September 2016

Van Bael & Bellis on Belgian Business Law

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ECJ Confirms Validity of Prohibition on Price Reductions for Tobacco Products

On 21 September 2016, the Court of Justice of the European Union ("ECJ") handed down its judgment in response to the request for a preliminary ruling from the Brussels Court of Appeal (the "Court of Appeal") in the Colruyt case (ECJ, 21 September 2016, Case C-221/15, Etablissements Fr. Colruyt NV – See also, this Newsletter, Volume 2016, No. 4, p. 3). The case concerns the compatibility with European law of the Belgian rules requiring retailers to respect minimum prices for manufactured tobacco.

The reference was made in the context of criminal proceedings against Colruyt. The supermarket chain had sold tobacco products at a unit price below the price indicated on the revenue stamp affixed by the manufacturer or importer and had applied several types of discounts to tobacco products. However, Belgian rules governing tobacco prohibit the advertising and sponsoring of tobacco products, including any communication or act which is directly or indirectly aimed at promoting sales. This rule is understood also to prohibit the application of retail prices for tobacco products which are lower than the price featuring on the revenue stamp. Following a finding of infringement at first instance (See, this Newsletter, Volume 2015, No. 8, p. 9), Colruyt appealed to the Court of Appeal, which in turn referred the case to the ECJ.

Following the reasoning of Advocate-General Nils Wahl (See, this Newsletter, Volume 2016, No. 4, p. 3), the ECJ found that national rules such as those at hand do not infringe any of the above rules. The ECJ acknowledged that the effect of those rules is to impose the price stated on the revenue stamp on retailers for the sale of tobacco products to the consumer. However, the ECJ did not view this as problematic as the imposed price is freely determined by the manufacturer or importer. Moreover, according to the ECJ, the price restrictions constitute selling arrangements which do not concern the characteristics of the tobacco product and do not restrict the free movement of goods between EU Member States. In reaching this conclusion, the ECJ noted that the price restrictions (i) apply to all relevant traders operating within the Belgian territory; and (ii) do not prevent access to the Belgian market of tobacco products from other EU Member States or impede access any more than they hinder the access of domestic products.

Finally, for rules to give rise to an infringement of the competition rules, proof is needed that such rules encourage the conclusion of anticompetitive agreements or reinforce their effect or somehow "privatise" the task of the government by allowing private businesses to take measures normally reserved for the government. The ECJ was of the opinion that none of these circumstances applied to the case at issue.

In view of this ruling, Colruyt’s pending appeal before the Court of Appeal will likely be dismissed. The judgment of the court of first instance, which imposed a fine of EUR 270,000 on Colruyt, will thus in all likelihood be confirmed.

Advocate General Proposes ECJ to Clear Belgian Prohibition on Advertising in Relation to Dental Care

On 8 September 2016, Yves Bot ("AG Bot"), Advocate General of the Court of Justice of the European Union (the "ECJ"), issued an opinion finding that the Belgian prohibition on advertising in relation to dental care is compatible with EU law (Case C-339/15, Openbaar Ministerie v. Luc Vanderborght).

The opinion was issued in response to a request for a preliminary ruling from the Dutch-language Brussels Court of First Instance (Nederlandstalige Rechtbank van Eerste Aanleg te Brussel/ Tribunal de Première Instance néerlandophone de Bruxelles – the "Court"). The Court had questioned the ECJ in the context of criminal proceedings brought...
against Luc Vanderborght, a general dental practitioner, who was accused of having advertised his dental services by means of “a large advertising pillar, of immodest size and appearance”, in local newspapers and on his website.

The Public Prosecutor considered that Mr. Vanderborght had breached (i) Article 8d of the Royal Decree of 1 June 1934 regulating the practice of dentistry (Koninklijk Besluit van 1 juni 1934 houdende reglement op de beoefening der tandheelkunde/Arrêté royal du 1er juin 1934 réglementant l’exercice de l’art dentaire) which, in order to protect the dignity of the profession, sets out the requirements of the discretion to be exercised by providers of dental care when they place a plaque or an inscription at the entrance of the building in which they practise; and (ii) Article 1 of the Law of 15 April 1958 on advertising in relation to dental care (Wet van 15 april 1958 betreffende de publiciteit inzake tandverzorging/Loi du 15 avril 1958 relative à la publicité en matière de soins dentaires), which prohibits providers of dental care services, in the context of a profession or a dental practice, to advertise their services to the public, directly or indirectly, in any form whatsoever.


Compatibility with Directive 2005/29/EC

AG Bot started his analysis by examining whether Directive 2005/29/EC applies to the case at hand. He stated that, in general, Directive 2005/29/EC has a very broad scope and applies to business-to-consumer transactions in all sectors of the economy. However, there are some exceptions to this broad application. In particular, AG Bot noted that, pursuant to Articles 3(3) and (8) of Directive 2005/29/EC, this Directive is without prejudice to (i) national rules relating to public health; and (ii) the ethical codes of conduct or other specific rules governing regulated professions. Stressing that the Belgian rules seek to protect public health and the dignity of the profession of dentist, AG Bot concluded that Directive 2005/29/EC does not apply to the case at hand.

Compatibility with Directive 2000/31/EC

In contrast, AG Bot considered that Directive 2000/31/EC applies because advertising over the internet constitutes an information society service within the meaning of Article 2(a) of this Directive. Therefore, AG Bot examined whether the rules at issue are compatible with the substantive rules of Directive 2000/31/EC, including Article 8(1). Pursuant to this provision, the use of commercial communications over the internet by a member of a regulated profession is permitted provided that the communication complies with the ethical rules of the profession. As the national measures at issue aim to ensure compliance with the ethical rules that apply to dental practitioners, AG Bot concluded that these measures are compatible with Article 8(1) of Directive 2000/31/EC.

Compatibility with freedom to provide services (Article 56 TFEU)

Holding that, in the present case, the freedom of establishment is ancillary to the freedom to provide services, AG Bot considered it sufficient to examine the compatibility of the national measures at issue with the freedom to provide services.

