De concern(genoten)enquête: Naar huidig en wenselijk recht

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SUMMARY

This research consists of four parts. Part I is the introductory part, which comprises two chapters. Chapter 1 is the introduction, in which the central question of this research is formulated:

> 'How must (or could) the Dutch right of inquiry be interpreted and applied in respect of national and international groups of companies?'

This question is divided into: (a) a question into current law; and (b) a question into desirable law. These questions are answered in Chapters 3 through 11 (*vide infra*). In the essence, the issue central to this research hinges on the fact that on the inside a group is an economic unit, but on the outside it is a legal plurality.

Chapter 2 pertains to groups of companies and their inherent force fields between legal reality and economic reality. The 'group' has evolved into the most common business structure. Despite this fact, Dutch corporate law as laid down in Book 2 of the Dutch Civil Code [*Burgerlijk Wetboek*, 'DCC'] – still – takes the single-company legal entity functioning autonomously, both from the legal and the economic perspective, as a basis. However, group companies are not separate and isolated entities; they jointly form a single business under the management of their parent company. Dutch corporate law looks at groups through an old-fashioned lens. Conversely, European competition law (Articles 101 and 102, TFEU) focuses on the whole, considering economic reality, in particular the economic, organisational and legal ties uniting the legal entities involved.

Together with Part III, Part II forms the body of this research. It comprises Chapters 3 through 10 and pertains to the right of inquiry in respect of groups of companies under current law.

Chapter 3 constitutes a reminder that the right of inquiry as embedded in Chapter 2 of Title 8 of Book 2 of the DCC is based on the single-company legal entity. This means that holders of shares (or depositary receipts for shares) in a parent company do not, in principle, have the power, under Section 2:346, first paragraph, subsection b. or c., of the DCC, to also elicit an inquiry of that parent company's (wholly owned) subsidiary. This was definitively changed, however, by the judgment rendered by the Supreme Court of the Netherlands [*Hoge Raad der Nederlanden*] in the *Landis* case, in which the 'inquiry of group companies' was sanctioned. In my opinion, a request for any such inquiry must, to the extent possible, be dealt with in conformity with the provisions laid down in the said DCC Chapter.

Chapter 4 devotes attention to the request, the summons and the defence. At the beginning and in the body of a request, and in the part thereof in which relief is sought, the requester is to include all the companies to be subjected to the inquiry. Subsequently, the Dutch Enterprise Chamber [*Ondernemingskamer*] is to summon those companies to appear and allow them to put up a defence.

Chapter 5 addresses foreign group companies, with procedural and substantive private international law playing a major role. First, an analysis is provided of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Regulation'). This analysis reveals that Article 25 of the Regulation (choice of court) will not secure jurisdiction for the Enterprise Chamber, that Article 24, opening words and subsection (2), of the Regulation (exclusive jurisdiction) does not apply to inquiry cases, that it appears that Article 8, opening words and subsection (1), of the Regulation (multiple defendants) cannot be invoked in inquiry cases and that Article 4, first paragraph, of the Regulation (general rule) must be relied on, which means that the Enterprise Chamber does not have jurisdiction with respect to a request to order an inquiry geared at a group company domiciled in another Member State. Should the group company have its seat in the territory of a non-Member State, then the Enterprise Chamber will, in principle, have jurisdiction on the grounds of Section 3, opening words and subsection a., of the Dutch Code of Civil Procedure [*Wetboek van Burgerlijke Rechtsvordering*]. Subsequently, the question as to applicable law is addressed. In view of Section 10:118 of the DCC, the Netherlands adheres to the incorporation doctrine, which also covers the right of inquiry. If a group company is governed by foreign incorporation law including an inquiry scheme of its own, then that scheme should be applied. Absent any such scheme, the request to order an inquiry cannot (to this extent) be allowed. Section 2:344 of the DCC merely serves as a safety-net provision.

Chapter 6 discusses how objections to a company's policies or affairs are to be made known. Before legal action can be instituted against a company, the requester must, under Section 2:349, first paragraph, first sentence, of the DCC, make the objections known in advance to the management board, and to the supervisory board, if any, of the company to be subjected to the inquiry. Although this also holds true for requests to order an inquiry of both a parent company and its subsidiary, no objection will be raised if – in case of a formal or substantive personal union of their management boards – all objections are made known to a single company (the parent company) only.

Chapter 7 zooms in on the power of holders of shares (or depositary receipts for shares) to request an inquiry in respect of a group of companies. In this chapter, the main focus is on the discussion of decisions passed by the Enterprise Chamber. The seven questions raised in relation thereto can be answered as follows:

(i) The decisions studied appear to show that a requester holding shares or depositary receipts for shares in a parent company, but failing to (directly) meet the provisions laid down in Section 2:346, first paragraph, subsection b. or c., of the DCC in respect of a subsidiary that is also to be subjected to the inquiry, must state that and (adequately) substantiate why he/she/it nonetheless has the power to request an inquiry of that subsidiary (that the requirements for an inquiry of group companies have been satisfied), for which purpose such requester will have to state (at least) one or more links (or any parts thereof) from the *Landis* case (*vide infra* in section (vi)); or the case papers and/or the proceedings at the session must show that this is the case, or such can be derived from those documents and/or proceedings.

(ii) Some of the decisions studied appear to show that the Enterprise Chamber tests the power to request an inquiry of group companies on a *pro-forma* basis, while other decisions appear to show that it does *not* test this on a *pro-forma* basis, so that the defendant(s) will have to contest such power providing (adequate) substantiation.

