VAN BAEL & BELLIS

VOLUME 2017,
Nº 4

April 2017

Van Bael & Bellis on Belgian Business Law

HIGHLIGHTS

COMPETITION LAW:

Belgian Competition Authority Clears Acquisition of Pharmaceutical Wholesalers Belmedis and Others by McKesson Group, Subject to Divestments

Belgian Competition Authority Publishes 2017 Enforcement Priorities

CORPORATE LAW: Council of Ministers Adopts Draft Bill on Implementation of Ultimate Beneficial Owner Register

DATA PROTECTION: Article 29 Data Protection Working Party Adopts Guidelines on Data Protection Impact Assessment

FINANCIAL LAW: Supreme Court Confirms Wide Scope of Statutory 6-Months Cap on Penalties in Case of Early Repayment of Loan

INTELLECTUAL PROPERTY: Court of Justice of European Union Holds that Multimedia Players Integrating Hyperlinks to Movies Infringe Copyright

LABOUR LAW: New Wage Norm for Period 2017 - 2018

LITIGATION: Belgian Court Rules on Recognition of U.S. Class Action Settlements

TOPICS COVERED IN THIS ISSUE

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

VAN BAEL & BELLIS

VOLUME 2017,
Nº 4

April 2017

Van Bael & Bellis on Belgian Business Law

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

VBB on Belgian Business Law | Volume 2017, Nº 4

| COMPETITION LAW

Belgian Competition Authority Clears Acquisition of Pharmaceutical Wholesalers Belmedis and Others by McKesson Group, Subject to Divestments

On 20 April 2017, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") cleared the proposed acquisition by McKesson of Belmedis, Espafarmed, Cophana, Alphar Partners and a controlling stake in Sofiadis, subject to divestments.

The proposed transaction, concerning pharmaceutical wholesalers, was in many ways controversial. Information emerging in the notification process caused the BCA to open a separate competition investigation on suspicions of illegal pricing agreements. Consequently, in November 2016, the BCA undertook surprise inspections at the premises of several wholesalers.

The merger review process itself went into a second phase after the initial stage of the inquiry and resulted in a decision of the BCA in December 2016 that was highly critical of the proposed transaction. The BCA found that the structural characteristics of the full-line wholesale market for pharmaceutical products are conducive to tacit coordination of market conduct by the wholesalers. These characteristics include: (i) a high degree of market concentration; (ii) a similarity (or symmetry) of market players; (iii) stable demand and supply; (iv) lack of innovation; (v) exchange of information via the wholesalers' trade association; (vi) IMS data that contribute to market transparency; (vii) repeated and frequent contacts among market players (including suppliers, wholesalers and pharmacists); (viii) client loyalty of pharmacists; (ix) the straightforward client profile of pharmacists; and (x) high entry barriers. Following this, the BCA reached the conclusion that the proposed transaction would give rise to a "quasi duopoly" which made the second phase, in-depth review necessary.

Clearance of the transaction illustrates that the parties were able to address suitably the BCA's concerns.

Belgian Competition Authority Publishes 2017 Enforcement Priorities

The Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") has published its policy priorities for 2017.

As in its previous policy notes (*See e.g., this Newsletter, Volume 2016, No. 4, p. 4*), the BCA first highlights the three main areas where the BCA contributes to the improvement of the functioning of the markets, namely (i) the launching of investigations and formal proceedings against infringements of Belgian and/ or European competition laws; (ii) merger control; and (iii) the pursuit of an informal competition policy through a broad range of actions.

The BCA's policy note primarily concerns the first area. Consistent with previous years, the BCA indicates that it takes into account four factors to assess the importance of a case:

- *Impact*: The BCA assesses the damage directly caused by the alleged infringement in terms of prices, product quality and consumer welfare. Indirect forms of impact such as deterrence, are also considered.

- *Strategic significance*: An investigation carries strategic relevance where its outcome may clarify the interpretation of the law, or set precedent.

- *Risks*: The BCA is unwilling to invest resources in the conduct of an investigation which is not likely to generate results.

- *Resources*: Availability of resources necessary for the conduct of investigations are also taken into consideration.

Interestingly, the BCA also lists the sectors which it considers to constitute an enforcement priority:

- Since the BCA started publishing its enforcement priorities, liberalised sectors and network industries have always been singled out as important. Contrary to last

year, the BCA does not mention the postal sector but instead focuses on telecommunications. It makes particular references to "triple play" and "quadruple play" offers which, according to the BCA, generate higher margins and increase consumer loyalty.

- The retail sector and its dealings with suppliers has also been an area of focus for several years. The BCA stresses the importance of this sector for the economy, and notes that it constitutes an access gate to a large number of products. The BCA considers that agreements between suppliers and retailers can be anticompetitive when they limit the retailers' freedom to set their own prices or to sell online.

- In 2017, the BCA intends to concentrate once again on the services industry. The BCA will maintain its dual approach: first, the BCA will ensure that trade associations comply with competition law and second, it will advocate for the removal of regulatory barriers to enter these markets.

- Similar to its 2016 policy note, the BCA considers public procurement to be an enforcement priority. This is not surprising, given that the BCA has just published an information leaflet on bid rigging (*See, this Newsletter, Volume 2017, No. 1, p. 8*). The BCA also very recently adopted a settlement decision imposing a total fine of EUR 1,779,000 on five firms that engaged in bid-rigging (this decision will be further discussed in the May edition of this Newsletter).

- Compared to its 2016 policy note, the "digital economy and media" industries disappeared from the list. These were replaced by the pharmaceutical sector, which as the BCA mentions, is also a priority sector in other EU Member States. The BCA makes clear that it will "pay attention to every level of the value chain" from the prices fixed by pharmaceutical firms, over competition between wholesalers-distributors to competitive dynamics and innovation at the pharmacy level.

- The BCA adds this year a sixth sector to the list (which only contained five in 2016): the logistics sector has now become a priority. According to the BCA, the logistics sector includes a high number of jobs and brings added value due to Belgium's geographical position and high-density road, railway and river networks.