In AG Bot’s view, the measures at issue constitute a restriction on the freedom to provide services. However, he went on to state that this restriction can be justified on the ground of the protection of public health because it does not go beyond what is necessary. According to AG Bot, even far-reaching measures such as those at hand can be deemed to be proportionate in view of the significant asymmetry of information between the patient and the service provider in the dental care sector. Because of this asymmetry, AG Bot continued, the level of trust between the patient and the provider of dental care is of great importance. He concluded that the rules at issue aim to ensure this high level of trust and do not go beyond what is necessary as they do not prohibit dental care providers from giving basic details, free from enticement or incentive, to make known their existence as professionals in a telephone directory or other source of information accessible by the public.
The opinion of AG Bot is not binding on the ECJ, which is expected to deliver its judgment at the end of this year or early next year. This will not be the first ruling of the ECJ on the Belgian prohibition on advertising in relation to dental care. On 13 March 2008, the ECJ already held that this prohibition is compatible with Article 101 TFEU (prohibition on cartels and other agreements that restrict competition) read in conjunction with Article 4(3) TFEU (duty of EU Member States to cooperate in good faith with the EU) (ECJ, 13 March 2008, Case C-446/05, Ioannis Doulamis).

Incidentally, it is interesting to note that, on 27 June 2016, the Court sent another question to the ECJ on whether the Belgian prohibition on advertising relating to interventions involving aesthetic surgery or non-surgical aesthetic medicine is compatible with Directive 2005/29/EC (Case C-356/16, Wamo BVBA and Luc Cecile Jozef Van Mol).
Brussels Court of Appeal Articulates Conditions for Provisional Measures Issued by Belgian Competition Authority

On 7 September 2016, the Brussels Court of Appeal (the “Court”) confirmed the decision of the Competition College of the Belgian Competition Authority (the “Competition College”) to adopt provisional measures involving television broadcasting rights in the Superprestige Cyclocross Competition.

The Competition College had adopted these provisional measures on 5 November 2015, following a complaint filed by telecommunications company Proximus, in order to address a possible infringement of Articles IV.1 and/or IV.2 of the Code of Economic Law (the Belgian equivalent of Articles 101 and 102 TFEU) (See, this Newsletter, Volume 2015, No. 12, p. 6). Proximus had filed this complaint subsequent to the conclusion of an agreement between the organiser of the Superprestige Cyclocross Competition, v.z.w. Verenigde Veldritorganisatoren (the “Organiser”), and Telenet, the main competitor of Proximus. The agreement, which was concluded without a prior bidding procedure, granted exclusive television broadcasting rights to Telenet for the Superprestige Cyclocross Competition for a period of five years.

In its decision, the Competition College held that there was a prima facie infringement of Articles IV.1 and IV.2 of the Code of Economic Law, and that there was an urgent need to avoid a situation which was likely to cause a serious and imminent disadvantage that would have been difficult to repair. As a result, the Competition College found that the conditions for granting provisional measures were satisfied, and ordered the Organiser to choose, within one month, between: (i) suspending the exclusivity clause until a final decision on the merits is taken on Proximus’ complaint; or, (ii) organising a transparent and non-discriminatory bidding procedure for the reallocation of the broadcasting rights. The Organiser chose the first option.

Telenet disagreed with the decision and brought an appeal before the Court on 7 December 2015. The main arguments of Telenet, and the Court’s assessment thereof, will be outlined below.

Prima facie infringement

In the contested decision, the Competition College held that, in order to assess the existence of a prima facie infringement, it had to determine whether it would be manifestly unreasonable to consider the facts as an infringement of competition law. Telenet argued before the Court that, in doing so, the Competition College had applied a wrong and insufficiently rigorous legal test. According to Telenet, the legal test applied is not appropriate anymore because, since the 2013 reform of Belgian competition law, Article 64 of the Code of Economic Law no longer provides for a preliminary investigation by the Prosecutor in Competition Matters (Auditeur/Auditeur – the “Prosecutor”) in decisions on provisional measures. Under the old procedure, the Competition College could rely on the Prosecutor’s investigation, which was conducted in an impartial manner and based on both incriminating and exonerating facts. According to Telenet, the Competition College should adopt a more stringent legal test, following the abolishment of this impartial preliminary investigation by the Prosecutor. In addition, Telenet argued that this legal test was not in line with the case law of the Court of Justice of the European Union (at the EU level, the legal test requires a prima facie finding of an infringement of competition law).

In its judgment, the Court dismissed this first ground of appeal, and held that although it is true that the Prosecutor had more powers of investigation than the Competition College has now, this does not preclude the Competition College from applying the same legal test as before. This is because the Competition College can base its assessment on the reasoned application of the applicant, complemented with the views of both parties and, if necessary, expert reports. The Court then rejected Telenet’s claim that the legal test applied violated EU case law. The Court held that if the Competition College, following a sufficiently rigorous assessment of the facts, concludes that it would not be manifestly unreasonable to consider the facts as an infringement of competition law, this also implies the finding of a prima facie infringement. As a result, the test applied by the Competition College was found to be in conformity with the test applied at the EU level.
Another point of discussion concerned the fact that the Competition College had considered that broadcasting rights of cyclocross competitions constituted a separate relevant market, rather than being part of a broader market of broadcasting rights for sport. The Competition College had justified its position on the basis of the particular popularity of cyclocross competitions, as apparent from the viewer figures, from which it deducted that cyclocross may be a determining factor when choosing a television subscription. The Competition College also noted that in their submissions the parties mainly referred to other cyclocross competitions. This supposedly showed that such competitions share a number of characteristics, which justify the finding of a separate market.

In its judgment, the Court made reference to a number of EU cases (e.g., Commission Decision of 22 March 2006 in Case COMP/C.2-38.173, FA Premier League), and cases of national competition authorities of other EU Member States (e.g., Decision no. 14-MC-01 of 30 July 2014, Top 14 rugby of the French competition authority). In these cases, broadcasting rights in specific sport competitions (e.g., football, rugby or ice hockey competitions) had also been considered as separate product markets. In addition, the Court held that the Competition College based its conclusion on relevant criteria and reasonably found that the market for the acquisition of broadcasting rights of cyclocross competitions prima facie constitutes a separate product market.

