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| COMMERCIAL LAW

Court of Justice of European Union Outlaws Belgian Ban on Advertising for Dental Care

On 4 May 2017, the Court of Justice of the European Union (the "ECJ") held that the Belgian general and absolute prohibition on advertising for dental care is incompatible with EU law (Case C-339/15, *Openbaar Ministerie v. Luc Vanderborght*).

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

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

In his defence, Mr. Vanderborght maintained that these rules are contrary to: (i) Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices ("Directive 2005/29/EC"); (ii) Directive 2000/31/EC of 8 June 2000 on specific legal aspects of information society services, in particular electronic commerce in the Internal Market ("Directive 2000/31/EC"); and (iii) the principles of freedom of establishment and freedom to provide services as laid down in Articles 49 and 56 of the Treaty on the Functioning of the European Union ("TFEU"). In view of these arguments, the Court requested the ECJ to assess the compatibility of the Belgian measures within these three sets of EU rules.

Compatibility with Directive 2005/29/EC

The ECJ started its analysis by reiterating that the term "*commercial practice*", as defined in Directive 2005/29/EC, has a very broad scope and that advertising in relation to dental care qualifies as a "*commercial practice*". However, it continued that, pursuant to Articles 3(3) and (8) of Directive 2005/29/EC, this Directive is without prejudice to: (i) national rules relating to the health and safety aspects of products and services; and (ii) the ethical codes of conduct or other specific rules governing regulated professions. In noting that the Belgian rules seek to protect public health and the dignity of the dentistry profession, the ECJ concluded, in line with the opinion of Advocate General Bot ("AG Bot") of 8 September 2016 (*See, this Newsletter, Volume 2016, No. 9, p. 4*), that the Belgian rules are compatible with Directive 2005/29/EC.

Compatibility with Directive 2000/31/EC

The ECJ considered that Directive 2000/31/EC applies because advertising over the internet for dental care services constitutes an information society service within the meaning of Article 2(a) of the Directive. The ECJ examined whether the rules at issue are compatible with the substantive rules of Directive 2000/31/EC, including Article 8(1). Pursuant to this provision, the use of commercial communications over the internet by a member of a regulated profession is permitted, this is so provided that the communication complies with the ethical rules of the profession. As Article 8(1) permits the members of a regulated profession to advertise their services by means of information society services, subject to compliance with the professional rules, the ECJ outlined that such professional rules cannot include a general and absolute prohibition of any type of online advertising aimed at promoting dental care. This rul-

ing departs from the view of AG Bot, who maintained that the Belgian rules are compatible with Directive 2000/31/EC (*See, this Newsletter, Volume 2016, No. 9, p. 4*).

Compatibility with freedom to provide services (Article 56 TFEU)

The ECJ considered that freedom of establishment is ancillary to the freedom to provide services. According to the ECJ, it is therefore sufficient to examine the compatibility of the national measures at issue with the freedom to provide services.

In the ECJ's view, the measures at issue constitute a restriction on the freedom to provide services. As a result, the ECJ examined whether this restriction can be justified on grounds of: (i) public health; and (ii) the dignity of the dentistry profession. The ECJ ruled contrary to AG Bot's reasoning. While the ECJ agreed that a general and absolute advertising ban is suitable for achieving the stated objectives of public interest, it held that these objectives could be achieved through less restrictive measures. In other words, Belgium is entitled to regulate how dentists can advertise their services, but it does not have the power to prohibit any advertising altogether.

The judgment is good news for Mr. Vanderborght, who will now quite likely avoid criminal sanctions.

This is not the first ruling of the ECJ on the Belgian ban on advertising of dental care. On 13 March 2008, the ECJ held that this prohibition is compatible with Article 101 TFEU (prohibition on cartels and other agreements that restrict competition) read in conjunction with Article 4(3) TFEU (duty of EU Member States to cooperate in good faith with the EU) (ECJ, 13 March 2008, Case C-446/05, *Ioannis Doulamis*).

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| COMPETITION LAW

Belgium Adopts Law on Private Competition Damage Actions

On 18 May 2017, the Chamber of Representatives of the Federal Parliament (*Kamer van volksvertegenwoordigers / Chambre des Représentants*) adopted a bill facilitating actions for damages resulting from a competition law infringement. This bill inserts a third chapter on "Actions for damages following competition law infringements" in Book XVII of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*) concerning "Specific jurisdictional procedures".

The bill implements Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States, and of the European Union (*See, VBB on Competition Law, Volume 2014, No. 11, pp. 16-17*). The deadline for the implementation of the Directive was 27 December 2016. Belgium was therefore under time pressure to implement this Directive into Belgian law and closely follow other Member States such as Austria, France and Germany, which also only recently adopted implementing legislation.