As for the type of infringements prioritised, the BCA will seek a balance between obvious hardcore infringements and more complex or innovative cases. This is a new addition: previously, the BCA's lack of human resources had forced it to focus on anticompetitive agreements that have a sig-nificant impact on the market.

Belgian Competition Authority Publishes its 2016 Annual Report

On 19 April 2017, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") published its annual report for 2016.

Interim Measures

In 2016, the BCA rejected two requests for interim measures. The first request was filed by football club Royal White Star following the refusal by the Belgian Football Association ("BFA") to grant the club a licence to play in the highest division of the Belgian football league, during the 2016-2017 season. The BCA considered that there were *prima facie* insufficient indications that BFA's refusal constituted an infringement of competition law (*See, this Newsletter, Volume 2016, No. 7, pp. 4-5*).

The BCA also rejected the request of Brouwerijen Alken-Maes NV ("Alken-Maes") to suspend the acquisition of Brouwerij Bosteels by Anheuser-Busch InBev NV. Alken-Maes argued before the BCA that even if this transaction was not caught by Belgian merger control rules, it had to be reviewed under the Belgian and European rules prohibiting the abuse of a dominant position. Interestingly, the BCA noted that Belgian competition law does not explicitly provide that antitrust rules do not apply to concentrations. A merger that is not subject to merger control can, however, only be assessed *prima facie* under the rules prohibiting the abuse of a dominant position if there are possible restrictions of competition that can be distinguished from the mere effect of the concentration. The BCA found that this transaction did not raise such concerns (*See, this Newsletter, Volume 2016, No. 11, pp. 6-7*).

Competition Decisions

The BCA settled two cases in 2016. The first concerned a cartel in the industrial batteries sector. The BCA imposed fines of EUR 3,857,000 on six firms which had agreed to sur-

charge customers for the lead contained in motive power batteries from 2004 to 2014 (*See, this Newsletter, Volume 2016, No. 2, p. 5*).

The second settlement decision was adopted in a case concerning a market sharing agreement between SME's in the river cruise sector. The BCA imposed a very modest fine of EUR 64,100 on one firm which did not benefit from immunity under the leniency programme (*See, this Newsletter, Volume 2016, No. 6, p. 8*).

The BCA also decided to close two investigations in 2016. The first investigation focused on the Professional Institute for Real Estate Agents ("PIR"). The BCA concluded that, despite the very limited variation between tariffs applied by real estate agents, nothing suggested that the PIR had imposed minimum scales (*See, this Newsletter, Volume 2016, No. 7, p. 4*).

The other investigation concerned Immoweb. The BCA had taken issue with a "most favoured nation" clause included in contracts between Immoweb and software developers for real estate agencies. Under these clauses, Immoweb could benefit from any more favourable conditions that the software developers would grant to platforms competing with Immoweb. Immoweb managed to meet the BCA's concerns by offering to end the most favoured nation clauses, and not to reintroduce any such clauses in its contracts for the next five years.

Merger Control

The President of the BCA, Jacques Steenbergen, considers that the BCA's "most striking" merger case in 2016 is the acquisition of the Delhaize Group by Ahold. This was conditionally approved by the BCA following the referral of the case by the European Commission (*See, this Newsletter, Volume 2016, No. 1, p. 5; and Volume 2016, No. 3, p. 3*).

The BCA also conditionally approved the acquisition of two out of the four Utopolis Cinema Complexes by Kinepolis (*See, this Newsletter, Volume 2016, No. 3, p. 4*). The BCA opened an in-depth investigation as it feared that the acquisition by Kinepolis of its second most important competitor would impede competition in the market for screening movies in cinemas, in addition to the upstream market for the distribution of movies (*See, this Newsletter, Volume 2015, No. 12, p. 8*).

The BCA further conditionally authorised the acquisition by bpost of AMP and LS Distribution Benelux in the sector for the distribution and retail of magazines and newspapers after bpost presented 10 commitments in order to prevent the new entity from restricting competition between unaddressed and addressed distribution, to guarantee the same level of quality for press distribution services, and to avoid privileged treatment of the new entity's retail outlets (*See, this Newsletter, Volume 2016, No. 11, p. 6*).

In addition, two concentrations were cleared without conditions: the acquisition of Mobile Vikings and the client base of Jim Mobile by Medialaan (*See, this Newsletter, Volume 2016, No. 1, p. 6*), and the acquisition of Group Cheyns and Cheyns by Cebeo.

Formal Opinions

The BCA issued several opinions in 2016. In an opinion to the Federal Minister of Economy, the BCA made clear that collective labour agreements do not fall within the scope of European and Belgian competition laws. The BCA also indicated in another opinion that setting conditions to benefit from a tax exemption is a measure which falls outside the scope of competition law, especially when it is decided by public authorities on grounds of the public interest. The BCA furthermore declared itself as without competence to determine whether the Walloon draft Decree creating a guarantee fund for rents complies with State aid rules. These rules are exclusively applied by the European Commission.

Finally, the BCA issued an opinion on the draft bill concerning abuse of significant market position ("*misbruik van aanmerkelijke marktpositie*"/"*abus de position de marché significative*"). The concept of significant market position contemplated in this draft bill is an open-ended notion meaning that there is a link of economic dependence between buyer and seller (*See, this Newsletter, Volume 2015, No. 11, p. 7*). According to the BCA, abuses of significant market positions would be distinct from the abuses of dominant position already prohibited under Belgian and European competition laws. However, should a specific provision prohibiting abuses of significant market positions be introduced into Belgian competition law, the BCA fears that the number of complaints which it receives would increase dramatically and this would jeopardise the enforcement of the current competition law provisions.

Advocacy

The BCA adopted several guidelines in 2016:

- New leniency guidelines which replaced the 2007 leniency guidelines and entered into force on 22 March 2016 (*See, this Newsletter, Volume 2016, No. 2, pp. 5-6*);
- A compliance guide for SME's (*See, this Newsletter, Volume 2016, No. 8, pp. 4-5*);
- An information guide on bid rigging and public procurements, which the BCA prepared in 2016 and adopted early 2017 (*See, this Newsletter, Volume 2017, No. 1, p. 8*).