Furthermore, Telenet had argued that the fact that its dominant position is strengthened by the acquisition of the exclusive broadcasting rights does not constitute an abuse, but rather resulted from competition on the merits. The Court also rejected this ground of appeal. It held that the Competition College was correct in ruling that it is not manifestly unreasonable to consider that the acquisition of such exclusive rights for a long period (five years), without a prior bidding procedure, while already owning the exclusive rights to the “UCI Worldcup” cyclocross competition, constituted a prima facie abuse of Telenet’s dominant position.

Serious, imminent and avoidable disadvantage

With regard to the existence of a serious, imminent and avoidable disadvantage, Telenet raised a number of factors which supposedly show the limited impact of its acquisition of the broadcasting rights on Proximus. In that regard, the Court noted that the Competition College does not have to limit itself to assessing the interests of, and disadvantages for, one party. Rather, it must adopt provisional measures which also favour competitors of the applicant. The Court pointed out that it is the task of the Competition College to safeguard the general economic interest. The Court also rejected Telenet’s argument that there had been no significant impact on Proximus’ turnover, and considered that impact on turnover is not a decisive criterion when assessing the existence of an avoidable disadvantage. Moreover, the Court held that, for the adoption of provisional measures, it is not required that the applicant is threatened to disappear from the market.

Finally, Telenet had also argued that its rights of defence were violated, since the Competition College had imposed provisional measures which went beyond the scope of the measures initially requested by Proximus. The Court rejected this argument, and added that the Competition College is entitled to impose measures that differ from those requested by the applicant, as long as the parties are heard on those measures. This finding of the Court is remarkable, as this possibility is not explicitly provided for in the law. However, it is expected that it will be formalised in the pending reform of the Code of Economic Law.

Consequently, the Court rejected all grounds of appeal put forward by Telenet and concluded that the imposition of the provisional measures by the Competition College was justified.

The Scoreboard monitors how 42 goods and services markets are functioning from the perspective of consumers in the 28 EU Member States, as well as in Iceland and Norway. The findings are based on a large-scale survey on consumers’ experiences and perceptions carried out in 2015. The Scoreboard measures market performance by means of the Market Performance Indicator (the "MPI"), a composite index made of 5 components: (i) comparability of offers; (ii) trust in businesses to respect consumer protection rules; (iii) extent to which markets live up to consumers’ expectations; (iv) choice of retailers/suppliers; and (v) degree to which problems experienced in the market cause harm.

The key findings of the Scoreboard include the following:

- While improvements are bigger for the services markets than for goods markets, the latter continue to be more favourably assessed than the former in absolute terms. Among the markets surveyed, those for (i) real estate services; (ii) mortgages; (iii) investment products; (iv) private pensions and securities; (v) second-hand cars; and (vi) meat products are ranked the lowest. In contrast, the markets for (i) leisure-related services; and (ii) books, magazines and newspapers are consumers’ top-ranking markets.

- These findings also reflect the situation in Belgium. However, the average MPI score for the goods and services markets surveyed in Belgium is below the EU average. Only two goods markets score above the EU average, namely the markets for (i) fuel for vehicles; and (ii) new cars. The markets for fruit and vegetables and for non-prescription medicines perform the worst when compared to the EU average. As regards the Belgian services markets, the market for mortgages is the only market which performs significantly better than the EU average. The worst performing services markets, again compared to the EU average, are those for (i) tram, local bus, metro and underground services; (ii) online gambling and lottery services; and (iii) train services.

- Market performance remains uneven across EU Member States. The largest differences are found in the markets for (i) electricity services; (ii) water supply; (iii) railway transport; (iv) mortgages; and (v) mobile telephone services. These markets are less subject to cross-border competition than better assessed markets. According to the Commission, this suggests that more integrated markets tend to perform better from the consumers’ perspective.

- Persistent issues are identified in the telecommunications, electricity and retail financial services markets. It would appear that these markets gather the largest proportion of consumers who have experienced problems or a particularly high level of harm. The Scoreboard also highlights the difficulty for consumers to switch supplier in these markets due to (i) the perception that switching might be difficult; (ii) obstacles which render switching difficult; or (iii) the lack of competition.

In particular, the Scoreboard points out that the telecommunications markets have not been able to keep pace with the progress observed in other services markets since 2013 and represent the markets with the highest proportion of consumers that have experienced problems. Of all 29 services markets surveyed, the markets for mobile telephone services and internet provision show the highest proportion of consumers having experienced problems in the last 12 months.

The electricity market is the fourth lowest ranked services market covered by the Scoreboard. Although its overall score increased since 2013, the Scoreboard reveals that the electricity market is still not delivering enough for consumers. However, there are considerable differences in the assessment by consumers in different EU Member States. Although its score decreased since 2013, the Belgian electricity market scores slightly above the EU average.
In order to address the above issues, different initiatives have been taken in the framework of the Digital Single Market E-commerce Package, which the Commission proposed on 25 May 2016 (See, this Newsletter, Volume 2016, No. 6, p. 4). Notably, the Commission submitted a proposal for a Regulation on Consumer Protection Cooperation. The Commission also proposed a Regulation aimed at putting a halt to geo-blocking and other discriminatory practices (See, this Newsletter, Volume 2016, No. 6, p. 4).

According to the Commission, the launch of the platform for Online Dispute Resolution, which occurred on 15 February 2016, should also help consumers to solve disputes with traders over online transactions in a simple, fast and inexpensive way (See, this Newsletter, Volume 16, No. 2, p. 4).

The Scoreboard is available here.
In its judgment of 7 April 2016 (Case C-483/14), the Court of Justice of the European Union (the "ECJ") offered guidelines for (i) the law applicable to subordinated loans; and (ii) the level of protection that holders of these loans enjoy under EU law in cross-border mergers by acquisition.

The ECJ was on 28 August 2014 requested to deliver a preliminary ruling by the Austrian Supreme Court (Oberster Gerichtshof) in a dispute between Sparkassen Versicherung AG Vienna Insurance Group ("Sparkassen") and KA Finanz AG ("KA Finanz").

In 2005, Sparkassen had taken out two subordinated loans issued by the Cyprus subsidiary of Kommunalkredit International Bank LTD ("Kommunalkredit"). These loans were governed by German law. As Kommunalkredit started to experience difficulties following the financial crisis in 2008, it stopped paying the interest due under the subordinated loans. In 2010, Kommunalkredit eventually merged with KA Finanz by way of a merger by acquisition.

