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April 2018

# VBB on Belgian Business Law

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# COMMERCIAL LAW

***Court of Justice of European Union Rules on Termination of Commercial Agency Contract During Trial Period***

On 19 April 2018, the Court of Justice of the European Union (the "ECJ") ruled on a request for a preliminary ruling from the French Supreme Court regarding the interpretation of Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (the "Directive") (ECJ, Case C-645/16, *Conseils et mise en relations SARL v. Demeures terre et tradition SARL*). The ECJ held that commercial agents are entitled to indemnity and compensation for damages pursuant to the Directive even if the agency contract is terminated during the trial period.

The request for a preliminary ruling was made in a dispute between a commercial agent and his principal following the termination of the commercial agency contract by the principal during the agent's trial period. Pursuant to Article 17 of the Directive, an agent is entitled, after termination of the contract, to an indemnity or compensation for damage. The national court, uncertain about the correct interpretation of that article, requested the ECJ to clarify whether the right to indemnity or compensation for damage also applies if the commercial agency contract is terminated during the trial period, given that the Directive makes no reference to such trial period.

The ECJ first of all acknowledged that, as the Directive does not regulate the provision of a trial period, such a period falls within the scope of the freedom of contract of the parties and is not as such prohibited by the Directive.

Next, in determining the scope of Article 17 of the Directive, the ECJ considered the wording, context and objective of this provision. First, as regards its wording, the ECJ stated that the indemnity and compensation regimes laid down in the Directive are not intended to penalise the termination of the contract but to indemnify the agent for his past services from which the principal will continue to benefit beyond the termination of the contractual relationship or for the costs and expenses which the agent has incurred in providing those services. Second, in relation to the context of Article 17 of the Directive, the ECJ noted that termination during the trial period is not specified as a ground for exclusion in the exhaustive list of circumstances in which no indemnity or compensation for damages should be paid, as laid down in Article 18 of the Directive. Moreover, Article 19 of the Directive prohibits parties from derogating from Articles 17 and 18 of the Directive to the detriment of the commercial agent before the agency contract expires. Third, the ECJ stressed that the Directive aims to protect the commercial agent in his relations with the principal.

For these reasons, the ECJ concluded that the right to indemnity and compensation for damages laid down in Article 17 of the Directive applies even if the termination of the commercial agency contract occurs during the trial period. Therefore, if the conditions laid down in Article 17 of the Directive are satisfied, a commercial agent must not be denied indemnity or compensation for damage solely on the ground that termination occurred during the trial period.

***Law on Reform of Business Law Published***

On 27 April 2018, the Law on the reform of business law (*Wet van 15 april 2018 houdende hervorming van het ondernemingsrecht/Loi du 15 avril 2018 portant réforme du droit des entreprises* – the "Law") was published in the Belgian Official Journal, following its adoption by the Chamber of Representatives on 29 March 2018 (*See, this Newsletter, Volume 2018, No. 3, p. 3*).

The Law marks a significant step in the modernisation of Belgian business law. It introduces a new, more inclusive, definition of the term "business" (*onderneming/entreprise*), which in turn affects the scope of application of many legislative texts. For an extensive discussion of the main novelties introduced by the Law, we refer to the December 2017 edition of this Newsletter (*See, this Newsletter, Volume 2017, No. 12, pp. 3-4*). Subject to some limited exceptions, the Law will enter into force on 1 November 2018, unless the King determines an earlier date of entry into force for specific provisions.

# COMPETITION LAW

***Belgian Competition Authority Publishes Enforcement Priorities for 2018***

The Belgian Competition Authority ("BCA") published on 27 April 2018 its list of enforcement priorities for 2018. As was the case in 2017, the pharmaceutical sector is again one of the BCA's targets for action. The BCA specifies that it emulates other European countries and will focus on "*all links of the value chain, including prices charged by pharmaceutical firms, competition between distributors with public-service obligations, and the competitive dynamics and innovation on pharmacy level*". Given the pending inquiries in the sector, this announcement does not come as a surprise.

Apart from the pharmaceutical sector, the BCA will also target telecommunications, distribution, service providers, public procurement and logistics.

The BCA's enforcement priorities can be found below:

https://www.bma-abc.be/sites/default/files/content/download/files/2018_nota_prioriteitenbeleid_bma.pdf

https://www.abc-bma.be/sites/default/files/content/download/files/2018_note_politique_priorites_abc.pdf

***Belgian Competition Authority Imposes Penalty Payments in Equestrian Sector***

On 13 April 2018, the Competition College (*Mededingingscollege/Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence*) ("BCA") imposed penalty payments on the organisers of the Global Champions League ("GCL") as well as the Fédération Equestre Internationale ("FEI").

Article IV.70(1) of the Belgian Code of Economic Law gives the Competition College the power to impose penalty payments of up to five percent of the average daily turnover of the firms concerned for non-compliance with a prior decision adopted by the Competition College.

The decision to impose penalty payments follows the interim measures adopted by the BCA on 20 December 2017 (*See, this Newsletter, Volume 2017, No. 12, p. 5*). The interim measures had been imposed to ensure that at least 60% of the invitations to GCL events would be sent to riders on the basis of their ranking in the official ranking of the FEI, and would not depend on whether riders are members of a paying team of the GCL. The BCA has now imposed penalty payments for lack of implementation of these interim measures by GCL and FEI.

The BCA reduced the amount of the penalty payments imposed on the organisers of the GCL to EUR 466 per day, accepting that, even though initiatives could have been taken to approach the intended result of the interim measures, they could not unilaterally modify the invitation rules. The penalty payments on the FEI amount to EUR 182 per day, based on their estimated turnover.

The penalty payments are due per day until the Investigation and Prosecution Service of the BCA considers that a reasonable degree of implementation of the interim measures has been attained.

# COMPLIANCE

***European Commission Proposes Whistleblower Protection Rules***

On 23 April 2018, the European Commission (the "Commission") published draft whistleblower protection legislation designed to shield persons who report breaches of EU law which they observe in their work-related activities ("*Proposal for a Directive on the Protection of Persons Reporting on Breaches of Union Law*" – COM(2018) 218 final of 23 April 2018 – the "proposed Directive"). According to the Commission, such protection is needed because whistleblowers play a critical role in uncovering unlawful activities that hurt the public interest.

The protection will be afforded for a wide range of EU law breaches in sectors as diverse as public procurement, financial services, public health (including pharmaceuticals and medical devices), food, transport and animal health; and activities as wide-ranging as competition law, environmental protection, consumer protection, data protection and privacy, money-laundering and terrorist financing, product safety and public procurement. This is the first time that EU law has addressed whistleblowing in such a comprehensive manner.