The bill provides that victims of a cartel have a right to full compensation as to the injury suffered (which is the rule under Belgian law). The bill introduces into Belgian law a rebuttable presumption that cartels cause harm. It also creates a non rebuttable presumption of existence of an infringement of competition law, if such an infringement was established in a final decision of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) or the Brussels Court of Appeal (*Hof van Beroep te Brussel / Cour d'appel de Bruxelles*).

In addition, the bill makes it easier for claimants to gather supporting evidence. The bill grants courts the power to demand that a party, or even a third party to the case (such as a competition authority), produce any type of evidence requested, with the exceptions of leniency applications (and any reference thereto) and settlement proposals.

Finally, the bill introduces into Belgian law the concept of a passing-on defence and establishes the principle of joint liability for authors of an infringement of competition law, with an exception for SMEs and for immunity applicants. As a result, SMEs and immunity applicants are in principle only liable vis-à-vis their own customers and/or suppliers (and not vis-à-vis any other victim of the cartel, unless these victims cannot obtain compensation from other cartel participants). The principle of joint liability is also limited vis-à-vis infringers who settle the dispute with the victim. Such settlements also suspend the statute of limitations for damages procedures for a maximum of two years.

The bill should enter into force 10 days after it is published in the Belgian official gazette (*Belgisch Staatsblad / Moniteur Belge*).

Belgian Competition Authority Publishes Opinion on Belgian Merger Control Thresholds

On 18 May 2017, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") announced that it would not recommend a change to the current Belgian merger notification thresholds.

At present, concentrations are subject to notification in Belgium if they do not have a Community dimension (in which case they must be notified to the European Commission) and if the notifying parties have a joint turnover in Belgium of more than EUR 100 million while at least two of the parties concerned by the transaction each realise a turnover in Belgium of at least EUR 40 million. Pursuant to Article IV.7(3) of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*), the BCA must reassess these thresholds every three years, "*taking into account, inter alia, the economic implications and administrative burden on undertakings*".

The BCA is not the only competition authority currently reviewing its merger control thresholds, as the European Commission engaged in a similar exercise with the launch of a public consultation on the matter in October 2016 (*See, VBB on Competition Law, Volume 2016, No. 10, p. 3*).

The BCA is of the opinion that Belgian notification thresholds should not be increased because they are already relatively high when compared to those neighbouring Member States.

At the same time, the BCA believes that the thresholds should not be reduced either, since, according to the BCA, transactions only meet them when the market has already reached "*a significant level of consolidation*". However, the BCA notes that, should a decrease of the threshold be considered, it would argue in favour of a reduction focusing on specific sectors involving local markets. This follows the French approach. The BCA is also open to the idea of requesting undertakings to simply inform the BCA of specific transactions that fall below the notification thresholds, but are nevertheless "*important for the Belgian market*" (with information thresholds to be defined), in order for the BCA to "*better anticipate market consolidation processes*".

Finally, the BCA recommends that any proposal to amend the notification thresholds be subject to consultation with stakeholders.

Belgian Competition Authority Sanctions Bid-Rigging Cartel in Public Contracts for Railway Infrastructure

On 2 May 2017, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") found that ABB, AEG, Siemens, Schneider and Sécheron had engaged in a cartel in the context of public tenders organised by government-owned railway network company Infrabel and imposed fines amounting to a total of EUR 1,779,000.

Infrabel had first concluded a framework agreement with selected firms in order to define the terms and conditions of future public tenders concerning electrical installations and equipment.

The BCA found that, when these tenders were later launched, ABB, AEG, Siemens, Schneider and Sécheron decided together which party should win each bid and submitted quotations with prices determined in such a way that Infrabel would choose the designated winner. These practices started in August 2010 (as regards Sécheron and Siemens) and in February 2011 (as regards ABB, AEG and Schneider) and produced effects until 30 June 2016, *i.e.*, long after the last evidence of collusion of 1 July 2014. The BCA decided that the duration of the infringement should also include the duration of its effects on the market.

Interestingly, the BCA also pointed to the behaviour of some of Infrabel's own employees, who disclosed information that made the market more transparent. This information included: (i) information on Infrabel's current and future projects; (ii) sensitive information on future tenders, Infrabel's budget for future projects and competing bidders' prices; and (iii) Infrabel's preferences for specific suppliers in local geographic areas. The BCA considered that this constituted a mitigating circumstance in favour of the cartelists and therefore granted a reduction in the fines.

ABB was the first firm to blow the whistle on this case and therefore obtained immunity from fines under the leniency programme. Four natural persons also requested – and obtained – immunity from prosecution. Additionally, Siemens and AEG secured 50% and 30% reductions respectively from fines under the BCA's leniency programme. Although not a leniency applicant, Sécheron obtained a decrease of its fine on account of its cooperation during the investigation, pursuant to para. 29 of the Belgian Fining Guidelines.