Following the merger, Sparkassen claimed reimbursement of the interest due under the subordinated loans from KA Finanz. Alternatively, it claimed to be entitled to the same level of protection of creditors as that granted by the Austrian law on limited liability companies of 31 March 1965 (Aktiengesetz, the "Austrian Law"). Paragraph 226 (3) of the Austrian law provides that, in the event of a merger, "holders of debentures and participation certificates are to be granted rights of equal value or else be paid reasonable compensation for the alteration of those rights or for the right itself". However, KA Finanz disagreed that the merger with Kommunalkredit resulted in the termination of the subordinated loans and, consequently, refused to grant rights of equal value to the holders of these certificates or pay any compensation.

Austrian courts upheld Sparkassen’s claims, which ultimately led KA Finanz to bring an appeal before the Austrian Supreme Court. The Austrian Supreme Court requested a preliminary ruling from the ECJ in order to obtain guidance as to (i) the law applicable to the subordinated loans and the applicable rules of protection of creditors; and (ii) whether Article 15 of Directive 78/855 of 9 October 1978 concerning cross-border mergers of public limited liability companies, as amended (the "PCMD"), precludes a national provision such as Paragraph 226 (3) of the Austrian Law, from allowing the issuer of securities, such as the subordinated loans at hand, to terminate the legal relationship with the holder of such securities and pay off the holder in a cross-border merger.

Firstly, on the applicable law, the ECJ stated that the law governing a contract entered into by an acquired company before a cross-border merger should continue to govern such a contract following the merger. This finding stems from Directive 2005/56 of 26 October 2005 on cross-border mergers of limited liability companies (the "CMD"), pursuant to which a merger by acquisition does not extinguish or constitute novation of any obligations of the acquired company but merely substitutes the acquiring company for the acquired company with respect to all obligations of the acquired company.

The ECJ further sided with Sparkassen with regard to the level of protection it is entitled to as a creditor. According to the ECJ, the protection of creditors of an acquired company should be governed by the provisions of national law which govern such a company. Again, the ECJ relied on the CMD and found that a company participating in a merger "remains subject, as far as, inter alia, the protection of its creditors is concerned, to the provisions and formalities of the national law which would be applicable in the case of a national merger".

Secondly, the ECJ examined whether Article 15 of the PCMD grants rights (e.g. the right to terminate legal relationships with the holder) to the issuer of securities, other than shares, to which special rights are attached. The ECJ stated that the national courts should determine whether the securities at hand fall within the scope of Article 15 of the PCMD. To help the Austrian Supreme Court make this analysis, the ECJ held that securities within the meaning of this provision refer to "debentures exchangeable for shares, debentures conferring a right of pre-emption over share capital to be issued, profit-sharing debentures and rights to be issued shares", i.e., securities that grant their holders rights
which are broader than the mere reimbursement of debts and stipulated interests.

Assuming that subordinated loans meet any of these criteria, the ECJ recalled that Article 15 of the PCMD aims to safeguard the interests of holders of securities. Therefore, in so far as Paragraph 226 (3) allows an issuer of securities to terminate unilaterally the legal relationship with a holder of those securities and to pay off such a holder, that right is incompatible with the wording and aim of Article 15 of the PCMD which grants rights to the holder of such securities and not to the issuer.
According to Advocate General of Court of Justice of European Union, Public Registers Limit Right to Be Forgotten

On 8 September 2016, Advocate General Yves Bot presented his opinion in Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce contre Salvatore Manni (C-398/15), providing further guidance on the boundaries between the right to be forgotten and legal certainty guaranteed by public registers.

Mr. Manni, a former company director, claimed to have suffered harm from data available in the commercial register of Lecce which mentioned that his company had gone into liquidation. This listing in the commercial register was a legal obligation in Directive 68/151/EEC on "co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community".

Furthermore, Article 6(1) (e) of Directive 95/46/CE of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the "Directive") requires that "personal data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use."

Mr. Manni contended that the data in the register were processed by third parties for professional purposes and therefore requested that the data be removed. However, the commercial registry of Lecce declined Mr. Manni’s request.

The Advocate General examined whether the above provisions, in light of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union regarding the right to respect for private and family life and the right to protection of personal data, preclude personal data kept in commercial registers from being deleted, anonymised or blocked after a certain period of time and on request. The Advocate General also explored whether access to the commercial register should be limited to a restricted number of persons.

The Advocate General reasoned that the right to the protection of personal data is not absolute but must be considered in relation to its function in society. He added that pursuant to the above legislation, the processing of the data is a legal obligation, which is furthermore essential and which creates a reliable source of information for the protection of third party interests, for the trustworthiness of commercial transactions and consequently for the well-functioning of the market.

Moreover, the Advocate General determined that the interests of the internal market prevail over the right of persons who request that after a certain period of time and on request, their personal data be deleted, anonymised or blocked or that access to the commercial register should be limited to a restricted number of persons. The essential goal of a register, which is to allow insight into a company and its history, and which permits everyone to gain insight into this information, should not be affected.

Advocate General of Court of Justice of European Union Questions Validity of Agreement on Transfer of Passenger Name Record Data, Planned Between the European Union and Canada

On 8 September 2016, Advocate General Paolo Mengozzi handed down his opinion in response to a request from the European Parliament to the Court of Justice of the European Union (the "ECJ") to ascertain whether the envisaged agreement between the EU and Canada on the transfer and processing of passenger name record data (the "Agreement") is compatible with EU law. The Agreement allows for the use, the retention and, if applicable, the transfer of passenger name record data ("PNR data") to the Canadian authorities to combat terrorism and other transnational crime.

In his opinion, the Advocate General found that specific provisions of the Agreement, as currently drafted, are contrary to the right for private and family life and, more in particular, the right to the protection of personal data as provided for in the Charter of Fundamental Rights of the European Union.
In the Advocate General’s view it is necessary to subject the agreement envisaged to a strict review as regards the right to respect for private and family life and the right to protection of personal data. He reached this conclusion on the basis of the ECJ’s judgments in Digital Rights Ireland (See, this newsletter, Volume 2014, No. 4, p. 13) and Schrems (See, this newsletter, Volume 2015, No. 10, p. 8). In general, the AG finds that the ECJ, even when reviewing international agreements, should strike a fair balance between the legitimate desire to maintain public security and the equally fundamental right for everyone to be able to enjoy a high level of protection of his private life and personal data.
New Proposals on Modernisation of EU Copyright Rules

On 14 September 2016, the European Commission (the “Commission”) unveiled its proposals to modernise the EU copyright rules. These proposals include a new Directive on copyright in the Digital Single Market and a Regulation on certain online transmissions of broadcasting organisations and retransmissions.