Many organisations will be subject to the new rules as these will apply to all firms with at least 50 employees or with an annual turnover or balance sheet of more than EUR 10 million. These firms will be required to create internal channels and procedures to handle whistleblowers' reports. Importantly, the new rules will also apply to governmental entities such as states, regional administrations, municipalities with a population of more than 10,000 and other entities of public law. Whistleblowers may be employees, self-employed persons, shareholders, directors, volunteers, trainees or any person working under the supervision and direction of a contractor, subcontractor or supplier.

EU Member States will have to complement the internal reporting procedures with external reporting channels. In addition, reporting will have to result in follow-up and feedback and will require the back-up of a record-keeping obligation. There will also be elaborate rules to avoid retaliation against whistleblowers, as well as remedies if the anti-retaliation measures fail.

The proposed Directive will now be discussed by the European Parliament and representatives from EU Member States. If adopted, the Member States will be obliged to adopt implementing legislation, the provisional deadline for which is May 2021. Currently, Belgian law provides for limited forms of protection for whistleblowers, primarily in the financial services sector (*See, this Newsletter, Volume 2017, No. 8, p. 15*). There are also provisions for protecting whistleblowers in the public sector, but only in respect of the Federal Administration and the Flemish Region.

The proposed Directive and additional information on the proposal can be found here: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=620400.

# CONSUMER LAW

***European Commission Proposes "New Deal for Consumers"***

On 11 April 2018, the European Commission (the "Commission") issued a new package of proposals designed to increase the protection afforded to consumers while also seeking to reduce administrative burdens for businesses. The Commission labelled its legislative initiative somewhat ambitiously a "New Deal for Consumers".

The main provisions proposed cover (i) collective actions; (ii) dual quality products; (iii) wide-spread cross-border infringements; (iv) individual remedies; (v) online marketplaces; (vi) digital services; (vii) reduced administrative burdens for businesses; and (viii) off-premise sales.

*Collective Actions*

*See, this Newsletter, Litigation.*

*"Dual Quality Products"*

The proposal also seeks to address the issue known as "dual quality products" which concerns products being marketed under the same brand and packaging across several EU Member States but where the quality is not uniform across the different markets. In relation to dual quality products, the proposal updates Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ("UCPD").

The amendment seeks to include as a "misleading commercial practice" the marketing of a product as being identical to the same product marketed in several other EU Member States, if those products have a significantly different composition or characteristics causing or likely to cause the average consumer to take a transaction decision that he would not have taken otherwise.

This follows on the heels of action which the Commission took in September 2017 when it adopted guidance on how to apply and enforce the relevant EU food and consumer protection laws to dual quality products.

Moreover, the Commission's Joint Research Centre is currently finalising a common testing methodology which will help national authorities enforce these EU rules. The tests involve the composition of a common basket of products which are marketed in most EU Member States and include chemical and sensory testing. The Commission aims to present the first results by the end of 2018.

*Penalties for Widespread Cross-Border Infringements*

The proposal introduces provisions regarding penalties for both "*widespread infringements*" encompassing illegal practices that affect at least three EU Member States and "*widespread infringements with a Union dimension*" encompassing practices which harm a large majority of EU consumers. The maximum available fine will be 4% of a trader's annual turnover in the EU Member State(s) concerned. Provision for such a penalty is introduced into the following directives: (i) the UCPD; (ii) Directive 2011/83/EU of 25 October 2011 on consumer rights (the "CRD"); (iii) Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts; and (iv) Directive 98/6/EC of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.

*Individual Remedies for Consumers*

The proposal envisages that consumers will have the right to individual remedies when they are harmed by unfair commercial practices. In particular, according to the proposal, EU Member States should make both contractual and non-contractual remedies available under the UCPD. As a minimum, the contractual remedies should include the right to contract termination and non-contractual remedies should encompass the right to compensation for damages.

*Transparency for Consumers in Online Marketplaces*

The proposal introduces in the CRD additional information requirements with regard to online marketplaces. When buying from an online marketplace, the proposal makes sure that consumers will have to be clearly informed about: (i) the main parameters determining ranking of the different offers; (ii) whether the contract is concluded with a trader

or an individual; (iii) whether consumer protection legislation applies; and (iv) which trader (third party supplier or online marketplace) is responsible for ensuring consumer rights related to the contract (such as the right of withdrawal or legal guarantee).

*Consumer Rights for "Free" Digital Services*

The proposal extends the scope of the CRD to digital services for which consumers do not pay money but provide personal data, including cloud storage, social media and e-mail accounts. As a result, consumers should have a right to pre-contractual information and should be given, the ability to cancel the contract within a 14-day withdrawal period.

*Removing Burdens for Businesses*

The proposal amends the CRD by granting traders more flexibility in choosing the most appropriate means for communication with consumers. It also removes two specific obligations on traders concerning the 14-day right of withdrawal which have been proven to constitute a disproportionate burden:

- First, the proposal removes the obligation for the trader to accept the right of withdrawal even if a consumer has used an ordered good instead of only trying it out in the same way he or she could have done in a brick-and-mortar shop;

- Second, the proposal removes the obligation for the trader to reimburse the consumer even before the trader has received the returned goods back from the consumer.

*EU Member States' Freedom to Adopt Rules on Specific Forms and Aspects of Off-Premise Sales*

The proposal clarifies that the UCPD does not prevent EU Member States from adopting rules to protect the legitimate interests of consumers with regard to some particularly aggressive or misleading marketing or selling practices in the context of unsolicited visits by a trader to a consumer's home or with regard to commercial excursions organised by a trader with the aim or effect of promoting or selling products to consumers. Such restrictions must be justified on grounds of public policy or respect for private life.

More information on the "New Deal for Consumers" is available through the following link: http://europa.eu/rapid/press-release_IP-18-3041_en.htm.

***Court of Justice of European Union Confirms Status of Uber as Transport Services Company***

On 10 April 2018, the Grand Chamber of the Court of Justice of the European Union (the "ECJ") delivered a judgment confirming that Uber's UberPop ridesharing service is a "*service in the field of transport*" within the meaning of Article 2(2)(d) of Directive 2006/123 of 12 December 2006 on services in the internal market (the "Services Directive") (ECJ, 10 April 2018, Case C-320/16, *Uber France SAS v. Nabil Bensalem*). Article 2(2)(d) of the Services Directive excludes transport services from the Directive's scope. The ECJ delivered its judgment in response to a request for a preliminary ruling from a Lille Regional Court. The dispute dealt with a private prosecution and civil action brought against Uber France SAS ("Uber") by a taxi driver based, *inter alia*, on a newly introduced provision of French criminal law which prohibits and penalises the organisation of a system for putting customers in touch with persons who engage in the carriage of passengers by road without authorisation. In the case giving rise to the preliminary reference, Uber was charged with the "*unlawful organisation from 1 October 2014 onwards of a system for putting customers in contact with persons carrying passengers by road for remuneration*".