Schneider was apparently in a peculiar situation: the BCA considered that, "*due to the specific circumstances of this case*", the immunity application filed by a former Schneider employee had established Schneider's participation in the cartel while making it impossible for Schneider to seek leniency itself. In an apparent effort to compensate this lost chance to seek leniency, the BCA reduced Schneider's fine by an undisclosed amount.

On the other hand, Siemens' fine was increased twice: the first time to sanction Siemens' role as the ringleader of the cartel and the second time in order to increase the deterrent effect of the fine, with the BCA noting that Siemens' worldwide turnover reached EUR 79,6 billion in 2016.

Finally, the fines imposed by the BCA were reduced by 10% as the cartel participants agreed to settle the case.

The BCA imposed a fine of EUR 357,000 on AEG, EUR 19,000 on Sécheron, EUR 432,000 on Schneider and EUR 971,000 on Siemens.

It is worth noting that this decision closely follows the publication by the BCA of a guide raising awareness of bid rigging and helping procurement managers of public bodies identify and to prevent collusive behaviour of potential suppliers (*See, this Newsletter, Volume 2017, Issue No.1, p. 8*). The BCA also made it clear earlier this year that public procurement constitutes one of its enforcement priorities for 2017 (*See, this Newsletter, Volume 2017, No. 4, pp. 3-4*).

Since this decision was adopted by the BCA in the context of a settlement procedure, it cannot be appealed and is thus final.

Belgian Competition Authority Intensifies Enforcement Activities

On 29 May 2017, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) announced inspections at the premises of several manufacturers and wholesalers of tobacco products. The BCA suspects the existence of anticompetitive agreements or concerted practices contrary to Article IV.1 of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*) and/or to Article 101 of the Treaty on the Functioning of the European Union.

Earlier this month, the BCA confirmed that it had conducted separate inspections at a firm active in the distribution and sale of cooking utensils, and at a firm active in the distribution and sale of water softeners.

The number and frequency of these inspections seem to point toward an intensification of the BCA's efforts to tackle anticompetitive conduct on the Belgian market. This coincides with the fact that the BCA recently hired a significant number of new staff members (the BCA had long been understaffed due to austerity measures).

Belgian Competition Authority Partially Lifts Remedies Imposed on Cinema Group Kinepolis in 1997 and 2010

On 31 May 2017, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") announced its decision to lift partially the remedies imposed on cinema group Kinepolis in 1997 and amended in 2010.

This decision constitutes the latest development in a legal saga concerning the cinema sector in Belgium. In 1997, the former Belgian Competition Council (which was the competition authority replaced by the BCA in 2013) cleared the concentration between the Bert and Claeys groups giving rise to Kinepolis group. This was, however, subject to a set of behavioural remedies, such as the prohibition on Kinepolis to negotiate exclusive rights for the screening of films or the obligation on Kinepolis to obtain the Competition Council's prior approval before any planned increase of the number of its screens or seats. Kinepolis asked the Competition Council to lift these conditions in 2006. The Competition Council acceded to Kinepolis' request in a decision adopted on 16 April 2007, noting changes in the market environment (*See, this Newsletter, Volume 2007, No. 4, p. 3*). However, this decision was successfully appealed by the Belgian Federation of Cinemas and competing cinema groups UGC and Utopolis. In a judgment of 18 March 2008, the Brussels Court of Appeal (*Hof van beroep te Brussel / Cour d'appel de Bruxelles*) found that the Competition Council had not shown in its decision that market conditions sufficiently changed to make the 1997 conditions redundant (*See, this Newsletter, Volume 2008, No. 3, pp. 2-3*).

The case was sent back to the Competition Council, which, in a 1 October 2008 decision, partially upheld the 1997 conditions (*See, this Newsletter, Volume 2008, No. 10, pp. 2-3*). However, the Belgian Federation of Cinemas as well as UGC and Utopolis cinema groups again appealed the decision. In the 11 March 2010 judgment, the Court of Appeal partially annulled the 2008 decision, considering that the market circumstances had not materially changed between the Competition Council's decisions of 16 April 2007 and 1 October 2008 in order to justify lifting the conditions imposed on Kinepolis (with the exception of the condition requiring Kinepolis to obtain prior approval before increasing the number of screens or seats in existing cinemas by more than 20%, which the Court lifted). Following this judgment, Kinepolis could request the annulment of the remaining conditions after three years. In the absence of such a request, the conditions would automatically be prolonged for additional three-year terms (*See, this Newsletter, Volume 2010, No. 4, p. 3*).

On 31 March 2017, Kinepolis requested the BCA to lift the remaining conditions imposed on it. The BCA analysed whether each of the conditions was still necessary to

counter a restriction of competition in the current market structure. The BCA concluded that the condition imposed on Kinepolis to obtain prior approval for expanding organically should be lifted. The other remedies (which: (i) prevent Kinepolis from obtaining exclusive or priority rights to distribute films; (ii) prohibit any acquisition of cinema complexes by Kinepolis without the BCA's prior approval; and (iii) include programming agreements with independent cinema owners) remain in force.