According to the European Commission, these new rules must allow (i) better choice and access to content online and across borders; (ii) improved copyright rules for education, research, cultural heritage and inclusion of disabled people; and (iii) a fairer online environment for creators and the press.

Better choice and access to content online and across borders

Under the proposed Directive, it will become easier for broadcasters to obtain the authorisations which they require to transmit programmes online in other Member States. These authorisations will cover the initial broadcast as well as their catch-up services.

The proposals will also make it easier for operators that offer packages of channels, such as Proximus TV and Telenet, to obtain the requisite authorisations. If the new proposals are adopted in their current form, these operators will be able to obtain the licences from collective management organisations representing right holders. They will no longer have to negotiate with every individual right holder in order to offer packages of channels originating in other EU Member States. Furthermore, Member States are instructed to set up negotiation bodies to help reach licensing deals between right holders of audiovisual content and Video-on-Demand platforms.

The proposed Directive will also help publicly accessible libraries or museums, archives or film or audio heritage institutions to digitise out-of-commerce works, such as books or films that are protected by copyright, but no longer available to the public.

Improved copyright rules for education, research, cultural heritage and inclusion of disabled people

The proposed Directive seeks to introduce new copyright exceptions to benefit teachers, researchers, cultural heritage institutions and visually impaired people. In particular, the exceptions would

- allow educational establishments to use materials to illustrate teaching through digital tools and in online courses across borders;
- allow reproductions and extractions to be made by research organisations in order to carry out text and data mining of works to which they have lawful access for the purposes of scientific research;
- allow cultural heritage institutions to preserve works digitally; and
- allow access to published works for persons who are blind, have other visual impairments or are otherwise print disabled.

Fairer online environment for creators and press publishers

The third goal of the proposed package is to reinforce the position of right holders to negotiate remuneration for the online exploitation of their creative content on video-sharing platforms such as YouTube® or Dailymotion®. Under the proposed rules, these types of hosting providers that give access to large amounts of copyright works will be required to deploy effective means such as technology to detect automatically songs or audiovisual works which right holders have identified and on which they have reached an agreement with the platforms either to authorise or remove these works. This obligation also applies when the hosting providers are eligible for the liability exemption provided for in Article XII.19 of the Belgian Code of Economic Law.

Furthermore, the Commission proposes to introduce a new related right for press publishers, similar to the right that already exists for film producers, record (phonogram) producers and other players in the creative industries like
This new right must help press publishers to use their content with online services and fight against piracy. In return, the press publishers are obliged to inform authors about the profits which they made with their works.

**Court of Justice of European Union Clarifies Relationship between Hyperlinking and Communication of Copyright Works**

On 8 September 2016, the Court of Justice of the European Union ("ECJ") issued a long-awaited ruling on hyperlinking and copyright law (Case C 160-15, GS Media v. Sanoma Media Netherlands). In its ruling, the Court departed from its previous case law – notably from its earlier decision in the Svensson case – and clarified whether hyperlinks ought to be considered as an act of communication within the meaning of current EU legislation.

This judgment stems from a reference for a preliminary ruling from the Dutch Supreme Court in proceedings between Sanoma – the publisher of Playboy magazine – and GS Media. The dispute before the Dutch Supreme Court concerns a publication on a website – Geenstijl.nl – ran by GS Media. Sanoma argued that the publication of hyperlinks to other websites hosting unpublished photographs of Dutch celebrity Britt Dekker without its permission constituted a communication to the public and thus amounted to a copyright infringement.

GS Media was initially sued before the Amsterdam District Court. The dispute was subsequently appealed to the Amsterdam Court of Appeal and to the Supreme Court, which decided to stay the proceedings and refer a question to the ECJ concerning the interpretation of Article 3, § 1 of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society. According to this provision, “Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them”. In particular, the Supreme Court asked the ECJ whether the publication of a hyperlink to another website operated by a third party, which is accessible to the general internet public and on which works protected by copyright are made available to the public, without the authorisation of the copyright holder constitutes an act of communication to the public.

The ECJ adopted a teleological approach of Directive 2001/29 which seeks to ensure a fair balance between, on the one hand, the interests of copyright holders and related rights and, on the other, the protection of the interests and fundamental rights of internet users, in particular their freedom of expression and of information, as well as the general interest.

In this context, the ECJ recalled its earlier case law related to the concept of “communication to the public”, which requires an individual assessment as well as the application of complementary criteria. Those criteria include, first, the deliberate nature of the intervention, i.e. when the user intervenes, in full knowledge of the consequences of its action, in order to give access to a protected work to its customers. Second, the concept of the ‘public’ covers an indeterminate number of potential viewers and implies a fairly large number of people. Third, it must be assessed whether the communication has a profit-making purpose.

The ECJ specified that it cannot be inferred from such case law – which concerned only the posting of hyperlinks to works that have been made freely available on another website with the consent of the right holder – that the posting of hyperlinks would automatically amount to a “communication to the public” when the works at issue have been published on the other website without the right holder’s consent.

The ECJ insisted on the fact that the Internet is of particular importance to freedom of expression and of information and that hyperlinks contribute to its sound operation. Moreover, as it may prove difficult for individuals to ascertain whether the works involved are protected and whether the right holder has consented to their publication on the internet, the ECJ held that the earlier approach in the Svensson case – which considered, as a matter of principle, that hyperlinks were acts of communication – could be potentially harmful to these freedoms.

On that basis, the ECJ held that when assessing whether a hyperlink is a “communication to the public”, “it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know
or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which knowledge must be presumed”.

Conversely, if it is established that the person knew or ought to have known that the hyperlink provides access to a work illegally published – e.g. if that person was notified by the right holder – the provision of that link constitutes a communication to the public and, therefore, should be prohibited. Moreover, the same applies if that link allows users to circumvent the restrictive measures taken by the site where the protected work is posted in order to restrict the public’s access to its own subscribers.