In addition, the President of the BCA offered two informal opinions in the insurance and agricultural sectors.

Finally, the BCA assessed the results of its activities using the methodologies developed by the OECD and by the European Commission. The BCA concluded that the positive effects of its activities for Belgian firms and consumers significantly outweighed their cost. Although lower than 2015, the BCA considers its impact on prices ranges from EUR 369.5 million to EUR 394.2 million in 2016 (depending on the methodology used), which the BCA considers to be "excellent". The President of the BCA also expressed his satisfaction with his ability to hire additional staff in 2016. As a result, no less than 13 new officials will be joining the BCA in 2017.

Belgian Competition Authority Unconditionally Clears Acquisition of Corelio Connect Noord and Others by Mediahuis

On 26 April 2016, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") cleared the acquisition by Mediahuis NV of control over advertisement and media companies Corelio Connect Noord, Vlaams-Brabantse Mediamaatschappij, Concentra Media Nederland, Digital Media Facilities, De Buren, Coldset Printing Partners, and Corelio's and Concentra's printing order portfolios, as well as joint control over De Vijver Media, De Vijver, Nostalgie, Vlaanderen Eén, Mass Transit Media, Regionale TV Media and Exuvis.

After phase I analysis, the BCA concluded that this transaction does not pose any risk to workable competition on the relevant media and advertisement markets (the national market for Dutch language Belgian paid newspapers, the national market for national advertisements in Dutch language newspapers, non-paid papers and on-line, and the Flemish Community market for the sale of commercials on national television channels). The BCA therefore authorised the transaction without conditions.

Belgian Competition Authority Unconditionally Clears Acquisition of Zetes by Panasonic

On 13 April 2017, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") cleared the acquisition by Panasonic Corporation of Zetes Industries SA. Zetes is a Belgian company specialised in personal identification (through the production of electronic identity cards), and the automatic identification and data capture systems of goods at different levels of the supply chain using code readers and small ruggedised mobile computers.

The BCA analysed the impact of the transaction on the market for large ruggedised mobile computers, and the segment of the market for automatic data capture solutions concerning the identification of goods. The BCA found that the transaction will not significantly impede competition on these markets: there is no risk that Panasonic will reserve its large ruggedised mobile computers for Zetes, and the market for automatic data capture solutions for the identification of goods is, according to the BCA, "i*n full expansion with many operators*". As a result, the BCA cleared the transaction without imposing conditions.

Belgian Competition Authority Fines Bid-Rigging Cartel in Public Procurement Sector

On 2 May 2017, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") imposed a total fine of EUR 1,779,000 on five firms that had engaged in bid-rigging practices in response to requests for tenders issued by the operator of the Belgian railway infrastructure, Infrabel.

This case will be discussed in further detail in the May issue of this Newsletter.

VBB on Belgian Business Law | Volume 2017, Nº 4

| CONSUMER LAW

Council of Ministers Adopts Draft Royal Decree on "Mystery Shopping"

On 28 April 2017, the Council of Ministers (*Ministerraad/Conseil des Ministres*) approved a draft Royal Decree which determines the infringements for which inspectors of the Economic Inspection will be authorised to visit companies by presenting themselves as customers, or potential customers, without disclosing their true identity (the "Draft Royal Decree"). They can therefore engage in so-called "mystery shopping".

The Draft Royal Decree implements Article XV.3/1 of the Code of Economic Law, which was established by the Law of 29 June 2016 containing miscellaneous provisions in economic matters (*Wet van 29 juni 2016 houdende diverse bepalingen inzake Economie/Loi du 29 juin 2016 portant dispositions diverses en matière d'Economie – See, this Newsletter, Volume 2016, No. 6, p. 24 and No. 7, p. 16*).

The text of the Draft Royal Decree is not yet publicly available. It remains unclear for which specific infringements mystery shopping will be made possible.

However, mystery shopping will be a last resort option to the extent that it will only be used if: (i) no other appropriate investigation methods are available; and (ii) there are indications of an infringement.

The Draft Royal Decree will now be transmitted to the Council of State (*Raad van State/Conseil d'Etat*) for review.

VBB on Belgian Business Law | Volume 2017, Nº 4

| CORPORATE LAW

Council of Ministers Adopts Draft Bill on Implementation of Ultimate Beneficial Owner Register

On 31 March 2017, the Council of Ministers adopted a draft bill on the prevention of money laundering, financing of terrorism and the use of cash (*Voorontwerp van Wet tot voorkoming van het witwassen van geld en de financiering van terrorisme en tot beperking van het gebruik van contanten (artikel 74) / Avant-projet de loi relative à la prévention du blanchiment de capitaux et du financement du terrorisme et à la limitation de l'utilisation des espèces (article 74)*; "Draft Bill").

The Draft Bill aims to implement the fourth anti-money laundering Directive 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the "Directive"). Pursuant to the Directive, the Member States must adopt a central register that stores information on the identity of the ultimate beneficial owner ("UBO") of companies, and other legal entities ("Register").

The obligation to register UBO information in the Register will apply to companies and other legal entities that have been incorporated in Belgium. These companies and legal entities will be required to provide specific information on their UBO, such as the name, the month and year of birth, the nationality and the country of residence of the beneficial owner, as well as the nature and the extent of the interest held by the UBO. For the application of the Directive, an 'UBO of a company' means the natural person who ultimately owns or controls a legal entity through direct or indirect ownership of more than 25% of the shares, voting rights or ownership interest in the company.

Access to the Register will be limited to: (i) specific public authorities, such as tax administrations and financial intelligence units; (ii) entities that are obliged to perform a customer due diligence, such as financial institutions, notaries and lawyers; and (iii) other persons or organisations having a legitimate interest. The access to information on the UBO must be unrestricted for authorities mentioned under (i). By contrast, access may be restricted for the persons and entities referred to under (ii) and (iii) if there is a risk of fraud, kidnapping, blackmail or intimidation.