Uber maintained that the French legislation constituted a technical regulation which concerns an information society service within the meaning of Directive 98/34/EC of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services (the "Directive on Information Society Services"). That Directive requires EU Member States to notify the European Commission (the "Commission") of any draft rules laying down technical regulations relating to products and information society services, failing which those rules will be unenforceable against individuals. In the present case, the French authorities had not notified the legislation in question to the Commission prior to its promulgation.

In essence, the reference for a preliminary ruling sought to establish whether the provision of French law must be classified as a rule on information society services, subject to the obligation of prior notification to the Commission,

or whether, conversely, the provision concerns a transport service, which is excluded from the scope of the Directive on Information Society Services and the Services Directive.

In relation to the legal classification of the service provided, the ECJ followed the reasoning which it had developed earlier in Case C-434/15, *Asociación Profesional Élite Taxi v. Uber Systems Spain SL* ("Uber Spain") (*See, this Newsletter, Volume 2017, No. 12, pp. 7-8*). In that case, the ECJ held that while in principle an intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the driver meets the criteria for classification as an "*information society service*", Uber's commercial offering consists of more than an intermediary service and its service is "*inherently linked*" to the offer of transport services. The ECJ noted that Uber is involved in the selection of the non-professional drivers and provides them with the application required to connect with service users. Moreover, Uber exercises a decisive influence over the conditions under which services are provided by the drivers, for instance by (i) determining a maximum fare; (ii) receiving the fare from the passenger; (iii) subsequently forwarding the fare to the driver; and (iv) exercising a degree of control over the quality of the vehicle and the conduct of the driver.

Therefore, in *Uber Spain*, the ECJ reached the conclusion that Uber's intermediation service has to be regarded as forming an integral part of an overall service the main component of which is a transport service and that, accordingly, Uber offers a "*service in the field of transport*". In the present case, the ECJ was of the opinion that the UberPop service on offer in France is essentially identical to the service provided in Spain. However, it instructed the Lille Regional Court to verify this, based on the concrete facts.

Accordingly, subject to that verification, the ECJ concluded that the French legislation cannot be classified as a rule on information services and that, therefore, the obligation of prior notification to the Commission did not apply.

The overall result of this classification of the UberPop service as a "*service in the field of transport*" is that Uber must comply with the relevant rules for taxis and other transport companies.

This is consistent with a judgment of the President of the Brussels Commercial Court of 23 September 2015 in which, to the extent that the remuneration of UberPop drivers exceeds the actual costs which they incur, UberPop was considered to be a "taxi service" pursuant to Article 2, 1° of the Ordinance of the Brussels Capital Region of 27 April 1995 on taxi services and vehicle location services with driver (*Ordonnantie van het Brussels Hoofdstedelijk Gewest van 27 april 1995 betreffende de taxidiensten en de diensten voor het verhuren van voertuigen met chauffeur/Ordonnance de la Région de Bruxelles-Capitale du 27 avril 1995 relative aux services de taxi et aux services de location de voiture avec chauffeur*) and thus subject to the licensing requirements contained in Article 3 of the same Ordinance (*See, this Newsletter, Volume 2015, No. 10, pp. 18-19*).

# CORPORATE LAW

***Court of Justice of European Union Clarifies Judicial Competence in Squeeze-Out Procedures with Cross-Border Element***

On 7 March 2018, the Court of Justice of the European Union (the "ECJ") delivered a judgment in case C-506/16 *E.ON Czech Holding v. Michael Dedouch and others*, in which it clarified the rules on jurisdiction in relation to squeeze-out procedures.

In the case at hand, the general assembly of shareholders of a Czech company had decided on the compulsory transfer of all of its outstanding shares to its principal shareholder, German company E.ON Czech Holding AG ("E.ON") for a fixed compensation (a so-called "*squeeze-out*" procedure). Following this decision, several shareholders challenged the amount of the compensation before a Czech court.

However, E.ON argued that, in accordance with Article 2 of Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation"), which was still applicable at the time, it could only be sued before the courts of Germany in which it was domiciled. After a long procedural battle, the Czech Constitutional Court referred a question for a preliminary ruling to the ECJ in order to settle the question on competence.

The ECJ agreed that, according to a literal interpretation, the case did not fall within the scope of Article 22 (2) of the Brussels I Regulation (roughly replicated in article 24 (2) of Regulation 1215/2012 which in the meantime has replaced the Brussels I Regulation). That provision confers exclusive jurisdiction on the courts of the Member State in which a company has its seat for all proceedings relating to the validity of its constitution, its nullity or the dissolution as well as the validity of the decisions of its organs. In the case at hand, the proceedings only sought to improve the compensation but did not challenge the validity of the decision taken by the general assembly itself.

However, the ECJ was of the opinion that, by challenging the amount of the compensation, the minority shareholders had at least partially challenged the validity of the decision of the general assembly. It further noted that the principal aim of Article 22 of the Brussels I Regulation was to confer exclusive jurisdiction on those courts that are best placed to adjudicate because of the particularly close link between the dispute and the Member State in which such courts are established. Thus, on the basis of the fact that the proceedings would be governed by Czech law as well as the fact that the challenged decision of the shareholders had been drawn up in Czech and was subject to Czech law, the Court concluded that the Czech courts had exclusive competence in the case at hand.

# DATA PROTECTION

***Irish High Court Refers Questions on Standard Contractual Clauses to Court of Justice of European Union***

In a judgment of 12 April 2018, the Irish High Court (the "High Court") referred eleven questions to the Court of Justice of the European Union (the "ECJ") for a preliminary ruling. With these questions, the High Court seeks to assess the validity of Commission Decisions 2001/497/EC, 2004/915/EC and 2010/87/EU, as amended by Commission Decision 2016/2297 (the "SCC Decisions").

This new reference comes in the same legal dispute between Maximillian Schrems ("Schrems") and Facebook over the transfer by Facebook Ireland Ltd ("Facebook") to Facebook Inc. of Schrems' personal data. That dispute led to the invalidation of the EU-US Safe Harbour in 2015. Since the European Commission Safe Harbour decision was declared invalid following the ECJ's judgment in case C-362/14 of 6 October 2015 (*See, this Newsletter, Volume 2015, no. 10, p. 8*), Facebook has been transferring data to Facebook Inc. by means of standard contractual clauses ("SCCs") adopted by the European Commission in the SCC Decisions. However, Mr. Schrems argued that the SCCs do not provide adequate protection for his personal data when transferred to the US.

Remarkably, Mr. Schrems did not question the validity of the SCCs as such. Instead, Mr. Schrems requested the Data Protection Commissioner (the "DPC") in Ireland to use Article 4 of the SCCs to suspend the transfer of data to Facebook Inc. to the US. Nevertheless, the High Court took the view that there was a larger issue as to the validity of the SCC Decisions having regard to Articles 7, 8 and/or 47 of the Charter of Fundamental Rights of the European Union and therefore decided to refer questions to the ECJ.