The decision to lift the prior approval on Kinepolis' organic growth will take effect as of 31 May 2019. The BCA explained that the two-year interim period between the adoption of this decision and its entry into force should make it possible to remedy any adverse effects on the market which this decision may have. It will further allow Kinepolis' competitors to plan profitable investments in markets which are not yet saturated.

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| CONSUMER LAW

European Commission Publishes Results of EU Consumer Law Review

On 29 May 2017, the European Commission (the "Commission") published the final report on the results of its review of EU consumer law (the "Fitness Check"), which was initiated in January 2016 (*See, this Newsletter, Volume 2016, No. 1, p. 7*). The Fitness Check presents an analysis of EU consumer law with suggestions for improvements to the EU regulatory framework.

As part of the Commission's Regulatory Fitness and Performance (REFIT) programme, a fitness check assesses whether the regulatory framework for an entire policy sector is still fit for purpose. The aim is to identify excessive regulatory burdens, overlaps, gaps, inconsistencies and/or obsolete measures which may have appeared over time, as well as the cumulative impact of the relevant instruments. Criteria evaluated are the added value, coherence, effectiveness, efficiency and relevance of the reviewed legislation.

The Fitness Check covered the following consumer law Directives (the "Directives"):

- Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts;
- Directive 98/6/EC of 16 February 1998 on consumer protection in the indication of the prices of the products offered to consumers;
- Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (the "Sales and Guarantees Directive");
- Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the "Unfair Commercial Practices Directive");
- Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising; and
- Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests.

The Commission also published a separate report evaluating Directive 2011/83/EC of 25 October 2011 on consumer rights (the "Consumer Rights Directive").

The Commission's review exercise demonstrates that insufficient enforcement of existing rules constitutes the main obstacle preventing the achievement of the Directives' goals. This is due in large part to a lack of consumer awareness about their rights and shortcomings of redress opportunities. According to the Commission, an update of the rules is required for bringing clarity in cross-border operations and bringing them in line with the digital age. In particular, the Commission identified the following problems:

- The divergence of enforcement across EU Member States has to be addressed. According to the report, few EU Member States offer consumers an efficient civil law remedy in case of breaches of the Unfair Commercial Practices Directive. The Commission stated that, despite the high number of reported infringements of the Unfair Commercial Practices Directive, rights to remedies are regulated differently at the national level and rarely applied in practice.
- The level of penalties for breaches of the consumer law rules also varies across the EU, as does the level of access to individual redress in case of unfair commercial practices. In addition, EU Member States continue to have divergent approaches towards collective actions and injunction procedures.
- The rules have to be updated in the light of the digital age. For example, the Sales and Guarantees Directive currently does not contain any rules protecting consumers against the provision of defective digital content.

To address these issues, the Fitness Check suggests three strands of potential action: (i) ensuring better knowledge of all rights and duties under EU consumer law; (ii) introducing a number of targeted legislative amendments to reduce divergences in implementation; and (iii) simplifying the regulatory landscape where fully justified.

Target areas for follow-up include: (i) extending the level of protection under the Consumer Rights Directive; (ii) expanding and strengthening remedies for consumers, in particular by developing EU-wide rights to individual remedies, improving injunction procedures and analysing ongoing assessments of collective redress across the EU; (iii) fully harmonising the rules on distance sales; and (iv) harmonising and increasing sanctions for consumer law breaches.

For instance, the Commission recently proposed a Regulation on a Single Digital Gateway, which would introduce an obligation on the EU and the EU Member States to provide updated information to consumers on their rights when buying products or services from another EU country. In addition, a Consumer Law Database is being developed to provide updated information about laws and practice in respect of a total of 12 EU Directives in the consumer law field. The Commission is also updating guidance on the Unfair Commercial Practices Directive, which forms the legal basis for many coordinated consumer rights enforcement actions at the EU level.

In terms of addressing digital content, the Commission proposed modern digital contract rules which, once adopted, will provide clear rules to better protect consumers. It will also align common rules regarding remedies.

Regarding better enforcement, the Commission made a proposal to strengthen the cooperation between national consumer protection bodies and the Commission.

The results of the Fitness Check are available **here**.

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| CORPORATE LAW

Amended Corporate Governance Code for Non-Listed Companies

On 17 May 2017, an amended version of the corporate governance code for non-listed companies, the so-called Code Buysse III (the "Code"), was published. The Code contains corporate governance recommendations for non-listed companies regarding their day-to-day operations as well as their long-term vision. The Code updates and replaces the previous version of the Code Buysse of 2009.