Given that the text of the Draft Bill is not yet publicly available, no further details of the implementation of the Register are available at this stage. The Draft Bill will now be submitted to the Council of State (*Raad van State / Conseil d'Etat*) for an advisory opinion and may be subject to further amendments. Once finally approved by the Council of Ministers, it will be submitted to Parliament. The deadline for implementing the Directive is 26 June 2017.

VBB on Belgian Business Law | Volume 2017, Nº 4

| DATA PROTECTION

Article 29 Data Protection Working Party Adopts Guidelines on Data Protection Impact Assessment

On 4 April 2017, the Article 29 Data Protection Working Party ("WP29") adopted guidelines on "Data Protection Impact Assessment ("DPIA") and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679" (the "Guidelines").

DPIAs assess the risks for the rights and freedoms of natural persons that arise, or threaten to arise, in connection with the processing of personal data. DPIAs also help the data controller to implement risk mitigating measures. In accordance with General Data Protection Regulation 2016/679 ("GDPR"), DPIAs are obligatory when a type of processing, in particular a type that relies on new technologies, is likely to result in a high risk to the rights and freedoms of natural persons.

The GDPR provides some examples of when a form of processing is "likely to result in high risks". The Guidelines develop these examples to offer a more concrete set of criteria for the data controller to consider, which include sensitive data and systematic monitoring. The Guidelines also contain additional direction on when a DPIA is not required. Furthermore, the Guidelines explain how a DPIA should be carried out.

Finally, the Guidelines indicate when the supervisory authority should be advised, suggesting this should take place when the residual risk is high.

The recommendation of the WP29 follows the draft recommendation of the Privacy Commission on Data Protection Impact Assessments earlier this year (*See, this Newsletter, Volume 2017, No. 1, p. 15*).

The Guidelines can be found **here**.

Article 29 Data Protection Working Party Adopts Opinion on Proposed ePrivacy Regulation

On 4 April 2017, the Article 29 Data Protection Working Party ("WP29") adopted Opinion 1/2017 on the Proposed Regulation for ePrivacy Regulation (2002/58/EC) (the "Opinion").

At the beginning of 2017, the European Commission proposed to replace the current Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector ("e-Privacy Directive") with a new Regulation ("Proposed Regulation") (*See, this Newsletter, Volume 2017, No. 1, p. 13-14*).

In its Opinion, the WP29 notes the positive aspects of the Proposed Regulation, citing uniform rules across the European Union, the provision of clarity for supervisory authorities and organisations as well as consistency with the General Data Protection Regulation ("GDPR"). The WP29 also welcomes the Proposed Regulation as a complementary legal instrument to the GDPR. In addition, it is in favour of the expansion of the scope of the Proposed Regulation to include Over-The-Top ("OTT") providers.

Still, the WP29 articulates four points of "grave concern". First, with regard to the tracking of the location of terminal equipment, the WP29 points out that the Proposed Regulation gives the impression that consent is not required in these specific circumstances. However, pursuant to the GDPR, such tracking is likely to be subject to consent. Otherwise, it may only be carried out if the personal data collected is anonymised.

The second concern of the WP29 relates to the analysis of content and metadata, for which the Proposed Regulation determines different levels of protection. The WP29 does not believe that this differentiation is warranted, and points out that the starting point should be that processing communications data without the consent of all end-users is prohibited. The WP29 then proceeds to provide a list of instances in which specific forms of processing may be allowed without consent, if strictly necessary for the purposes.

Third, the WP29 recommends that terminal equipment and software must *by default* discourage, prevent and prohibit unlawful interference with it and provide information about the available options. It notes that the current obligations in the Proposed Regulation do not amount to "*privacy by default*", which is required under the GDPR. Additionally, users must be guided through easily accessible configuration menus to deviate from these default settings upon installation.

Finally, with regard to consent for tracking, the WP29 recommends an explicit prohibition on tracking walls in the Proposed Regulation, *i.e.* the practice whereby access to a website or service is made conditional upon the individual's acceptance to be tracked on other websites and services.

Article 29 Data Protection Working Party Adopts Final Guidelines on Data Portability, Data Protection Officers and Lead Supervisory Data Protection Authority

On 5 April 2016, the Article 29 Working Party ("WP29") adopted revised guidance on key implementation issues arising under the EU General Data Protection Regulation (the "GDPR"). The draft guidance was published on 13 December 2016 (*See, this Newsletter, Volume 2016, No. 12, p. 7-8*). The WP29 adopted the final guidelines after having examined the comments received during the public consultation which ended on 15 February 2017.

The final guidance concerns three important topics that are relevant under the GDPR, namely: (i) the right to data portability; (ii) data protection officers ("DPOs"); and (iii) identifying a controller or processor's lead supervisory authority ("LSA").

Data portability

The guidelines on data portability contain the most significant changes. WP29 now also provides guidance on the obligations of data processors, even though data portability only applies to data controllers. The revised guidance encourages data processors and data controllers to include in their contract an obligation imposed on the data processor "*to assist the controller by appropriate technical and organisational measures, [...] to respond to requests for exercising the data subject's rights*". Therefore, WP29 advises data controllers to "*implement specific procedures in cooperation with its data processors to answer portability requests*".

Furthermore, WP29 clarifies the data subjects' right to transmit personal data from one data controller to another data controller "*without hindrance*", and the right to request the transfer of personal data to another data controller where it is technically feasible. According to WP29 such hindrance can be characterised as "*any legal, technical or financial obstacles placed by data controllers in order to refrain or slow down access, transmission or reuse by the data subject or by another data controller*". The technical feasibility should be assessed on a case by case basis and applies when "*communication between two systems is possible, in a secured way, and when the receiving system is technically in a position to receive the incoming data*". Consequently, in accordance with Recital 68 of the GDPR, data controllers are not obliged to develop systems that are technically compatible.