(iii) Some of the decisions studied appear to show that the Enterprise Chamber subjects the assessment of the said power to a full test, as is evidenced by the words 'it is true that', 'correct', 'proper grounds' and 'correctly', while other decisions appear to show that it subjects the assessment of such power to a marginal (limited) test, as is evidenced by the words 'not incorrectly', 'no reason to find otherwise' and 'to be considered plausible'.

(iv) The decisions studied boast an array of parallel (or other) criteria, such as 'economic and organisational unit under joint management', 'inextricably intertwined', 'concern', 'group', 'economic and organisational unit', 'organisational unit', 'financial, economic and organisational unit', 'economic and organisational interrelationship', 'joint policies under joint management', no 'independently adopted management policies', no 'independently pursued management policies', no 'independently adopted and pursued management policies', 'virtually overall personal union', 'likewise and equally affected' and 'likewise affected'. In most cases, however, the assessment of the power to request an inquiry in respect of a group of companies (eventually) hinges on the question as to whether there is an 'economic and organisational unit under joint management' or on the 'likewise and equally affected' criterion.

(v) The decisions studied in which the Enterprise Chamber found that a requester had the power to request an inquiry of group companies do not show, or not explicitly, that it put such requester on a par with a holder of shares (or depositary receipts for shares) as referred to in Section 2:346, first paragraph, subsection b. or c., of the DCC.

(vi) The decisions studied show that, both before the Enterprise Chamber's decision in the *Landis* case in October 2003 and after the judgment rendered by the Dutch Supreme Court in *Landis* in February 2005, the

criterion of 'economic and organisational unit under joint management' (which, together with 'virtually overall personal union', I call the 'first *Landis* link') was applied and is – still – applied. Although, after the said judgment in the cassation appeal, the Enterprise Chamber did not immediately start assessing the power of holders of shares (or depositary receipts for shares) to request an inquiry in respect of a group of companies otherwise, by testing (in so many words), in line with the Supreme Court's judgment in *Landis*, whether interests had been 'likewise and equally affected' (which I call the 'third *Landis* link'), it has applied the 'affected' requirement every year since (mid-)2015. Remarkably, in the decisions passed by the Enterprise Chamber during the 2006-2018 period which involved requests to order an inquiry of group companies, the two aforementioned criteria alternated in that the former criterion was applied one time and the latter criterion the next. On 7 July 2015, they coincided in that the former criterion was applied in two decisions passed on that date and the latter criterion was applied in one decision passed on that date. Oddly enough, in the decision passed in *SNS* on 26 July 2018, the Enterprise Chamber considered that it took the yardstick formulated in the Supreme Court's judgment in *Landis* to mean that the question whether interests are 'likewise and equally' affected is relevant, while it (once again) referred to an 'economic and organisational unit under joint management' in two decisions passed in November 2018, i.e. in *JBNT* and *RAB*. Rare are decisions in which the question whether there were no 'independently adopted and pursued management policies' (which I call the 'second *Landis* link') was (eventually) relevant.

(vii) Some of the decisions studied show that, as part of the assessment of the power of holders of shares (or depositary receipts for shares) to request an inquiry in respect of a group of companies, the Enterprise Chamber sufficed with – went no further than – referring to one or more Landis links (or any part thereof) (*vide infra* in section (vi)), while other decisions show that it also (autonomously) justified *why* a specific criterion had been satisfied.

Chapter 8 deals with the valid reasons. Pursuant to Section 2:350, first paragraph, of the DCC, the Enterprise Chamber will allow a request only if there are valid reasons to doubt the correctness of the policies or affairs of the legal entity to be subjected to the inquiry. This also holds true for a request to order an inquiry of group companies. This means that there must be such reasons in relation to *all* group companies to be subjected to the inquiry.

Chapter 9 addresses the issues of the inquiry costs and two separate proceedings. Among other things, it is concluded that, as a rule, inquiry costs are to be borne by both the parent company and its subsidiary or subsidiaries. However, it is also possible that they are to be borne by the parent company only. In addition, it is concluded that the separate proceedings, i.e. those of Section 2:350, second paragraph, of the DCC and those of Section 2:354 of the DCC, are to be removed from the

inquiry scheme, one of the reasons being that they (essentially) pertain to liability, which does not belong in such scheme.

Chapter 10 discusses mismanagement and relief, concluding, among other things, that decisions in which the Enterprise Chamber also established mismanagement at the subsidiary level are rare and that those in which it also provided relief at that level are even rarer.

Part III contains Chapter 11, which discusses the right of inquiry in respect of groups of companies under desirable law using ten questions, which are answered as follows:

(1) It should be possible to elicit an inquiry of a group as such.
(2) A legal entity or person domiciled in the Netherlands or elsewhere that, alone or together with other parties, holds a substantial interest in the outstanding share capital of a company of a group to be subjected to an inquiry, or that can be put on a par with such an entity or person, should be able to request the inquiry of that group.
(3) Shareholders of the parent company would have to make their objections known to the parent company's management board (in advance). This also holds true for the shareholders of a subsidiary in case of a personal union of the two companies' management boards. Absent any such personal union, the objections would (first) have to be made known to the subsidiary's management board and, should that be to no avail, to the parent company's management board.
(4) There should be valid reasons to doubt the correctness of the polices or affairs of the group as such.
(5) The request would have to be directed towards the group as such.
(6) The parent company would have to be summoned to appear in the inquiry proceedings.
(7) In principle, all group companies would be jointly and severally liable for the payment of the inquiry costs and for the provision of security for those costs.
(8) The parent company's management board would have to receive the report of the inquiry and be allowed to quote from that report in respect of third parties.
(9) The group would have to be considered a legal person *sui generis*, so that it should be possible to establish mismanagement by the group.
(10) It should be possible to provide relief throughout the group.

Part IV consists of Chapter 12, which provides a summary and conclusions, as set forth above.