In contrast to the Code Lippens (*i.e.*, the Belgian corporate governance code for listed companies), the Code is non-binding and only applies on a voluntary basis. According to the Code, the corporate governance measures and principles adopted should be contained in a corporate governance declaration and form part of the company's annual report. The Code is supplementary to applicable Belgian legislation.

The main changes brought about by the Code concern the board of directors, the management and the shareholders of non-listed companies.

Board of directors

The Code provides an overview of the main functions and role of the board of directors, including the president of the board. Furthermore, the Code emphasises the importance of diversity of the board. It also includes practical recommendations on the organisation of board meetings (agenda, minutes and convocation) and principles on self-evaluation of the board's performance, the performance of the individual directors and that of the president of the board.

Management

The Code also discusses in detail the division of tasks between the board of directors and management in relation to the general strategy of the company.

Shareholders

In addition, the corporate governance principles on the role of the shareholders have been updated. The Code requires shareholders to show an active interest in the long term fortunes of the company. In addition, shareholders should be kept well informed by the board of directors. In this regard, the Code provides an overview of the most essential tasks of the shareholders.

Finally, the Code contains a new chapter with recommendations on cooperating with private equity investors.

The Code is available in Dutch and French and can be found here.

New Legislative Framework for Judicial Liquidation of Companies

On 4 May 2017, the federal Parliament adopted a new law (*Wet tot wijziging van diverse wetten met het oog op de aanvulling van de gerechtelijke ontbindingsprocedure van vennootschappen / Loi modifiant diverses lois en vue de compléter la procédure de dissolution judiciaire des sociétés*, the "Law") which introduces extensive changes to the procedure of judicial liquidation of companies. The Law steps up efforts to combat dormant companies and enhances the role of the Chambers for Commercial Investigations (*Kamers voor Handelsonderzoek / Chambres des Enquêtes Commerciales*) within the commercial courts.

First, the Law expands the grounds on which a procedure for judicial liquidation can be initiated. This procedure allows the commercial court to order the liquidation of a company that is considered to be dormant. Under current rules, a company can only be judicially liquidated if it has not published its annual accounts for three consecutive years. By contrast, the Law allows the commercial court to order such a liquidation if the company has not published its annual accounts within seven months after the end of its accounting year. The commercial court may nevertheless allow the company a grace period to rectify the publication and is, in some cases, even obliged to do so.

Second, the commercial court can, after having been notified by a Chamber for Commercial Investigations, order the judicial liquidation of: (i) companies that have been deregistered from the Crossroads Bank for Enterprises (*Kruispunt-*

bank Ondernemingen / Banque-Carrefour des Entreprises) because they are considered to be inactive; (ii) companies that have repeatedly failed to comply with a hearing request from a Chamber for Commercial Investigations; and (iii) companies whose directors cannot prove their basic management skills or the legally required professional skills.

Third, the Law introduces several novelties in relation to the liquidation procedure itself. For example, the commercial court may decide to refrain from appointing a liquidator in case no interested party requests such an appointment. Failing a request to appoint a liquidator within one year after the publication of the judicial liquidation, all claims against the liquidated company will no longer be deemed to be payable and the assets of the liquidated company will automatically transfer to the Belgian State. The same applies to any assets of the liquidated company that would be discovered more than five years after publication of the commercial court's decision.

The Law also requires the former directors of the liquidated company to provide the liquidators with any information and, to a certain extent, assistance they would request. Any lack of cooperation by the directors may result in the prohibition to become or remain director or officer of a company for up to three years.

Fourth, the Law also confers on the public prosecutor the power to request the judicial liquidation of specific types of companies in case their net assets fell below the statutory minimum. Currently, only interested third parties are entitled to submit such a request.

At a broader level, the Law heralds the start of a wider overhaul of Belgian corporate and insolvency legislation, which had already been announced in the 2014 agreement that forms the basis for the current federal government. In particular, extensive changes to the Law on Continuity of Enterprises (*Wet Continuïteit Onderneming / Loi sur la Continuité des Entreprises) and the Bankruptcy Law (Faillissementswet / Loi sur les faillites*) are currently being discussed in Parliament.

That bill envisages introducing a so-called "*silent bankruptcy*" which aims at maximising employment and value within the bankrupt company, and improving the possibility of bankrupt entrepreneurs to obtain a second chance whilst also amending the rules on directors' liability. Both laws will also become part of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*).

Fifth and finally, it is expected that a bill proposing drastic changes to the Belgian Company Code will be introduced in Federal Parliament in the fall of 2017. The details of this bill are not yet publicly known.

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| DATA PROTECTION

Legitimate Interests Concept Contained in Data Protection Directive Does Not Encompass an Obligation for Data Processing

On 4 May 2017, the Court of Justice of the European Union ("ECJ") handed down a judgment in which it addresses the concept of legitimate interests contained in Article 7(f) of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("Data Protection Directive") (Case C-13/16 *Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA "Rīgas satiksme"*).