Finally, the ECJ enshrined a new presumption. When the posting of hyperlinks is undertaken for profit, it can be expected that the person who posted such a link carried out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead. In such a framework, and in so far as the presumption is not rebutted, the publication of a hyperlink to a work illegally posted on the Internet constitutes a “communication to the public”.

GS Media, which provided the hyperlinks to the files containing the photos for profit and knew that Sanoma had not authorised their publication on the Internet, was aware of the illegal nature of the publication and could not rebut the presumption that it posted those links in full knowledge of the illegal nature of that publication. Therefore, the ECJ held that it appears, subject to the verifications to be made by the referring court, that GS Media made a “communication to the public”.

Does Champagne Sorbet Infringe Protected Designation of Origin for “Champagne”?

On 13 March 2014, the Court of Appeal of Brussels delivered a judgment in a dispute with regard to “protected designations of origin” (“PDO”) and, specifically, the protection of the designation for Champagne. In separate proceedings before German Courts, a question of the use of “Champagne” for sorbet was referred to the Court of Justice of the European Union (“ECJ”).

Delhaize commercialised a sorbet of which the packaging contained the denomination “Champagne”. The term “Champagne” is registered as a PDO. Moreover, the list of ingredients of the sorbet indicated that the sorbet contained “cava” in an equal quantity as the quantity of Champagne, namely 8.5%. The organisation “Comité Interprofessionnel du Vin de Champagne” brought an action against Delhaize for infringement of its PDO before the President of the Commercial Court of Brussels in preliminary proceedings on the merits (procedure zoals in kortgeding/procédure comme en référé). On 15 April 2013, the President found that Delhaize had infringed the PDO and ordered Delhaize to cease any distribution and commercialisation to the public of the sorbet together with “Champagne”, except for the mentioning of the product on the label in order to provide information on the composition of the product, which is legally required. Furthermore, Delhaize was ordered to withdraw any product containing the denomination “Champagne” from its stores. Delhaize appealed against the decision to the Court of Appeal of Brussels.

The Court of Appeal held that the offering for sale of the “sorbet Champagne” by Delhaize infringes the European and national rules on designations of origin. The court based its decision on the fact (i) that Delhaize exploits the reputation of the PDO “Champagne” and takes advantage of this; (ii) that the offer contains a misrepresentation as to the nature of the product that is pictured on the packaging; (iii) that the product also contains a comparable ingredient, cava, which is substitutable for Champagne; (iv) that the PDO “Champagne” is mentioned four times on the packaging, while it is only legally required to be mentioned in the list of ingredients; (v) that Champagne has not been used in a sufficient quantity in order to confer upon the product an essential characteristic; (vi) that the low percentage of Champagne deteriorates the reputation of the PDO; (vii) that the percentage of incorporation of Champagne is not indicated in the immediate proximity of the sales description; and (viii) that the presentation is misleading and contrary to the requirements of professional diligence and, furthermore, that it is susceptible to change in a substantial manner the economic behaviour of the average consumer who, due to the false information reproduced on the front of the packaging, is misled as to the characteristics of the product and its composition.
With regard to the claimant’s demand to cease and desist “any production, distribution and commercialisation of the sorbet “Champagne” under this denomination, packaging, and with that composition” the court reformed the decision at first instance because it was deemed to be too vague. Accordingly, the court ordered Delhaize to cease and desist any distribution and commercialisation to the public of the sorbet “Champagne”, under this denomination, under the packaging as was reproduced in the judgment and with its composition.

Interestingly, on 2 June 2016, the Supreme Court of Germany (Bundesgerichtshof) referred a number of questions to the ECJ regarding the use of a PDO for the denomination of a foodstuff that is not covered by the registration when the PDO product is used as an (essential) ingredient. The preliminary ruling of the ECJ on these questions is expected in early 2017.

**Tax Deduction for Patent Income Ended on 1 July 2016**

A Law of 3 August 2016 repealed Articles 205(1) to 205(4) and Article 236bis of the Belgian Income Tax Code (Wetboek van de inkomstenbelastingen / Code des impôts sur les revenus – “ITC”) regulating the Belgian regime for patent income deduction. The new rules apply retroactively as from 1 July 2016. This specific regime was abolished as a result of its failure to satisfy the conditions set out in the Base Erosion and Profit Shifting (“BEPS”) program of the OECD. The Belgian government will therefore refrain from granting further deductions for patent income.

The Law of 3 August 2016 provides for a transitional regime. Taxpayers can apply for an extension until 30 June 2021 of the tax deduction for patents applied for before 1 July 2016 or, in case of acquired patent or licensed rights, if these rights were acquired prior to that date.

The government intends to propose a new tax deduction regime for investment in innovation shortly.

**Trade Mark Holders to Clarify Scope of Goods and Services**

The EU Intellectual Property Office (“EUIPO”) recently invited owners of EU trade marks filed before 22 June 2012 and covering at least one entire class heading to clarify the scope of their trade mark’s protection. These owners were requested to file a declaration to either confirm their registration or suggest a suitable amended specification. This follows the entry into force, on 23 March 2016, of the new EU Trade Mark Regulation (See, this Newsletter, Volume 2016, No. 3, p. 7) as well as the judgment of the Court of Justice of the European Union (“ECJ”) in IP Translator (See, this Newsletter, Volume 2012, No. 8, p. 4).

In its judgment, the ECJ held that specifications of goods and services were to be given their ordinary meaning. This means that, while a trade mark filed for a class heading was formerly considered to be registered for all goods and services in this particular class, any goods or services not specifically covered by the normal meaning of the terms used are now excluded from the EU trade mark’s protection. As a consequence, certain goods and services for which protection was previously considered to be granted under a specific class heading may no longer be covered. The trade mark holder may thus find it more difficult to assert protection for those goods or services not explicitly mentioned in the application.

**Wi-Fi Providers Required to Password-protect their Network and Monitor Users’ Identity**

The Court of Justice of the European Union (“ECJ”) held on 15 September 2016 in Mc Fadden v Sony Music Entertainment that a shopkeeper offering free Wi-Fi to its customers is generally not liable for copyright infringements committed by users of the network but might nonetheless be required to protect his network by a password and share this password with identified users only. This judgment provides welcome guidance on the potential liability and the duty of care for those who make available a Wi-Fi network.

