SUMMARY

2011/16: The (central) works council of French subsidiaries must be informed of a foreign parent company merger project (FR)

<p>The French Cour de cassation1 recently handed down a decision that increases French works council involvement in mergers where the decision-making is carried out at a higher level within the group, such as by the parent company. When a parent company located in The Netherlands and a US company were involved in a merger operation, the (central) works council (“CWC”) of the former’s French subsidiaries should have been informed, in compliance with the combined provisions of EC Regulations 802/2004 and 139/2004 relating to the control of mergers between undertakings and of Articles L.2323-1 and L.2323-20 of the French Labour Code, insofar as all the economic entities are either directly or indirectly affected by the acquisition of sole or joint control. The decision has wide-ranging implications for both French and international groups with subsidiaries in France.</p>

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council ("CWC") of the former's French subsidiaries should have been informed, in compliance with the combined provisions of EC Regulations 802/2004 and 139/2004 relating to the control of mergers between undertakings and of Articles L.2323-1 and L.2323-20 of the French Labour Code, insofar as all the economic entities are either directly or indirectly affected by the acquisition of sole or joint control. The decision has wide-ranging implications for both French and international groups with subsidiaries in France.

Facts

The Dutch legal entity Organon BioSciences NV had two French subsidiaries, Organon SA and Diosynth. Pursuant to French case law, these subsidiaries were considered to form a social and economic unit.[2] In March 2007, Schering Plough, a US company, initiated a public takeover bid of Organon BioSciences NV and notified the contemplated merger of activities to the Directorate-General of Competition of the European Commission.[3] On 18 September 2007, in accordance with the provisions of Article L.2323-20 of the Labour Code, the CWC decided to seek the assistance of a chartered accountant with a view to examining the proposed takeover (at the expense of Organon SA and Diosynth). Organon SA and Diosynth challenged the appointment of a chartered accountant, stating that as they were not parties to the merger itself, the provisions of Article L.2323-20[4] did not apply and the CWC was therefore not entitled to appoint an accountant in respect of the operation. They argued that only the entities that were actual parties to the legal transaction should be considered parties to the merger operation, i.e. in this particular case, the acquiring US company and the Dutch company being acquired. They maintained that subsidiaries should not be considered as parties simply because they could potentially be affected by the operation in the long term. The court of first instance found in favour of the CWC and, in a judgment dated 14 January 2009, the Appeal Court of Versailles stated that the CWC had a right to specific information as soon as the French subsidiaries could be affected by the planned merger.

Judgment

The Cour de cassation rejected the strict interpretation upheld by the French companies, affirming that the relevant European and French texts show that "all economic entities affected either directly or indirectly by the acquisition of sole or joint control are parties to the merger operation". Hence, as the projected merger operation would eliminate one of the market participants and have an impact on the situation of the employees of the indirectly targeted companies, "the Court of Appeal has ruled, without its judgment being vitiated in the manner alleged in the pleadings, that these companies were parties to the operation and that the CWC of the economic and social unit that they form had grounds to seek the assistance of a chartered accountant to examine the proposal". Article L.2323-20 of the Labour Code had left

room for doubt as to the scope of the information process. Granted, while it was acknowledged that, by referencing Article L.430-1 of the Commercial Code[5], the Labour Code referred to merger operations involving independent companies and acquisitions of sole or joint control, this did not establish to what extent an entity of the group was to be considered a "party to a merger operation". In line with Appendix I of Regulation 802/2004, regarding the content of the merger notification form, the French Cour de cassation had found a credible legal basis to support a broad interpretation of the notion of "party/ies to a merger" as being "both the party/ies that acquire and those that are acquired, or the parties that merge, including all companies in which a controlling interest is acquired or that are the object of a public takeover bid". This offered a favourable solution for the CWC.