The case, which was referred to the ECJ by the Latvian Supreme Court, Administrative Division, concerns a dispute between the Latvian national police and a trolleybus company, Rīgas satiksme ("RS"), operating in Riga. RS had challenged the police's decision to disclose only the first name and surname, but not the identification number and/or address of a minor known to the police to have caused damage to one of RS's trolleybuses. RS considered that information to be necessary for the purpose of bringing civil proceedings. The police based its decision on the grounds that it did not have permission under national law to supply all of the requested information to a third party. The Latvian Supreme Court decided to stay the proceedings and refer two preliminary questions to the ECJ regarding the interpretation of Article 7(f) of the Data Protection Directive, and the relevance of the fact that the data subject was a minor at the time of the accident.

Article 7(f) Data Protection Directive

The ECJ first held that it was clear from the Data Protection Directive and the wording of its Article 7 that Article 7(f) of the Data Protective Directive does not in itself set out an obligation, but only expresses the possibility of processing data for the purposes of the legitimate interests pursued by a third party. However, such a communication is permitted in the event that it is made on the basis of national law and is in accordance with the three cumulative conditions laid down in Article 7(f) of the Data Protection Directive.

First, as for the requirement that the third party pursue a legitimate interest, the Court held that bringing an action to attain redress for damaged property qualifies as such.

Second, regarding the requirement that the processing should be necessary to pursue the legitimate interest, the Court held that this condition is fulfilled in the present case because, in the absence of disclosure, it would be impossible to identify the person against whom the action should be brought.

Third, as regards the condition requiring that the legitimate interest be balanced against the opposing rights and interests at issue, the ECJ emphasised that this determination would depend in principle on the specific circumstances of the case.

Minors as Data Subjects

With regard to the second preliminary question concerning the age of the data subject, the ECJ noted that this may be one of the factors that should be taken into account in the context of balancing the interests of the data subject with the other interests at stake. However, the ECJ added that, in the present case, it is not justified to refuse disclosure of the requested information on the mere ground that the data subject is a minor.

In conclusion, the legitimate interest requirement in Article 7(f) of the Data Protection Directive cannot provide a legal basis on which to compel a data controller to disclose personal data. However, it will not preclude the disclosure of personal data to a third party in order to enable that party to bring an action for damages before a civil court for harm caused by the data subject, if such a possibility is provided for under national law.

Belgian Privacy Commission Issues Opinion on Its Proposed Reform

Pursuant to Regulation No 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the "GDPR"), national supervisory authorities will have a strengthened role and increased enforcement powers – including the power to impose fines of up to EUR 20 million or 4% of a company's worldwide turnover. The Belgian Parliament prepared a draft bill to reform the current Privacy Commission (*Commissie voor de bescherming van de persoonlijke levenssfeer/Commission de la protection de la vie privée* – the "Privacy Commission") and submitted the draft for review to that same Privacy Commission. Under the draft bill, the name of the Privacy Commission will be changed to the Supervisory Authority for Processing of Personal Data (*Toezichthoudende Autoriteit voor de Verwerking van Persoonsgegevens/ Autorité de Contrôle des Traitements de Données à Caractère Personnel* – the "Supervisory Authority").

On 3 May 2017, the Privacy Commission gave a lukewarm opinion regarding the proposed bill (the "Opinion"). The Opinion discusses the draft bill on an article-by-article basis and illustrates specific shortcomings and ambiguities.

First, as regards the organisational structure of the Supervisory Authority, the Privacy Commission notes that the prosecution and sanctioning powers are held by the dispute chamber (*geschillenkamer/chambre contentieuse*). The Privacy Commission notes that this allocation sits uncomfortably with the principle of the separation of powers.

Second, as regards the tasks performed by the Supervisory Authority, the Opinion indicates that the draft bill fails to attribute a number of tasks imposed by the GDPR to the Supervisory Authority, including the follow-up of data breaches and tasks related to the cooperation with supervisory authorities of other Member States. In addition, the Privacy Commission would like to have the tasks of the newly established Ombudsman function extended to include awareness-raising.

Third, the draft bill confers on the Supervisory Authority powers to impose administrative sanctions (as required by the GDPR), or transfer files to the criminal courts. The Privacy Commission has a number of reservations regarding the manner in which cases will be handled under the proposed bill. It regrets the lack of flexibility in the proposed procedural rules, including the preliminary phase before the Ombudsman and the fact that decisions to settle or shelve cases can only be made late in the procedure. According to the Privacy Commission, this causes an unnecessary administrative burden. Moreover, the Privacy Commission is of opinion that the Supervisory Authority should have more flexibility to determine whether or not to investigate cases. On the other hand, the draft bill proposes to maintain the current practice of the Privacy Commission regarding mediation. However, the Privacy Commission notes that this may be incompatible with its enforcement duties under the GDPR. Indeed, a mediated solution could mean that a significant infringement of the privacy rules remains unpunished.