The upcoming judgment is important as SCCs are currently relied on by thousands of companies to transfer data outside of the European Economic Area.

***Article 29 Working Party Explains When SMEs are Exempt from Keeping Records of Processing Activities***

Further to Article 30 of the Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation – "GDPR"), organisations have to maintain records of their processing activities. These records provide an overview of the organisation's processing activities, indicating (i) whether it acts as a processor or a controller; (ii) the purposes of the processing; (iii) a description of the categories of data subjects and the categories of personal data; (iv) to which recipients the personal data may be disclosed; (v) whether personal data are transferred to third countries; (vi) when the personal data will be erased; and (vii) a description of the technical and organisational security measures.

Article 30 (5) of the GDPR provides for a derogation to this obligation for SMEs with fewer than 250 employees. However, this derogation does not apply to a processing activity which:

- is likely to result in a risk for the rights and freedoms of data subjects;
- is not occasional; or
- includes special categories of personal data (as referred to in Article 9(1) of the GDPR).

The Article 29 Working Party notes that the record of processing activities is a very useful tool to analyse the implications of any processing.

The Working Party furthermore explains that the exceptions to the derogation only apply to the relevant activities. Hence, an organisation with less than 250 employees must only keep records of the specific activities that fall in the group defined by one of the three criteria. For example, SMEs usually process personal data on their employees on a regular basis. Hence, such processing is not occasional and must be included in the record of processing activities. However, this organisation must not keep records of its other data processing activities provided that these do not result in a risk (as opposed to a high risk) for the rights and freedoms of data subjects, and do not include special categories of personal data.

Finally, the Article 29 Working Party encourages supervisory authorities to make available simplified models of the records for SMEs. The full text of the position paper can be consulted here.

***Article 29 Working Party Statement on Encryption***

On 11 April 2018, the Article 29 Working Party ("WP29") published a statement on encryption and its impact on the protection of individuals with regard to the processing of their personal data in the European Union (the "Statement"). With the Statement, the WP29 adds its opinion to the ongoing discussion on whether law enforcement should be allowed a "backdoor" or "master key" to encrypted files and messages.

The WP29 communicates three key messages to safeguard the individual right to confidentiality and privacy while taking into account the need to balance different public interests:

First, given the widespread use of services enabled by information and communication technologies, WP29 is of the opinion that strong and reliable encryption is necessary.

Second, WP29 believes that encryption must remain standardised, strong and efficient. For this reason, WP29 is of the opinion that backdoors (*i.e.*, vulnerabilities secretly implemented in a particular software by its developer) and master keys (*i.e.*, keys allowing the decryption of every message encrypted with a specific software) deprive encryption of its utility and cannot be used in a secure manner.

Third, WP29 refers to the large quantities of data that law enforcement agencies already have access to via existing legal powers. WP29 is of the opinion that this access must remain proportionate and targeted, but at the same time should be under control of the judiciary, supported by tools such as e-evidence to allow faster and easier access for enforcement. Also, the capability of interpreting data should be improved.

Therefore, the WP29 is of the opinion that any obligation aiming to reduce the effectiveness of encryption techniques in order to allow enforcement access to encrypted data could seriously harm the privacy of European citizens.

The full text of the WP29 Statement can be found here.

***Article 29 Working Party Working Document on Co-Operation Procedure for Binding Corporate Rules Approval under General Data Protection Regulation***

On 11 April 2018, the Article 29 Working Party ("WP29") published a working document setting forth a co-operation procedure for the approval of "binding corporate rules" ("BCR") for controllers and processors under the GDPR (the "Working Document").

In the Working Document, WP29 aims to identify smooth and effective cooperation procedures in line with the GDPR whilst taking into account the experience of the data protection authorities with BCR approvals. WP29 focuses on two main points: first, the identification of the BCR lead supervisory authority, and second, the cooperation procedure for the approval of BCRs.

With regard to the identification of the BCR lead supervisory authority, WP29 is of the opinion that a group of firms or enterprises engaged in joint economic activity should propose a supervisory authority. This proposal should include all appropriate information justifying its proposal.

Criteria that should be applied include the location of the group's European headquarters, the place where most decisions in terms of purposes and the means of the processing are taken, and the Member State within the European Union from which most or all transfers outside the EEA will take place. The supervisory authority will then exercise its discretion in deciding whether it is in fact the most appropriate lead supervisory authority. This may also be determined by the supervisory authorities themselves.

The full text of the WP29 Working Document can be found here. WP29 also published recommendations on the approval of the processor binding corporate rules form and the controller binding corporate rules form, which can be found here (processor) and here (controller).

# INSOLVENCY

***Entry into Force of New Insolvency Law***

On 1 May 2018, the Law of 11 August 2017 concerning the insertion of Book XX "Insolvency of entities" in the Code of Economic Law (the "New Insolvency Law") will enter into force.

The principal objective of the New Insolvency Law is to move the existing insolvency rules to the Code of Economic Law in a consolidated manner. Nevertheless, the New Insolvency Law will also implement significant changes to the existing bankruptcy and judicial reorganisation procedures.

*New Criterion of Business for Scope of Application*

First, the New Insolvency Law applies the single and much broader criterion of a "business" to determine the scope of persons that may fall within the scope of bankruptcy or judicial reorganisation procedures. A "business" includes the following three categories of persons/entities:

1. any natural person independently pursuing a professional activity on a self-employed basis;

2. any legal person;

3. any other organisation without legal personality.

As a result these insolvency procedures will now also apply to (i) self-employed persons who are not traders; (ii) firms without legal personality; and (iii) not-for-profit organisations.

*Changes to Judicial Reorganisation Procedure*

Second, the New Insolvency Law brings about several minor changes to the judicial reorganisation procedure. These include:

- The requirement to obtain the confirmation of the "judicial amicable settlement" by the court and to have the court declare it enforceable;

- An increase of the minimum amount by which creditor's claims must be reimbursed pursuant to a reorganisation plan from 15% to 20%;

- The possibility for a judicial reorganisation by transfer under judicial supervision to allow the prospective bidder to select one or more non-intuitu personae ongoing contracts which he will enter into in the event his bid is successful, without requiring the consent of the other contracting parties involved.

*Changes to Bankruptcy Procedure*

Finally, the New Insolvency Law brings several changes to the bankruptcy procedure in order to provide incentives for entrepreneurs to start over and in respect of directors' liability.

# INTELLECTUAL PROPERTY

***Injunctive Relief Granted for Infringement of Unregistered Design Right***

On 2 March 2018, the President of the Dutch-language Commercial Court of Brussels (*Voorzitter van de Nederlandstalige rechtbank van koophandel te Brussel/Président du tribunal de commerce néerlandophone de Bruxelles* – the "Court") granted Obumex, a manufacturer of luxury kitchens and other furniture, injunctive relief for infringement of unregistered design rights and copyright.