The dispute arose between Mr. Mc Fadden, the owner of a shop providing lighting and sound systems in Germany, and the German branch of Sony Music Entertainment. In 2010, the free and unprotected Wi-Fi connection offered by Mr. Mc Fadden in his shop was used by a third party to upload and make available to the public a music track owned by Sony, without the consent of the rights holders. The German court before which Sony had brought an action referred questions for a preliminary ruling to the ECJ, mainly regarding the potential liability of Mr. McFadden for infringement of Sony’s copyright.
The ECJ first declared that making a Wi-Fi network available to the general public free of charge constituted an "information society service" if the activity is performed by the service provider for the purpose of advertising his goods or services. The ECJ then went on to state that, as set out in article 12(1) of Directive 2000/31/EC, service providers cannot be held liable for information transmitted to them by the recipients of that service on the threefold condition that such providers do not initiate such a transmission, do not select the receiver of that transmission and do not select nor modify information contained in the transmission. Consequently, in the present case, the ECJ found that Sony was not authorised to seek compensation from Mr. Mc Fadden for a copyright infringement committed by a third party.

Nonetheless, the ECJ held that service providers like Mr. Mc Fadden could be ordered by national courts to terminate and/or prevent further copyright infringement. A fair balance should then be struck between Sony’s fundamental right to the protection of its intellectual property, Mr. Mc Fadden’s right of freedom to conduct a business and the customers’ freedom to information. In this respect, the ECJ found that the measure of securing the Wi-Fi network by means of a password was capable of striking such a fair balance and dissuade Wi-Fi users from infringing intellectual property rights although only if these users were required to reveal their identity to obtain the password and were therefore prevented from acting anonymously. The ECJ ignored in this case the opinion of its Advocate-General who had concluded that compelling network providers to filter the access to their Wi-Fi networks was disproportionate.

This judgment partly empowers right holders to act against free Wi-Fi providers. However, these cannot be held liable for damages. The ECJ avoids placing an additional burden on the development of the European digital economy by protecting operators of free public Wi-Fi, albeit at the expense of online anonymity.
Brussels Court of Appeals Orders Cessation of Unfair Competition by Former Employee

The freedom of work is not an absolute right for the employee as the employee’s right to compete with his employer is limited by law and by contract. During the term of the employment agreement the employee is prohibited from exercising any competing activity. Following the end of the employment agreement the former employee must refrain from engaging in acts of unfair competition. In addition, if the employment agreement contains a non-compete clause, the former employee must also temporarily refrain from legitimate forms of competition.

The question arises which actions a former employer can take to fend off unfair competition by his former employee.

In a recent judgment (Brussels, 21 April 2016, A.R. 2016/CB/1, www.socialeye.be), the Brussels Labour Court of Appeals confirmed that acts of unfair competition by former employees constitute a serious infringement of the former employer’s rights and, having established that the condition of urgency was fulfilled, ordered the immediate cessation of these acts.

In the proceedings against the former employee, the President of the Labour Court of Appeals decided that urgent interim measures were required in order to protect the apparent rights of the Belgian company. The spreading of disparaging and misleading information concerning the Belgian company (for the purpose of luring away its customers), the use of confidential information about customers of the Belgian company and the attempt to create confusion between products of the Belgian company and the new employer were considered as acts of unfair competition and their cessation was ordered under forfeiture of a daily penalty in case of non-compliance.

These judgments confirm the possibility to achieve the immediate cessation of acts of unfair competition by a former employee and his new employer. However, in order to obtain damages to compensate for the injury caused by these acts, the former employer will have to introduce separate proceedings.
Bill to Create Market Court in Brussels Court of Appeal

On 15 July 2016, the federal government submitted a Bill to the Chamber of Representatives which provides for various changes to Belgium’s judicial system (Wetsontwerp tot wijziging van de rechtspositie van de gedetineerden en van het toezicht op de gevangenissen en houdende diverse bepalingen inzake justitie/Projet de loi modifiant le statut juridique des détenus et la surveillance des prisons et portant des dispositions diverses en matière de justice) (the “Bill”).

The Bill follows up on the Policy Note on Justice published by the Minister of Justice (the “Minister”) on 10 November 2015 (See, this Newsletter, Volume 2015, No. 11, p. 17), in which the Minister announced a pilot project to reform the procedure at the commercial courts, as well as the creation of a so-called “Market Court” (“Marktenhof”/“Cour des Marchés”) at the Brussels Court of Appeal. The preparatory works for the Bill explain that the proposed reform in relation to the commercial courts requires additional research and consultation and is therefore not yet ripe for legislative action. By contrast, the Bill does contain the necessary proposals to bring about the Market Court.

The Bill’s preparatory works explain that a number of important competences have been attributed to the Brussels Court of Appeal in relation to regulated markets, such as the competence to rule on appeal in cases against the Belgian Competition Authority (Belgische Mededingingsautoriteit/Autorité belge de la Concurrence), the Financial Services and Markets Authority (Autoriteit voor Financiële Diensten en Markten/Autorité des services et marchés financiers), the Belgian Institute for Postal Services and Telecommunications (Belgisch Instituut voor Postdiensten en Telecommunicatie/Institut belge des Services Postaux et des Télécommunications), and the Commission for the Regulation of Electricity and Gas (Commissie voor de Regulering van de Elektriciteit en het Gas/Commission de Régulation de l’Électricité et du Gaz). According to the preparatory works, it is necessary to embed these specialised competences in a separate, specialised section within the Brussels Court of Appeals, by analogy to the civil courts, the criminal courts, the family courts and the courts for the enforcement of penalties that exist within the courts of first instance.