The Opinion also underlines that the inspection service of the Privacy Commission should be explicitly entitled to inspect data held by data processors as well as objects, such as pacemakers, internet connected surveillance devices and internet connected toys. Such objects or their connected services may not be subject to seizure, and therefore an amendment to the draft bill would be required for the Supervisory Authority to inspect the objects and connected services. In this regard, the Privacy Commission also recommends clarifying and extending the supervision of information security obligations.

Furthermore, the Privacy Commission questions the qualification of inspection officers as officers of judicial police, which could hamper the independence of the Supervisor Authority.

Finally, the Privacy Commission emphasises that one of the main shortcomings of the draft bill is the lack of sanctions in case of non-cooperation. The Privacy Commission is of the opinion that hindering supervision should give rise to a penalty and, possibly, even a criminal fine.

The full Opinion is available in **Dutch** and in **French**. The draft bill has not yet been made publicly available.

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INSOLVENCY

Constitutional Court Rules on VAT and Payroll Tax Claims under Law on Continuity of Enterprises

In its judgment dated 27 April 2017, the Constitutional Court ruled on the constitutionality of Article 37 of the Law of 31 January 2009 on the Continuity of Enterprises (*Wet van 31 januari 2009 betreffende de continuïteit van de ondernemingen/Loi de 31 janvier 2009 relative à la continuité des entreprises*, the "Law"). The Constitutional Court held that Article 37, first indent of the Law does not violate the principles of equality and non-discrimination, as debts towards the VAT administration are not debts of the bankrupt estate (boedelschulden/dettes de la masse). However, the Constitutional Court also held that Article 37, first indent of the Law does violate the principles of equality and non-discrimination, as VAT debts are not debts of the bankrupt estate while payroll taxes are. But the Constitutional Court added that Article 37, first indent of the Law may be interpreted differently in a way that payroll taxes are not considered to be debts of the bankrupt estate. The Constitutional Court added that such an interpretation does not contradict the text of the Law and satisfies the principles of equality and non-discrimination.

In the case at hand, the Commercial Court of Charleroi had decided that the VAT administration did not benefit from the protection of debts of the bankrupt estate under Article 37, first indent of the Law. On appeal, the Court of Appeal of Mons requested the Constitutional Court to provide it with a response to two preliminary questions.

The first preliminary question was whether Article 37 of the Law violates the principles of equality and non-discrimination, since the claim of the VAT administration relating to services performed for the debtor during the reorganisation period, are not debts of the estate. This is due to the fact that they arise from statutory provisions and not from a contract.

In its judgment, the Constitutional Court noted that the claim of the VAT administration results from the VAT Code. The Constitutional Court added that the judicial reorganisation procedure aims to protect the continuity of the distressed company and its activities and reconciled this legitimate aim with the protection of the creditors' rights. To that end, Parliament granted a priority right to the co-contractor in order to encourage that party to continue doing business with companies in judicial reorganisation and to facilitate their success. The Constitutional Court held that there is a substantial difference between the VAT administration and the company's co-contractor, which justifies the different treatment.

The second preliminary question was whether Article 37 of the Law violates the principles of equality and non-discrimination to the extent that the claim of the VAT administration relating to services performed for the debtor during the reorganisation period, are not debts of the estate due to their specific character, while debts towards payroll taxes are.

The Constitutional Court held that, for the same reasons as set out above, no priority right should be provided to the tax administration for payroll taxes, since the tax administration has no commercial relationship with the company. The Constitutional Court held that the payroll tax is provided for by statute. The fact that the payroll tax is part of the salary, which is a compensation for services performed in execution of the employment agreement during the reorganisation period does not change that analysis. The Constitutional Court concluded that this should not result in the qualification of the tax administration as the company's co-contractor who should be granted a priority right in order to encourage the continuation of contractual relations.

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| INTELLECTUAL PROPERTY

Brussels Commercial Court: Parallel Imported Pharmaceuticals Must Comply with Latest Packaging

On 27 April 2017, the President of the Dutch-language Commercial Court of Brussels (*Nederlandstalige Rechtbank van Koophandel/Tribunal de commerce néerlandophone*)decided a case concerning the repackaging of parallel imported pharmaceuticals, in which it applied the so-called "*BMS*"-criteria which the Court of Justice of the European Union ("ECJ") developed in *Bristol-Myers-Squibb* (Case C-427/93).