The dispute arose after a construction company (the "Defendant") published pictures of a kitchen designed by Obumex together with an architect in its own leaflet on 4 October 2016. Obumex claimed that the kitchen, as well as the bookcase, the fireplace and the lighting elements forming part of the same project, were protected by unregistered design rights and copyright. Hence, it sought an injunctive relief against the Defendant.

The Court recalled that unregistered design rights do not require prior registration to provide protection.

The Court then went on to examine whether the kitchen, the bookcase, the fireplace and the lighting elements each satisfied the requirements of novelty and individual character. To that end, the Court assessed whether the overall impression produced by these designs was different from that of any design which had previously been made available to the public. It concluded that these designs were original, partly because the Defendant did not provide evidence proving otherwise. Given that Article 85, paragraph 2, of Regulation 6/2002 on Community Designs provides for a presumption of validity of unregistered designs, it was for the party challenging the validity of the unregistered design to come up with supporting evidence.

Having concluded to the originality of the designs at stake, the Court then verified whether the Defendant infringed the intellectual property rights of Obumex.

Relying on the three-year validity of unregistered designs and the date on which the designs at stake were first made available to the public (*i.e.*, 11 September 2014), the Court concluded that Obumex' unregistered designs were valid until 10 September 2017, i.e., after the release of the Defendant's leaflet. The Court then found that a simple comparison between the protected designs and the designs shown in the Defendant's leaflet showed an infringement of the copyright and unregistered design right of Obumex.

The Court therefore granted the injunctive relief together with a penalty payment.

***Failure to Inform Court about Circumstances Giving Rise to Doubts regarding Validity of Design While Seeking Seizure Constitutes Fault under Belgian Law***

In a judgment of 28 February 2018, the Brussels Court of Appeal (the "Court") held that, by failing to inform it that specific circumstances could cast doubt on the validity of the right at stake, *in casu* a design right, while seeking seizures on that basis, the right holder committed a fault within the meaning of Article 1382 of the Civil Code, *i.e.*, the general principle of tort liability.

The dispute arose between Devoted 2 Passion NV ("D2P"), a wholesaler active in the lighting sector, and Globall Concept BVBA ("Globall Concept"), a wholesaler active in the same sector, and Hubo Belgie NV ("Hubo"), a franchise organisation selling lighting products bought from Globall Concept directly to end-users.

In 2010, before the Brussels Commercial Court, D2P had claimed that Globall Concept and Hubo were infringing the Community design which it had registered on 10 January 2008 with the European Union Intellectual Property Office ("EUIPO"). The design concerned Christmas lights and Globall Concept and Hubo sold similar lights. Hence, D2P sought the seizure of the counterfeiting products. D2P's request was granted on 30 December 2010 and the contested goods were seized in January 2011. On 23 February 2011, Globall Concept started third party proceedings to

challenge the decision of the Brussels Commercial Court of 30 December 2010. These proceedings were declared unfounded by a decision of 10 May 2011.

On 28 March 2011, D2P brought an action before the Brussels Commercial Court seeking a cease-and-desist order against Globall Concept and Hubo as they were still selling the products concerned. The proceedings were stayed on the grounds that Globall Concept had started an invalidity application relating to D2P's Community design before the EUIPO. EUIPO ruled on 21 January 2013 that the design was invalid for lack of individual character. Following this decision, in the resumed proceedings, Globall Concept and Hubo requested the release of the seized products and lodged a counterclaim against D2P for damages on the basis of Article 1369bis of the Judicial Code. This provision enables a defendant in seizure proceedings to claim compensation from the applicant for damages caused by a seizure that was later released.

In first instance, the Brussels Commercial Court dismissed D2P's claim and awarded damages to both Globall Concept and Hubo. D2P appealed to the Court. In its judgment of 28 February 2018, the Court noted that, contrary to what Globall Concept and Hubo had maintained, Article 1369bis of the Judicial Code does not provide for an objective liability, *i.e.,* a liability not requiring a finding of fault or breach of a duty of care. Rather, D2P's liability in this respect should be assessed under the conditions laid down in Article 1382 of the Civil Code which requires the existence of a fault, a causal link and harm. An objective liability in such a situation would unduly discourage right holders to exercise their rights and to request seizures where an infringement is suspected, the Court reasoned.

The Court then examined whether D2P committed a fault within the meaning of Article 1382 of the Civil Code. In this respect, it noted that there was a presumption of validity for D2P's registered design and that the validity of the latter was only challenged by Globall Concept on 12 September 2011, *i.e.,* after the seizures in question had been carried out. Nonetheless, the Court also underlined that D2P was aware since 2007, or at least should have been aware, of circumstances potentially undermining the validity of its design since its design had been disclosed in 2006, *i.e.,* more than twelve months before its registration and therefore outside the "grace period". The Court therefore concluded that, by failing to inform the Court of those circumstances while seeking seizures on that basis, D2P committed a fault in the sense of Article 1382 of the Civil Code. The Court added that Globall Concept and Hubo had suffered harm and that the causal link between D2P's fault and this harm was established.

As a consequence, the Court rejected D2P's appeal and declared Globall Concept and Hubo's counterclaim for damages meritorious. Globall Concept was awarded EUR 161,349.06 while Hubo was awarded EUR 81,217.40.

***No Protection for Designs If Need to Fulfil Technical Function is Only a Factor Determining Features of Appearance***

In a judgment in case C-395/16 handed down on 8 March 2018, the Court of Justice of the European Union (the "ECJ") clarified Article 8(1) of Council Regulation No 6/2002 of 12 December 2001 on Community Designs (the "Regulation") following a reference for a preliminary ruling by the Higher Regional Court of Düsseldorf, Germany (the "Court").

The issue arose after DOCERAM GmbH ("DOCERAM"), a company manufacturing technical ceramic components and supplying weld centring pins to customers in the automotive, textile machinery and machinery industries, brought an action against CeramTec GmbH ("CeramTec") for infringement of its Community designs for centring pins before the Düsseldorf Regional Court. In its counterclaim, CeramTec challenged the validity of the contested designs, contending that the features of the appearances of the products were solely dictated by their technical function. The Düsseldorf Regional Court sided with CeramTec and declared DOCERAM's Community designs invalid on the ground that they were excluded from the protection afforded by Article 8(1) of the Regulation. Pursuant to this provision, design protection does not apply to features of appearance of a product that are solely dictated by its technical function.

DOCERAM appealed this decision to the Court which, in turn, decided to stay the proceedings and refer questions for a preliminary ruling to the ECJ in view of the conflicting approaches in case-law and legal doctrine as regards the application of Article 8(1) of the Regulation. One approach is that protection should be refused to a design if there are no alternative designs fulfilling the same technical function (also called the "multiplicity of forms theory"). In such a case, the possibility to have recourse to another design

to fulfil the same function would show that the design at issue is not solely dictated by its technical function. The second approach is that protection should be refused on the basis of that provision where the various features of appearance of the product are dictated solely by the need to achieve a technical solution and that aesthetic considerations are entirely irrelevant.