If the Bill is adopted, the Market Court will be competent to hear most cases that currently pertain to the exclusive jurisdiction of the Brussels Court of Appeal. In view of the technical nature of the matters concerned and given the fact that the Market Court will rule at first and last instance, the Market Court will be sitting with three judges. It will consist of several so-called “market chambers” (“kamers voor marktzaken”/“chambres des affaires de marché”), each composed of at least one magistrate who was specifically recruited on the basis of his/her expertise in relation to economic, financial or market legislation. The Market Court will hear cases in both Dutch and in French.
Court of Justice of European Union Allows Bundling of Computers and Software

On 7 September 2016, the Court of Justice of the European Union ("ECJ") held that the sale of a computer equipped with pre-installed software does not constitute, in itself, an unfair commercial practice within the meaning of Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices ("Directive 2005/29/EC"), unless such a practice is contrary to the requirements of professional diligence and materially distorts, or is likely to materially distort, the economic behaviour of the average consumer. The ECJ added that, in the context of a joint offer consisting of the sale of a computer equipped with pre-installed software, the failure to indicate the price of each of those items of pre-installed software does not constitute a misleading commercial practice (Case C-310/15, Vincent Deroo-Blanquart v. Sony Europe Limited).

The ECJ delivered its judgment in response to a request for a preliminary ruling from the French Supreme Court (Cour de Cassation) in the context of a dispute between Mr. Deroo-Blanquart and Sony Europe Limited ("Sony"). Mr. Deroo-Blanquart had acquired a Sony laptop equipped with pre-installed software, including the Windows Vista Home Premium operating system. When using the laptop for the first time, Mr. Deroo-Blanquart refused to subscribe to the operating system’s "end-user licence agreement" ("EULA") and requested reimbursement from Sony of the part of the purchase price of the laptop corresponding to the cost of the pre-installed software. Sony rejected this request but, instead, offered to cancel the sale and to reimburse Mr. Deroo-Blanquart the full sale price. Mr. Deroo-Blanquart declined that offer and initiated proceedings against Sony, claiming that the sale constituted an unfair commercial practice.

Absence of the opportunity to buy each item separately at its usual price

Referring to its judgment in joined cases VTB-VAB NV v. Total Belgium NV and Galatea BVBA v. Sanoma Magazines Belgium NV (See, this Newsletter, Volume 2009, No. 4, p. 16), the ECJ noted that joint offers qualify as business-to-consumer commercial practices within the meaning of Article 2(d) of Directive 2005/29/EC. It continued by stating that a joint offer is "unfair" only on the dual condition that it (i) is contrary to the requirements of professional diligence; and (ii) materially distorts or is likely to materially distort the economic behaviour of the average consumer.

With respect to the first condition, the ECJ found that Sony had in all likelihood observed the requirements of honest market practices and of the principle of good faith. In this regard, the ECJ required the national court to consider the following circumstances in the context of its overall assessment of the circumstances of the case:

- The sale by Sony of computers with pre-installed software meets the expectations of a significant proportion of consumers. Rather than purchasing a computer and software separately, consumers prefer to purchase a computer that is already equipped and ready for immediate use.
- Prior to the purchase of the computer, Mr. Deroo-Blanquart was duly informed of the existence and nature of each item of pre-installed software by Sony’s retailer.
- When Mr. Deroo-Blanquart used the computer for the first time, Sony offered him the option of either subscribing to the EULA or cancelling the sale.

With respect to the second condition, the ECJ reiterated that the economic behaviour of the average consumer is materially distorted when his ability to make an informed decision is significantly undermined and, consequently, he is caused to make a decision that he would not have taken otherwise. The ECJ added that, to determine whether or not this was the case, the national court should pay particular attention to the fact that Mr. Deroo-Blanquart had been duly informed, prior to the purchase, that the model of computer concerned was not marketed without pre-installed software and that he was therefore, in principle, free to choose another model of computer, or another brand, with similar technical specifications, sold without software or used with different software.
Failure to indicate the price of each of the items separately

Regarding the question whether Sony’s failure to indicate the price of each item of pre-installed software constituted a misleading commercial practice, the ECJ reiterated that a commercial practice is to be regarded as misleading if it omits material information that the average consumer needs in order to make an informed decision and thereby causes, or is likely to cause, the average consumer to make a decision that he would not have made otherwise. Applying this criterion to the case at hand, the ECJ found that the overall price of the computer concerned constitutes material information, but not the price of each individual component. In reaching this finding, it considered, amongst others, that the computer was only offered for sale equipped with the pre-installed software. As the price of each of those items of software does not constitute material information, the failure to indicate this price does not constitute a misleading commercial practice either.

The ECJ’s ruling is a victory for computer manufacturers and software companies in that they can continue to bundle computers and software and have no obligation to offer machines without an operating system. This has been badly received by the free software community because the bundling practice discourages the use of open source software. While the judgment relates to computers, it would seem to apply by analogy to other devices such as smartphones and tablets.
Supreme Court Defines Concept of “Public Sale”

On 9 June 2016, the Supreme Court (Hof van Cassatie / Cour de Cassation; the “Supreme Court”) issued a judgment in a dispute concerning the validity of the sale of a piece of real estate on the internet.

A real estate broker had sold real estate following a bidding procedure organised on a website. The buyer eventually disputed the validity of the sale and lodged proceedings against the broker and the owner of the website. According to the buyer, the sale constituted a public sale for which the involvement of a public notary is required. The Court of Appeal upheld that interpretation and declared the sale invalid. Consequently, the plaintiffs filed an appeal to the Supreme Court against the judgment of the Court of Appeal.

In accordance with Article 1 of the Law of 16 March 1803 on the regulation of the office of notary public (Wet van 16 maart 1803 op het notarisambt / Loi du 16 mars 1803 concernant organisation du notariat; the “Law”), only public notaries are authorised, without prejudice to the rights of the public authorities, to sell real estate publicly. However, the Law itself does not contain a definition of “public sale”. The Supreme Court has now provided clarity on the conditions that have to be satisfied for a sale to qualify as a “public sale”. According to the Supreme Court, these conditions are: (i) the existence of a public, which is gathered physically or virtually, that is given the opportunity to participate in a competitive bidding procedure; (ii) in which one participant has knowledge of bids placed by other participants, without necessarily knowing from whom the bid stems of who placed the bid; and (iii) in which it is clear from the outset that the property will be assigned to the highest bidder or will be retained. In addition, the Supreme Court noted that the fact that some formalities have to be fulfilled, for example that of prior registration, does not prevent a sale from constituting a public sale within the meaning of the Law.

Thus, according to the Supreme Court, the Court of Appeal had not erred in law by finding that the sale in question constituted a public sale for which the involvement of a public notary is required.