date the dividend is declared.

Eligibility for the benefits of the zero rate for dividends paid by a company that is resident of the United States is subject to a more stringent set of limitation-on-benefits requirements than the requirements that normally apply under the treaty.

Specifically, in order to qualify for the zero rate, a dividend-receiving company that is a resident of Belgium must (1) satisfy the public trading test of the limitation-on-benefits article; (2) meet the ownership and basis erosion test, and satisfy the active trade or business conditions of the limitation-on-benefits article with respect to the dividend in question; (3) satisfy the derivative benefits test of the limitation-on-benefits article; or (4) receive a favorable determination from the competent authority with respect to the zero-rate provision.

A zero rate also applies for dividends received by a pension fund, provided the dividends are not derived from the carrying on of a business by the fund or through an associated enterprise. Special rules apply to dividends received from RICs and REITs.

Belgium: New Decree on Fiscal-friendly Cancellation of Private Real Estate Sales Agreements

In principle, under Belgian law, registration duties are due when parties agree on the sale of real estate for an agreed price. In the past, even when parties mutually agreed to cancel a sales agreement before the notarial deed had been signed, registration duties were nevertheless due. The same was applicable if the buyer wanted to transfer the private sales agreement to another legal or natural person.

On Nov. 23, 2007, the Flemish Parliament adopted a decree providing that a new fixed fee of 10 EUR is due in such situations. This new system is applicable (i) if the private sales agreement is cancelled by mutual consent and (ii) if the notarial deed has not yet been signed.

When the private sales agreement has not yet been submitted for registration, the fixed fee of 10 EUR must be paid twice, since both the private sales agreement and the agreement enacting the cancellation must be submitted for registration and the fee of 10 EUR will be levied on each of these agreements.

When the private sales agreement has already been submitted for registration but the notarial deed has not yet been signed, only the fixed fee of 10 EUR is due, this is for the registration of the agreement enacting the cancellation of the private sales agreement. After that, the buyer may obtain full reimbursement of the registration duties that were initially paid.

The new decree was published in the Belgian Official Gazette on Jan. 3, 2008, but entered into effect retroactively as from Nov. 1, 2007. The new decree also applies to life tenancy contracts, but not to long lease and surface rights contracts. It should be noted that these new rules only apply in the Flemish Region.

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