By its first question, the Court essentially sought guidance as to which approach should be favoured when assessing the application of Article 8(1) of the Regulation. The ECJ first recalled the need for an autonomous definition and interpretation of the concept of "features of appearance of a product which are solely dictated by its technical function" at the European level, given the absence of clear indications in the Regulation. Second, the ECJ stated that the wording of that provision does not in any way suggest that the existence of alternative designs which fulfil the same technical function as that of the product concerned would be the only criterion for determining whether a design may be granted protection. Third, referring to its case law, the ECJ recalled that the appearance of the product is the decisive factor for a design and that, therefore, Article 8(1) should be interpreted so as to rule out protection for a design if a feature of that product is determined only by the need to fulfil a technical function, while considerations of another nature (and in particular those related to its visual aspect) were irrelevant. This interpretation is, according to the ECJ, consistent with the objective pursued by this provision of the Regulation, *i.e.*, preventing technological innovation from being hampered by granting design protection to features dictated solely by the technical function of a product. The ECJ added that, should design alternatives be the point of reference, a company could achieve a protection similar to that of a patent without fulfilling patent law requirements, simply by monopolising all design alternatives. This would deprive Article 8(1) of the Regulation of its full effectiveness.

By its second question, the Court asked if the assessment of whether the relevant features of appearance of a product were exclusively dictated by its technical function should be based on the perception of an objective observer. The ECJ replied negatively, stating that, in its assessment, the national court must take into account all the objective circumstances relevant to each individual case, especially with regard to the design at issue, the reasons which dictated the choice of features of appearance of the product, the information on its use or the existence of alternative designs fulfilling the same technical function, if supported by reliable evidence.

The ECJ thus settled the controversy by formally rejecting the "multiplicity of forms theory".

# LABOUR LAW

***Employment Law Reforms in 2018 Following Implementation of Summer Agreement (Part III)***

The measures contained in the so-called Summer Agreement (the "Agreement") have been incorporated partially in the Program Law of 25 December 2017 (the "Program Law") (*See, this Newsletter, Volume 2017, No.12*) and in the Law of 15 January 2018 regarding various provisions in relation to work (*Wet van 15 januari 2018 houdende diverse bepalingen inzake werk/ Loi portant des dispositions diverses en matière d'emploi*) (*See, this Newsletter, Volume 2018, No.2*).

On 26 March 2018, the federal Parliament adopted a third law incorporating additional measures of the Agreement, *i.e.*, the Law regarding the reinforcement of economic growth and social cohesion (the "Law of 26 March 2018") (*Wet betreffende de versterking van de economische groei en de sociale cohesie/Loi relative à la relance économique et au renforcement de la cohésion sociale*).

The Law of 26 March 2018, published on 30 March 2018, contains the following noteworthy items:

*New Notice Periods During First 6 Months of Employment*

As of 1 May 2018, new notice periods apply if an employer wishes to terminate the employment contract of an employee who has less than 6 months' service.

By way of compensation for abolishing the probationary clause, reduced notice periods apply for employers who wish to terminate an employee's employment contract during the first 4 months of service.

Subsequently, the notice periods gradually increase. In this respect, an employer must provide a notice period of 5 weeks once the employee has reached 5 months of service (whereas currently a notice period of 4 weeks would suffice).

Once an employee reaches 6 months' service, the existing notice periods to be observed by the employer remain the same.

For its part, the notice period that should be respected by an employee who wishes to terminate the employment contract during the first 6 months of employment remains unchanged as well.

For notice periods that have been notified and have entered into effect prior to 1 May 2018, the old rules remain applicable. Therefore, the new notice periods apply in the following situations:

- Termination of an employment contract with a notice period served by a bailiff as of 1 May 2018;
- Termination of an employment contract with a notice period notified by registered mail which was sent after 26 April 2018 (as a registered letter is only deemed to be notified 3 working days after its sending);
- Immediate termination of an employment contract with payment of an indemnity in lieu of notice as of 1 May 2018.

*Funding of Projects for Prevention of Burn-Out*

Joint committees, joint subcommittees and companies will be given the opportunity to submit projects seeking to prevent cases of burn-out. Approved projects can be financed with a part of the profits of the special employer contribution of 0.10% for the benefit of persons belonging to risk groups.

In the context of tackling burn-outs, the National Labor Council (NAR/CNT) issued advice regarding burn-out in which guidelines are drawn up for setting up pilot projects on primary prevention of cases of burn-out with a view to preventing employees from being absent due to psychosocial complaints in general and burn-outs in particular.

The new measures entered into force retroactively on 1 January 2018. By contrast, the implementing measures have to be determined by Royal Decree.

*Consultations about 'De-connecting' from Work and Use of Digital Means of Communication*

As of 9 April 2018, employers have the obligation, on a regular basis, and whenever the employee representatives of the Committee for Prevention and Protection at Work ("CPPW") request it, to organise consultations in the CPPW (in the absence of a CPPW, with the trade union delegation and in the absence of a trade union delegation, with the employees directly) on 'de-connecting' from work and from the use of digital means of communication (such as PC, laptop, mobile phone, tablet, etc.).

The consultation must take place with a view to ensuring respect for rest periods, annual holidays and other types of leave and safeguarding the balance between work and private life. The CPPW can, on the basis of the consultation, formulate proposals and provide specific advice to the employer. When the consultation leads to specific agreements, these can be included in the work rules or in a collective bargaining agreement ("CBA").

The new measure does not entitle employees to 'de-connect'. It only gives them the possibility to discuss issues related to work-life balance at company level. Employers may, of course, voluntarily choose to grant their employees specific rights involving 'non-accessibility', which may vary depending on the tasks and the responsibilities of the employees at issue.

*Starter Jobs for Young People*

In order to tackle youth unemployment, the federal Parliament has sought to increase the employment opportunities of this target group by allowing employers to employ young employees without work experience with a gross salary lower than the currently applicable minimum wages. The effect of the reduction of the net salary of the young employee is tempered by the employer having to pay a fixed (net) allowance (exempt from social security and tax withholdings) in each month in which he reduces the salary. Employees under the age of 21 and without work experience may be offered a starting job contract which stipulates the following salary reductions:

1. 6% in the months in which the employee concerned is 20 years old on the last day of the month;

2. 12% in the months in which the employee concerned is 19 years old on the last day of the month;

3. 18% in the months in which the employee concerned is 18 years old on the last day of the month.

This only applies to the private sector and to young employees who would normally receive the minimum wage.

Nevertheless, the full-time salary of employees with at least six or twelve months of seniority in the company may under no circumstances be lower than the guaranteed minimum monthly income provided for in CBA No. 43. Employers should bear in mind that employment contracts for students are excluded from this regime.