Commentary

First and foremost, the debate concerning the definition of "party to a merger" is now closed[6]. The French Cour de cassation has integrated the fact that the employees' right to be informed and consulted is part of their fundamental rights – a fact supported by Directive 2002/14/EC of 11 March 2002, which established a general framework for the information and consultation of workers in undertakings within the European Community. It is important to recall that in accordance with this Directive, the information and consultation process' scope is broad, including: information on the recent and probable development of the company's or establishment's activities and its economic situation; information and consultation on the situation, structure and probable evolution of employment within the company or establishment, as well as any potentially contemplated measures of anticipation, notably where there may be a threat to employment; information and consultation on the decisions liable to cause important changes to the organisation of work or in the employment contracts. Moreover, the Directive requires that "information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employee representatives to conduct an adequate study and, where necessary, prepare for consultation". Likewise, Article L.2323-19 of the Labour Code provides that "in the economic order, it is mandatory to inform and consult the works council on issues that concern the organisation, management and general running of the company and notably on measures liable to affect the volume or structure of the headcount, working time, employment conditions and professional training". The importance of the information and consultation process and the need to guarantee its useful effect is supported by the ECJ, which notably condemned the French regulations that imposed on certain employers duties provided by Directive 2002/14, and deprived workers (those under 26 years of age) of recognised information and consultation rights[7]. It therefore makes sense that, in accordance with EU law, the French Cour de cassation itself has attached great value to the information and consultation process, having recently interpreted several

provisions of the Labour Code in light of Directive 2002/14[8]. In practice, a French company's management may have difficulty in answering questions from the (central) works council concerning a merger, as this may be taking place at a significantly higher level within the group. In addition, aside from the issue of the cost of acceding to the accountant's information access request, actually responding to information requests and obtaining the relevant documents may not be easy, in particular with respect to information concerning the other group. However, the argument that a French company does not hold the information itself is not generally accepted by French courts. The company must do its utmost to obtain the requested information, and it is likely that the courts will consider this to be possible within the group to which it belongs.

Footnotes

1 French Supreme Court, see Hastings F, "Droit du travail Concentration: rôle renforcé pour les comités d'entreprise de filiales françaises", La Tribune. fr 08/12/2010.

2 "Unité économique et sociale" – a social and economic unit should not be considered as a single company, but should be seen as the organized representation of employees from various companies pertaining to the same group. For example, see Royle, T, "Worker Representation Under Threat? The McDonald's corporation and the effectiveness of statutory works councils in seven European countries", Comparative Labour Law & Policy Journal 2005 Vol 22:392.

3 Pursuant to Dutch law, Organon BioSciences was required to seek the advice of its works council regarding the planned acquisition by Schering-Plough. That council issued its initial advice on 27 July 2007, which was positive, subject to various conditions. With the satisfactory conclusion of subsequent discussions among Organon BioSciences, the Dutch works council and Schering-Plough, and the expiration of a mandatory waiting period, the works council declined to take any formal action relating to the transaction. As a result, the requirements of Dutch law relating to the completion of the consultation procedures with Organon BioSciences' works council were met and the corresponding condition to the transaction proceeding was satisfied.

4 Whereby "where a company is party to a merger operation as defined in Article L.430-1 of the Commercial Code, the head of the company summons the works council within three days at the latest of the publication".

5 In accordance with this text, a merger is an operation whereby two or more previously independent undertakings merge together, or one or more undertakings (or one or more persons already controlling at least one undertaking) acquire the direct or indirect control of one or more other undertakings, or where certain joint ventures are created. The French merger control regime is set out in Articles L.430.1 and seq. of the Commercial Code, as amended by the Modernisation of the Economy Act ("LME") of 4 August 2008.

6 Olczak-Godefert, G, "L'information du CE en cas d'opération de contrôle des concentrations", Semaine sociale Lamy 2010 no 1467, p.11.

7 ECJ, 18 January 2007, case C-385/05, CGT et al. – v – Premier Ministre, Ministre de l'Emploi, de la Cohésion sociale et du Logement.

8 Cour de cassation, Employment Div, 18 December 2007, no 06-17389; 15 December 2009, no 08-17722; Cour de cassation, Employment Div, 12 September 2007, no 06-13667.

Subject: Information and consultation

Parties: Organon SA, Diosynth and Schering-Plough – v – (central) works council of the economic and social unit between Organon and Diosynth

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