Data protection officers

With regard to DPOs, the final guidance contains small changes and clarifications. The most important clarification is that the analysis as to whether or not a DPO is to be appointed is part of the documentation under the accountability principle. Therefore, a supervisory authority can request a copy of the analysis. This analysis and documentation should be updated when necessary.

Furthermore, WP29 clarifies that only one DPO can be designated for all processing activities and the DPO must be located in the EU. This is so even if the controller has no EU establishment. The DPO can be assisted by a team if necessary. Furthermore, WP29 included a confidentiality obligation for DPOs not to hinder complaints from employees to the DPO. Therefore, "secure means of communication" must be put in place to enhance communication between a DPO and employees. Notwithstanding the confidentiality obligation, the DPO can consult with or request guidance from the supervisory authority.

Lead supervisory authority

The most important clarifications in the final guidance on LSA are that: (i) in joint controller situations – *i.e.*, where two or more controllers established in the European Union

jointly determine the purposes and means of processing – in order to benefit from the on-stop-shop principle the joint controllers should designate one establishment which has the power to implement decisions about processing with respect to all of the joint controllers; and that (ii) in cases involving both controller and processor, the competent LSA should be the LSA for the controller while the LSA of the processor should only participate in the cooperation procedure.

VBB on Belgian Business Law | Volume 2017, Nº 4

| FINANCIAL LAW

Supreme Court Confirms Wide Scope of Statutory 6-Months Cap on Penalties in Case of Early Repayment of Loan

On 24 November 2016, the Supreme Court (*Hof van Cassatie / Cour de Cassation*) confirmed that the statutory cap on early repayment penalties set out in Article 1907*bis* of the Civil Code (*Burgerlijk Wetboek / Code Civil*) applies to all forms of penalties associated with an early repayment.

In the case of a voluntary early repayment of a loan by the borrower, Article 1907*bis* of the Civil Code provides that the penalty charged to the borrower must not be higher than an amount equal to six months of interest over the repaid amount.

In the case at hand, the corporate loan agreement (*i.e.*, not a consumer loan or a mortgage loan that are subject to specific, more protective, conditions) prohibited voluntary early repayment. The borrower nevertheless informed the lender that he wanted to repay the entire outstanding amount of the loan immediately and terminate the relationship with the lender. The lender accepted the early termination but charged a penalty to the borrower that was significantly higher than the maximum amount provided for by Article 1907*bis* of the Civil Code.

Since the loan agreement prohibited voluntary early repayment, the Brussels Court of Appeal was of the opinion that the penalty did not qualify as a penalty for early repayment, subject to Article 1907*bis* of the Civil Code. According to the court, it should rather be considered an indemnity for losses suffered and as compensation for early termina-tion. As a result, the penalty was deemed not to be subject to the statutory cap.

In a judgment of 24 November 2016, the Supreme Court disagreed and took a more borrower friendly approach. It held that all penalties due for a partial or full loan repayment fall within the scope of Article 1907*bis* of the Civil Code, regardless of whether or not the loan agreement contemplates the possibility of early repayment. The Supreme Court added that, as a result, the Court of Appeal could not have decided that the penalty charged in the case at hand was not subject to the statutory cap.

VBB on Belgian Business Law | Volume 2017, Nº 4

| INTELLECTUAL PROPERTY

Court of Justice of European Union Holds that Multimedia Players Integrating Hyperlinks to Movies Infringe Copyright

On 26 April 2017, the Court of Justice of the European Union (the "ECJ") held in case C-527/15 that the sale of multimedia players enabling movies illegally available on the internet to be viewed easily and for free on a television screen, qualifies as a "*communication to the public*" within the meaning of Article 3(1) of Directive 2001/29/EC of 22 May 2001 on the harmonisation of specific aspects of copyright and related rights in the information society ("InfoSoc Directive"). Therefore, such a sale constitutes a copyright infringement. The ECJ thus confirmed the opinion of Advocate General Campos Sanchez-Bordona of 8 December 2016 (*See, this Newsletter, Volume 2016, No. 12, p. 18*).

The judgment follows a reference for a preliminary ruling from the District Court of Midden-Nederland ("Referring Court") in proceedings pitting Stichting Brein ("Stichting Brein"), a foundation involved in the protection of copyright and other related rights, against Jack Frederik Wullems ("Mr Wullems"). Mr Wullems developed and sold over the internet various models of multimedia players under the name "Filmspeler". On these players, Mr Wullems had installed an open source software enabling files to be played through a user-friendly interface as well as add-ons with hyperlinks to streaming websites offering free and unrestricted access to digital content without the consent of the right holders. These properties were explicitly advertised to the public.

Before the Referring Court, Stichting Brein argued that, by selling and marketing multimedia players offering hyperlinks to protected works without the right holders' consent, Mr Wullems had made a communication to the public in breach of national copyright rules implementing the InfoSoc Directive. Hence, Stichting Brein sought a cease and desist order against Mr Wullems. The Referring Court stayed the proceedings and referred two questions for a preliminary ruling to the ECJ.

First, the Referring Court asked the ECJ whether there is a communication to the public, within the meaning of Article 3(1) of the InfoSoc Directive, when the protected work at issue has already been published without the right holder's consent. Recalling the aim of the InfoSoc Directive, *i.e.* to establish a high level of protection for authors, the ECJ first explained that the concept of "communication to the public" ought to be interpreted broadly. The ECJ then referred to its judgments in cases "*Svensson and Others*" and "*GS Media*" (*See, this Newsletter, Volume 2014, No. 2, p. 6 and Volume 2016, No. 9, p. 15*). In these cases, the ECJ had held that the availability on a website of clickable links to protected works featuring on another website constituted an act of communication pursuant to Article 3(1) of the InfoSoc Directive. The ECJ applied this reasoning by analogy to Mr Wullems' multimedia players.