The provisions concerning the starters' salary will take effect on 1 July 2018 and apply to employment contracts that are concluded from that date.

# LITIGATION

***Parliament Adopts Draft Bill Extending Collective Redress Mechanisms to SMEs***

On 22 March 2018, federal Parliament adopted a draft bill (the "Bill") aimed at making collective redress mechanisms available to SMEs (*Wetsontwerp houdende wijziging, wat de uitbreiding van het toepassingsgebied van de vordering tot collectief herstel tot K.M.O.'s betreft, van het Wetboek van Economisch Recht/Projet de loi portant modification, en ce qui concerne l'extension de l'action en réparation collective aux P.M.E., du Code de droit économique*). The Bill had been submitted to Parliament in January 2018 (*See, this Newsletter, Volume 2018, No. 1, p. 13*).

Collective redress mechanisms were first introduced by the Law of 28 March 2014 which inserted a Title 2 on collective redress mechanisms in Book XVII of the Commercial Code (*See, this Newsletter, Volume 2014, No. 3, p. 15*).

Through the Bill, the scope of application of collective redress provided by the Law of 28 March 2014 is now extended by making it available to SMEs (*i.e.*, companies that employ less than 250 persons and which have an annual turnover not exceeding EUR 50 million or an annual balance sheet not exceeding EUR 43 million).

The Bill also provides that SMEs must bring their action for collective redress through a recognised group representative which must be either:

- A professional organisation having legal personality and defending the interests of SMEs and which is either represented in the High Council for Self-Employed and SMEs, or is authorised by the Minister of the Economy;
- An association that is authorised by the Minister of the Economy, which does not pursue a long-term economic purpose and which has been in existence for more than 3 years; or
- A representative entity designated for this purpose by an EU Member State which meets the requirements set out in paragraph 4 of the European Commission Recommendation 2013/396/EU.

The Commercial Court of Brussels (*Rechtbank van koophandel/Tribunal de commerce*) and the Court of Appeal of Brussels (*Hof van Beroep/Cour d'Appel*) have exclusive jurisdiction over actions for collective redress.

The Bill also provides that SMEs will only be able to file collective actions if their common injury arose after 1 September 2014.

***New European Commission Proposal for Directive on Collective Representative Actions***

On 11 April 2018, the European Commission (the "Commission") published a new proposal on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (the "Proposal"). In light of increasing cross-border trade and EU-wide commercial strategies, the Proposal aims to facilitate redress for consumers if there are widespread infringements of their rights in more than one EU Member State.

Under Directive 2009/22/EC, it was possible for qualified entities designated by EU Member States, such as consumer organisations or independent public bodies, to bring representative actions with the aim of stopping both domestic and cross-border infringements of EU consumer law. However, the aim of the Proposal is to extend this possibility in order to allow consumers to obtain redress, such as compensation, repair, replacement, price reduction, contract termination, or reimbursement of the price paid.

According to the Commission, the proposed model for representative actions incorporates numerous safeguards in order to prevent it from being misused.

First, representative actions may only be taken by qualified entities. These qualified entities will have to satisfy minimum reputational criteria: they must be properly established; not for profit; and have a legitimate interest in ensuring compliance with the relevant EU law. EU Member States will be required to monitor on a regular basis whether a designated qualified entity continues to comply with the criteria and failure to do so will lead to the loss of the status of qualified entity.

Second, representative actions for redress will only be possible if based on a final decision of a national court or authority which establishes that the trader has breached the law. This prevents frivolous and vexatious claims.

Third, no punitive damages should be awarded and compensation for consumers will be limited to actual harm suffered.

Finally, qualified entities must be transparent about their sources of funding in order to enable the court or administrative authority to ensure that there are no conflicts of interest or risks of abuse in a given case and to assess whether the third party has sufficient resources in order to meet its financial commitments to the qualified entity should the action fail.

The Proposal further provides that the infringing trader is, at its own expense, required to inform affected consumers about any final decision (injunction, redress or settlement), its legal consequences and, if relevant, the subsequent steps to be taken by the consumers concerned.

In relation to cross-border representative actions, the Proposal establishes that the representative action may be brought to the competent court or administrative authority of a EU Member State by several qualified entities from different EU Member States, acting jointly or represented by a single qualified entity, for the protection of the collective interest of consumers from different EU Member States. By contrast, the Proposal appears to remain silent on rules governing jurisdiction and parallel litigation in cases where entities bring different representative actions before the courts of different Member States.

Finally, the interaction between the Proposal and Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms ("Recommendation 2013/396/EU") remains unclear. According to the Explanatory Memorandum provided for in the Proposal, the "[P]*roposal takes into account* [Recommendation 2013/396/EU]". However, the Explanatory Memorandum also indicates that not all the procedural elements from Recommendation 2013/396/EU have been reproduced in the Proposal. According to the Explanatory Memorandum, Recommendation 2013/396/EU lays down a set of common principles for collective redress mechanisms that apply to all breaches of Union law across all policy fields, while the Proposal is "*limited to infringements that may affect the collective interests of consumers, and the pre-existing features of the representative action model in the current Injunctions Directives*".

# PUBLIC PROCUREMENT

***Amending Royal Decree on Public Procurement***

On 18 April 2018, the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*) published an amending Royal Decree amending public procurement laws (*Koninklijk Besluit van 15 april 2018 tot wijziging van meerdere Koninklijke Besluiten op het vlak van overheidsopdrachten en concessies en tot aanpassing van een drempel in de Wet van 17 juni 2013 betreffende de motivering, de informatie en de rechtsmiddelen inzake overheidsopdrachten, bepaalde opdrachten voor werken, leveringen en diensten en concessies/Arrêté royal du 15 avril 2018 modifiant plusieurs Arrêtés royaux en matière de marchés publics et de concessions et adaptant un seuil dans la Loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics, de certains marchés de travaux, de fournitures et de services et de concessions* – the "RD"). The main changes introduced by the RD are summarised below.

*Amendments to Royal Decrees on Award of Public Procurement Contracts*

The RD amends the Royal Decree of 18 April 2017 on the award of public procurement contracts in the classical sectors (*Koninklijk Besluit plaatsing overheidsopdrachten in de klassieke sectoren van 18 april 2017/Arrêté royal du 18 avril 2017 relatif à la passation des marchés publics dans les secteurs classiques*) and the Royal Decree of 18 June 2017 on the award of public procurement contracts in the special sectors (*Koninklijk Besluit plaatsing overheidsopdrachten in de speciale sectoren van 18 juni 2017/Arrêté royal du 18 juni 2017 relatif à la passation des marchés publics dans les secteurs spéciaux*) as follows:

- The date from which the European Single Procurement Document ("ESPD") should be submitted to contracting authorities in electronic format is 18 April 2018, which is six months earlier than initially planned. Other exchanges of information between tenderers and contracting authorities can still take place in non-electronic format. For public procurement contracts with a value equal to or above the thresholds for European publication, the use of electronic means of communication for these other exchanges will become compulsory from 18 October 2018.