The ECJ added that Mr Wullems had installed the add-ons on his devices intentionally and in full knowledge of the consequences. For the ECJ, this behaviour goes beyond the mere provision of physical facilities enabling or making a communication within the meaning of the InfoSoc Directive. In particular, this is because the streaming websites to which the hyperlinks referred to were not readily identifiable by the public and changed frequently.

The ECJ then went on to examine whether the communication was made to a "public" as is required to qualify for protection under the InfoSoc Directive. It found that the communication at issue covered all potential buyers with an internet connection, *i.e.* an indeterminate, yet potentially large, number of persons. Hence, the ECJ reasoned that the sale of multimedia players similar to the one at issue falls within the concept of "communication to the public" referred to in Article 3(1) of the InfoSoc Directive.

Second, the Referring Court sought guidance as to whether streaming (*i.e.*, the temporary reproduction made by an end-user of a copyright-protected work from a third party website) can be regarded as a "lawful use" within the meaning of Article 5(1)(b) of the InfoSoc Directive, if that copyright-protected work is offered without the right holder's authorisation.

Under Article 5(1) of the InfoSoc Directive, an act of reproduction will be exempt from the reproduction right provided in Article 2 if it satisfies the following criteria: (i) it is temporary; (ii) it is transient or incidental; (iii) it is an integral

and essential part of a technological process; (iv) its sole purpose is to enable a transmission in a network between third parties by an intermediary or a lawful use of a protected work; and (v) it does not have any independent economic significance. Additionally, pursuant to Article 5(5) of the InfoSoc Directive, the above exemption will not apply if the act of reproduction at stake conflicts with the normal exploitation of the work, or unreasonably prejudices the legitimate interests of the right holder.

Relying on the above provisions, the ECJ held that the temporary reproduction made by end-users with the help of the multimedia players was not a "lawful use" since: (i) the use of the protected work was not authorised by the right holder; (ii) temporary acts of reproduction such as those at issue adversely affect the normal exploitation of the protected works at stake, since this practice causes unreasonable prejudice to the legitimate interests of the right holders given its likely effect of diminishing the number of lawful transactions involving the protected works. Consequently, the ECJ held that the acts of reproduction under review did not satisfy the conditions set out in Article 5(1) and (5) of the InfoSoc Directive.

Brussels Commercial Court Declines to Offer Protection Provided by Well Known Trade Mark Rules

On 20 February 2017, the Dutch-speaking Commercial Court of Brussels (the "Court") delivered a judgment in a dispute with regard to an alleged infringement of the "Cipriani" trade marks.

The claimant, Altunis, manages the intellectual property rights of the Cipriani group ("Claimant") which is primarily active in the Italian cuisine catering services and retail products. The defendant runs several restaurants that mainly offer Italian food under the trade name "Il Capriani" ("Defendant"). The Defendant registered the word "Il Capriani" as a Benelux trade mark and as a domain name.

Having noticed that one of the Defendant's restaurants used the word "Cipriani" to name several dishes on its menu, the Claimant sent a cease and desist order to the Defendant. Upon receipt, the Defendant changed the word "Cipriani" into "Capriani". The Claimant then sent a new notice to the Defendant's demanding to cease the use of the word "Capriani" as a commercial name on the menus and website.

In separate proceedings, the Claimant also requested the Defendant to withdraw the Benelux word mark "Il Capriani".

The Claimant based its claim on an alleged infringement of Article 9.2 (c) and Article 9.2 (b) of Regulation (EU) 2015/2424 of 16 December 2015 amending Council Regulation (EC) 207/2009 on the Community trade mark and Commission Regulation (EC) 2868/95 implementing Council Regulation (EC) 40/94 on the Community trade mark, and repealing Commission Regulation (EC) 2869/95 on the fees payable to the Office for Harmonization in the Internal Market ("CTMR"). Furthermore, the Claimant asserted that the Defendant infringed the rules on unfair market practices.

The Court began by analysing whether the use of the word "Capriani" led to an infringement of Article 9.2 (c) CTMR which protects right holders of well-known trade marks against free riders. To benefit from this provision, four criteria must be fulfilled.

First, the Cipriani trade mark must be well-known in the European Union ("EU"). Since the Court was of the opinion that the Claimant failed to provide sufficient evidence as to the well-known character of its trade mark (*i.e.*, market shares, intensity and duration of the use of the trade mark, geographical scope, etc.), it decided that the first condition of Article 9.2 (c) CTMR was not satisfied.

Second, the litigious sign, *i.e.* Capriani, must be used in the course of trade in relation to goods and/or services. The Court found that the sign was indeed used to indicate the origin of the Defendant's goods and services. Accordingly, the Court deemed the second condition was fulfilled.

Third, the signs in question must be similar. The Court therefore compared the signs taking into account their visual, aural and conceptual similarity as well as the nature of the goods and services. The Court concluded that there is no visual, aural or conceptual similarity between the sign "Cipriani" and the sign "Capriani" taken as a whole. Consequently, the Court held that the third condition was not met.

Fourth, the use of the sign "Capriani" must take an unfair advantage of, or must be detrimental to, the distinctive character or repute of the EU trade mark "Cipriani". According to the Court, the Claimant failed to provide evidence as to the reputation of its trade mark and, further, failed to

prove that the economic behaviour of the average consumer had changed due to the use of the sign Capriani. The Court therefore stated that the fourth condition was not fulfilled.

On the basis of the above, the Court dismissed the Claimant's claim based on Article 9.2 (c) CTMR.

Finally, the Court ruled that the use of the word "Cipriani" and "Capriani" as a company name, commercial name, domain name, trade mark and on the restaurants' menus was not misleading since the Defendant did not give the impression that his business was related to Altunis and/or Cipriani. Hence, the Court concluded that the Defendant had not infringed the rules on unfair market practices.

VBB on Belgian Business Law | Volume 2017, Nº 4

| LABOUR LAW

New Wage Norm for Period 2017 - 2018

The wage norm is a percentage expressing the maximum wage cost change over a period of two years, based on the development of the wage costs in France, Germany and the Netherlands and on the evolution of the wage costs in Belgium since 1996. In order to protect Belgium's competitive position compared to that of the neighbouring countries, the wage cost increases are subject to restrictions.

The Law of 19 March 2017 (*Wet van 19 maart 2017 tot wijziging van de wet van 26 juli 1996 tot bevordering van de werkgelegenheid en tot preventieve vrijwaring van het concurrentievermogen, BS, 29 maart 2017/Loi du 19 mars 2017 modifiant la loi du 26 juillet 1996 relative à la promotion de l'emploi et à la sauvegarde préventive de la compétitivité,* M.B., *29 mars 2017*) amends the Law of 26 July 1996 in relation to the determination of the wage norm in several ways. As a consequence, the wage norm is now also influenced by past wage cost differences with our neighbouring countries. Moreover, the monitoring of the compliance with the wage norm will become much stricter.

Non-compliance with the wage norm may now result in administrative fines from EUR 250 to 5,000 (to be multiplied by the number of employees concerned, up to a maximum of 100 employees). In addition, the inspection services can rely on the National Social Security Office (*RSZ/ONSS*) and the National Bank of Belgium (*NBB/BNB*) for information on the wage development in the different sectors and companies in order to make inspections more efficient. In addition, the Joint Committees (*i.e.*, permanent bodies who determine labour and employment conditions at sectoral or subsectoral level) can request an opinion from the Federal Public Service Employment, Labour and Social Dialogue (*FOD WASO/SPF ETCS*) with regard to the conformity of a draft Collective Bargaining Agreement as to the wage norm.

The social stakeholders have agreed on a salary increase (compared to 2015 and 2016) of *maximum* 1.1% for 2017 and 2018 combined. This authorised increase comes on top of the inflation-induced adjustments. The increase may be applied to the base salary or the fringe benefits and was laid down in a Collective Bargaining Agreement of the National Employment Council of 21 March 2017 (*Collectieve arbeidsovereenkomst nr. 119 van 21 maart 2017 tot vaststelling van de maximale marge voor loonkosten-ontwikkeling voor de periode 2017-2018/ Convention collective de travail n° 119 du 21 mars 2017 fixant la marge maximale pour l'évolution du coût salarial pour la période 2017-2018, Conseil National du Travail*, http://www.cnt-nar.be/CCT-ORIG/cct-119-(21.03.2017).pdf).

The various industry sectors must now specify by 15 May 2017 how the margin of 1.1% will be implemented.

VBB on Belgian Business Law | Volume 2017, Nº 4

| LITIGATION

Belgian Court Rules on Recognition of U.S. Class Action Settlements

On 23 March 2017, the Ghent Court of Appeal (*Hof van Beroep/Cour d'Appel*) ("Court of Appeal") handed down a lengthy judgment on the merits in the well-known *Lernout & Hauspie* ("L&H") case. The judgment contains a specific section on the recognition in Belgium of two United States opt-out class action settlements.

Class action suits are legal devices that allow an individual (or a small group of individuals) to proceed in court on behalf of a much larger and unnamed group of individuals, who have suffered a similar injury and who share common claims.

While class actions form an integral part of the judicial system in the United States, European jurisdictions (with the notable exception of the Netherlands) tend to be very cautious with respect to this instrument. It is only in June 2013 that the European Union published a recommendation setting out a series of common, non-binding principles that EU Member States should adopt in order to put collective redress mechanisms in place. Based on this recommendation, some EU Member States that previously did not allow for collective redress mechanisms have since introduced them into their legal systems.

In contrast with the American class action system – where any individual who fulfils the conditions to be part of a class action will automatically be considered as part of the class bringing the action, unless that member expressively indicates his desire to be excluded from the proceedings (*i.e.*, "opt-out" system) – most European systems have embraced an "opt-in" system. In such a system, plaintiff classes are formed through the express consent of their members.

The case at hand concerns an interesting scenario in which the Belgian court, belonging to a jurisdiction in which only opt-in class actions are allowed, was asked to recognise a U.S. opt-out class action settlement.

Facts

L&H was a Belgian company incorporated in the 1980's that specialised in voice recognition. The company had a spectacular growth and was listed both on NASDAQ and on the Brussels stock exchanges. At its peak, L&H was considered to be a leading company in its field.

However, L&H went bankrupt in the early 2000's following significant securities fraud engaged in by its management.

This gave rise to both civil and criminal cases in Belgium against L&H's key executives, L&H's bank (Dexia Bank) and L&H's statutory auditor (KPMG).

In the meantime, class actions were also initiated in the United States against Dexia Bank and KPMG by investors who sought compensation for the loss suffered. Those cases were ultimately settled as KPMG agreed to pay USD 115 million and Dexia Bank agreed to pay USD 60 million. Importantly, because those cases arose in the United States, those settlements constituted opt-out settlements.

Issue

One of the key issues that arose during the proceedings before the Court of Appeal, was whether the decision of the American courts approving the class action settlements in the KPMG and Dexia Bank cases could be recognised in Belgium. This would consequently preclude the civil claimants who were part of the class that benefited from the settlement (but had not opted-out of those proceedings) from claiming damages in the Belgian procedure.

In order to answer this question, the Court of Appeal turned to the Belgian provisions governing the recognition and enforcement of foreign (*i.e.*, non-EU) judgments. Those rules are contained in Articles 22, 23, 24, 25 and 26 of the Belgian Code of Private International Law ("CPIL").

Analysis of Court of Appeal's Reasoning

At the outset of its analysis, the Court of Appeal had no difficulty to establish that the class action settlements reached in the United States consisted of "judgments" (and were therefore subject to scrutiny under Articles 22, 23, 24, 25 and 26 of the CPIL), as they were enacted by courts in the United States.

The Court of Appeal then turned to the important question of whether there was any valid justification to refuse to recognise the class action settlement in Belgium. In this regard, the Court of Appeal turned to Article 25 of the CPIL which provides for various grounds for refusing to recognise and enforce a foreign judgment as follows:

A foreign court judgment shall not be recognised and enforced in Belgium if:

1° the recognition or enforcement of this judgment would lead to a violation of public policy;

2° the rights of the defence have been violated; [...]