- The RD clarifies that the assessment of the tenders should be inclusive of VAT only when VAT entails an actual cost for the contracting authority (*i.e., when the contracting authority cannot recover VAT).*

- The RD specifies that requests to participate in a tender procedure and tenders are filed in a timely fashion only if the contracting authority receives them *before* the specified date and time. If the contracting authority receives the request to participate or the tender *on or after* the date and time specified, it will be considered as belatedly filed.

- The RD confirms explicitly that contracting authorities are entitled to request translations of documents and certificates even if they are drafted in one of Belgium's official languages.

*Amendments to Law of 17 June 2013 concerning Reasons, Information and Legal Remedies with regard to Public Procurement Contracts and Specific Contracts for Works, Supplies and Services*

- The RD updates specific threshold amounts in the Law of 17 June 2013 concerning the reasons, the information and the legal remedies with regard to public procurement contracts and specific contracts for works, supplies and services (*Wet van 17 juni 2013 betreffende de motivering, de informatie en de rechtsmiddelen inzake overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten/Loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics et de certains marchés de travaux, de fournitures et de services*) to align them with (i) the thresholds mentioned in other legal texts; and (ii) new EU public procurement thresholds which apply from 1 January 2018 (*See, this Newsletter, Volume 2017, No. 12, p. 22*).

*Amendments to Royal Decree of 14 January 2013 Laying Down General Rules for Performance of Public Procurement Contracts*

- The RD replaces Article 30 of the Royal Decree of 14 January 2013 laying down general rules for the per-

formance of public procurement contracts (*Koninklijk Besluit van 14 januari 2013 tot bepaling van de algemene uitvoeringsregels van de overheidsopdrachten/Arrêté royal du 14 janvier 2013 établissant les règles générales d'exécution des marchés publics* – the "RD of 14 January 2013") with a new provision which makes it clear that contracting authorities are under a duty to observe the contractor's rights of defence under Article 44, §2 of the RD of 14 January 2013 should they wish to call on the guarantee provided by the contractor for the latter's failure to perform the contract correctly.

- The RD expands the situations in which the contractor cannot be entitled to damages if performance of the contract is suspended at the request of the contracting authority.

- The RD gives retroactive effect to Articles 38/1 ("*Additional works, supplies or services*"), 38/2 ("Unforeseeable circumstances for the contracting authority") and 38/19 ("Publication") of the RD of 14 January 2013, which were introduced by the Royal Decree of 22 June 2017 containing new rules on the performance of public works contracts and concession contracts for public works (*Koninklijk Besluit van 22 juni 2017 tot wijziging van het Koninklijk Besluit van 14 januari 2013 tot bepaling van de algemene uitvoeringsregels van de overheidsopdrachten en van de concessies voor openbare werken en tot bepaling van de datum van inwerkingtreding van de Wet van 16 februari 2017 tot wijziging van de Wet van 17 juni 2013 betreffende de motivering, de informatie en de rechtsmiddelen inzake overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten/Arrêté royal du 22 juin 2017 modifiant l'Arrêté royal du 14 janvier 2013 établissant les règles générales d'exécution des marches publics et des concessions de travaux publics et fixant la date d'entrée en vigueur de la Loi du 16 février 2017 modifiant la Loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics et de certains marchés de travaux, de fournitures et de services* – the "RD of 22 June 2017"). The RD provides that Articles 38/1, 38/2 and 38/19 will apply also to contracts tendered before 30 June 2017 (*i.e.*, the date of entry into force of the RD of 22 June 2017).

The RD entered into force on 28 April 2018, subject to exceptions for some specific provisions (including the provision on the ESPD which, as indicated above, applies from 18 April 2018).

The RD should be welcomed in that it provides helpful clarifications. However, similar clarifications may prove necessary in the near future for a variety of other issues frequently encountered by tenderers and contracting authorities.

# REAL ESTATE

***Decree of Walloon Parliament relating to Short-Term Commercial Leases in Wallonia Published***

On 28 March 2018, the Decree of the Walloon Parliament of 15 March 2018 relating to short-term commercial leases and amending the Civil Code (*Décret relatif au bail commercial de courte durée et modifiant le Code Civil*) (the "Decree") was published in the Belgian Official Journal. The decree governs short-term commercial leases in Wallonia, *i.e.*, leases for a term equal to or shorter than one year of real estate or part thereof that is mainly used by the tenant or subtenant as a retail store or exercising the activity of an artisan with direct contact with the public.

The decree provides that the lease agreement can be renewed on the same terms as the original lease agreement insofar as the total length of the lease does not exceed one year.

The lease agreement is terminated automatically by the expiry of the term (unless the tenant remains within the premises and is not challenged by the landlord). The tenant is entitled to terminate the lease agreement at any time, subject to one month's notice given by registered letter. Additionally, the parties can at any time mutually agree to terminate the lease agreement.

The decree contains provisions relating to the right of the tenant to make modifications to the leased property, how the landlord can oppose such modifications and the fate of these modifications at the end of the lease.

Pursuant to the decree, sub-tenancies and transfers of the lease agreement are forbidden, unless the parties explicitly agree to the contrary in writing.

The decree entered into force on 1 May 2018.

The Flemish parliament has already adopted similar legislation (Decree of 17 June 2016) governing short-term leases of premises for commercial and artisanal purposes in Flanders.

***Supreme Court Confirms Strict Formalism for Renewal of Commercial Leases***

In a judgment of 16 February 2018, the Supreme Court (*Hof van Cassatie / Cour de Cassation)* confirmed the strict formalism concerning the renewal of commercial leases. Article 14 of the Law of 30 April 1951 concerning commercial leases (*Wet op de handelshuurovereenkomsten / Loi sur les baux commerciaux*) governs the renewal of a commercial lease. It stipulates that a tenant wishing to exercise its right of renewal is required to notify the landlord by registered letter or by writ served by a bailiff. This notification should contain the conditions under which the tenant is willing to enter into a new lease, and should mention that the land-lord will be deemed to have consented to the renewal of the lease under the proposed conditions if he does not notify the tenant in the same manner of either his refusal to renew the lease, or of different conditions or of the offer of a third party.

As such, the notification of the tenant should inform the landlord that he can notify the tenant by means of a registered letter or a writ served by a bailiff. If the notification does not mention these two options, it is null and void.

In its judgment of 16 February 2018, the Supreme Court confirmed this strict formalism. If the tenant's notification informs the landlord that he can notify the tenant "in the same way", it will be null and void. The tenant's notification should explicitly mention that the landlord can inform the tenant by means of a registered letter or a writ served by a bailiff.

The Supreme Court's judgment confirms an earlier judgment of 2 March 2006.

## In the centre of Europe with a global reach

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