7° only Belgian courts had jurisdiction to rule on the matter; and

8° the foreign court's jurisdiction was based on the mere fact that the defendant was located in this jurisdiction, but without any other substantial relationship with this jurisdiction.

The plaintiffs before the Court of Appeal contested the fact that the U.S. class action settlements should be recognised in Belgium (as this would result in a limitation of their rights to claim damages).

More specifically, the plaintiffs argued: (i) that recognising the U.S. class action settlements would be a violation of public policy (Article 25, §1, 1° of the CPIL) as Belgium only recognises "opt-in" (and not "opt-out") class action mechanisms; (ii) that the U.S. opt-out class action system violated their rights of defence (Article 25, §1, 2° of the CPIL); and (iii) that the American courts had exceeded this jurisdiction and that only the Belgian Courts should have been competent to rule on this matter.

First, with respect to the public policy argument, the Court of Appeal noted that class action mechanisms have recently been introduced in Belgian law as well (See, Title II of Book XVII of the Code of Economic Law) and that, when enacting those new legal provisions, Parliament had specifically emphasised that class action mechanisms complied with Article 6 of the European Convention on Human Rights ("ECHR"). Furthermore, the Court of Appeal methodically proceeded with a comparison of the American and the Belgian class action systems, it concluded that the U.S. class action regime did not offer less procedural guarantees than the Belgian system. Indeed, the American class actions system allows for the right to appeal, organises spread-out publications and provides for an assessment of adequacy and reasonability of the settlements before enactment.

Second, the plaintiffs argued that the Court of Appeal should refuse to recognise the U.S. class action settlements as their rights of defence had been violated. This is because some members of the class were not U.S. residents and had therefore not sufficiently been informed of the proceedings, including the legal consequences of the opt-out system. However, the Court of Appeal noted that: (i) all the identifiable members of the class actions had been personally notified of the class action proceedings; (ii) the class action proceedings had featured in several newspapers such as *The Wall Street Journal* and *The Wall Street Journal Europe*; (iii) articles had been published in De Tijd and other Belgian newspapers; (iv) a website had been set up solely for these class actions' purposes; and (v) the Belgian financial institutions had also relayed the information. Consequently, the Court of Appeal concluded that a normal and diligent investor, placed in the same circumstances, would have been aware of the action. As a result, the plaintiffs' rights of defence had not been violated.

Third, the plaintiffs relied on Articles 25 7° and 8° of the CPIL and alleged that the American courts had exceeded their jurisdiction as only the Belgian Courts should have been competent to rule on this matter. The Court of Appeal dismissed this claim as well.

With respect to the application of Article 25 7° of the CPIL, the Court of Appeal found that the plaintiffs did not sufficiently demonstrate that only Belgian Courts had jurisdiction over the dispute.

With respect to the application of Article 25 8° of the CPIL, the Court of Appeal found that the American courts had

validly asserted jurisdiction since L&H had sufficient links with the United States (one of L&H's headquarters was located in Massachusetts and the company was listed on the NASDAQ stock exchange).

Therefore, the Court of Appeal held that none of the grounds listed under Article 25 of the CPIL could validly be raised in the case at hand and the U.S. class action settlements had to be recognised in Belgium.

As a consequence, all civil claimants in the proceedings before the Court of Appeal who were also part of the class that benefited from the U.S. settlements, but had not opted-out of those proceedings, were precluded from asserting their rights before the Court of Appeal.

Although the end result is not surprising, opt-out class action settlements will have to be handled with caution. Indeed, while it is likely that many L&H Belgian investors were aware of the existence and the consequences of those settlements, these investors probably never thought that the settlements would have consequences for their rights under Belgian Law. The judgment of the Court of Appeal does not imply that all class action settlements will automatically be recognised in the Belgian legal system. At the same time, the Court of Appeal's judgment confirms that U.S. opt-out class action settlements are not, per se, deprived of any legal effects in Belgium.

EU Justice Scoreboard Releases Results for Belgium

On 10 April 2017, the European Commission published its fifth EU Justice Scoreboard ("Justice Scoreboard") (**here**). The goal of the Justice Scoreboard is to provide data compiled from the different EU Member States on the quality, the independence and the efficiency of the national judicial systems. The ultimate objective is to help EU Member States strengthen and improve their legal systems.

Overall, this year's edition of the Justice Scoreboard demonstrates that the effectiveness of justice has globally increased and that some EU Members States (including Belgium) have taken initiatives to reform their judicial systems comprehensively. Key improvements include: (i) an overall reduction in the length of civil and commercial court proceedings; (ii) the fact that consumer authorities tend to solve consumer issues instead of relying on court proceedings; and (iii) an enhanced overall feeling of judicial independence. However, the 2017 EU Scoreboard also shows that the use of information and communication technologies in justice systems can still be enhanced, and that the legal aid is still not granted in some EU Member States.

As regards the results concerning Belgium, in 2015 the Justice Scoreboard shows that Belgium had one of the highest numbers of incoming first instance civil and commercial cases (for example 6.8 per 100 inhabitants against 2.6 for France), alongside Romania. Surprisingly, the Justice Scoreboard also shows that the average time needed to solve these cases is fairly low as compared to other EU Member States (only 87 days).

However, the results are less positive with respect to administrative cases. On average, Belgian courts took 444 days to solve administrative cases in 2015 (and 625 days in 2014). Likewise, the figures published by the European Commission also show an average of 623 days for judicial review in competition law cases, and 730 days for electronic communication matters. These averages are much higher than those found in other EU Member States.

While Estonia takes the lead regarding the use of information and communication technologies (electronic signature and submissions to courts), Belgium is lagging behind with only 24% of submissions being filed electronically in courts in 2015.

Finally, the Justice Scoreboard notes that while Belgium counts a fairly reasonable number of lawyers, the number of judges is too low. It is additionally noted that the number of female judges at the highest courts should increase dramatically.

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com