The ECJ held in *Bristol-Myers-Squibb* that parallel imported products can be repackaged: (i) if repackaging is objectively necessary to market the product in the country of importation; (ii) if the repackaging does not affect the original condition of the product inside the packaging; (iii) if the new packaging clearly states who repackaged the product and indicates the name of the manufacturer; (iv) if the presentation of the repackaged product is not liable to damage the reputation of the trade mark or of its owner; and (v) if the importer gives notice to the trade mark owner before the repackaged product is put on sale, and, on demand, supplies him with a specimen of the repackaged product. If these five conditions are satisfied, the trade mark owner cannot legitimately object to the further marketing of a repackaged pharmaceutical.

The dispute before the Commercial Court of Brussels related to the parallel import and repackaging by Pi Pharma NV ("Pi Pharma") of pharmaceuticals of Merck Sharp & Dohme Corp. and MSD Belgium BVBA (together, "MSD"). MSD is the marketing authorisation holder of a pharmaceutical with the active ingredient *montelukast* which it markets under the trade mark "*Singulair*" in various presentations, including formats of 28 and 98 tablets. After the Federal Agency for Medicines and Health Products (*Federaal Agentschap voor Geneesmiddelen en Gezondheidsproducten/Agence Fédérale des Médicaments et des Produits de Santé,* the "FAMHP") had objected to the use by MSD of two shades of the colour blue for its logo as this could hamper the legibility of the labelling, MSD changed the logo to a single dark blue colour. On 16 January 2015, Pi Pharma notified MSD that it had received a licence from the FAMHP to distribute parallel imported "Singulair" products on the Belgian market. Pi Pharma imported the products from Poland where MSD also markets Singulair in packaging formats of 28 tablets. Subsequently, Pi Pharma repackaged the product into a new packaging of 98 tablets.

MSD claimed that Pi Pharma infringed its trade marks and copyright since Pi Pharma: (i) had failed to indicate on the packaging the identity of the company responsible for the repackaging of the product; (ii) had damaged MSD's reputation by using two shades of blue for the logo; and (iii) had failed to demonstrate that repackaging of the product was objectively necessary in order to gain effective access to the Belgian market.

First, with regard to the third BMS-requirement, *i.e.*, that the new packaging must clearly state who repackaged the product, the Commercial Court held that consumers or end users would be likely to believe that the trade mark owner was responsible for the repackaging or re-labelling of Singulair. Because the products sold by Pi Pharma did not fulfil the third BMS-requirement, the Court decided that Pi Pharma thus infringed MSD's trade marks.

Second, on the fourth BMS-requirement, *i.e.*, that the presentation of the repackaged product must not be liable to damage the reputation of the trade mark or its owner, the Commercial Court held that the use by Pi Pharma of two shades of blue is in contradiction with FAMHP's viewpoint regarding the use by MSD of two colours for the "Singulair" logo. Furthermore, the Court referred to the obligation contained in Article 7, para. 2 of the Royal Decree of 19 April 2001 (the "Parallel Importation Decree") which requires parallel importers to take all necessary steps to remain informed of the latest changes with regard to the license for parallel imports. Accordingly, the Commercial Court concluded that the presentation of the repackaged product was "*inadequate*" and that there was a risk that the reputation of the trade mark and/or its owner would be damaged.

Third, regarding the first BMS-requirement, *i.e.*, that repackaging must be objectively necessary to market the product in the country of importation, the Commercial Court again referred to the ECJ's reasoning in *Bristol-Myers-Squibb*. The ECJ had held that repackaging must be allowed where it is

necessary to market effectively the parallel imported pharmaceutical in the country of import. Indeed, allowing trade mark owners to object to such practices would lead to an *artificial partitioning* of the markets. Conversely, the ECJ had added that repackaging was not objectively necessary if less drastic means of repackaging were available. This was confirmed by the ECJ in the *Orifarm* case (C-297/15) and by the Belgian Supreme Court in the *Cozaar*-cases (*See, this Newsletter, Volume 2016, No. 12, p. 12-13*). According to the Commercial Court, Pi Pharma failed to show that repackaging was objectively necessary to market Singulair in Belgium since Pi Pharma could have over stickered the product. Therefore, the Court reached the conclusion that the first BMS-requirement was not fulfilled either.

Based on the above reasons, the Court held that Pi Pharma infringed MSD's trade marks and copyright and issued an injunction against Pi Pharma to stop selling infringing Singulair products on the Belgian market.

Velvet Jogging Is Not Original

On 19 April 2017, the President of the Commercial Court of Ghent (the "President") decided a case relating to copyright protection of joggings.

The parties in the dispute before the President both market velvet joggings. The dispute was brought by Miles BVBA ("Miles"), the producer of the "Key Cy" jogging ("Key Cy"), which claimed that the "Cosy Cat" jogging ("Cosy Cat") of Makali BVBA ("Makali") infringed the copyright in its own Key Cy jogging.

The President first held that the Key Cy jogging lacked originality to qualify for copyright protection as it did not reflect the personality of its author. The President found that the design and characteristics of the jogging were the mere consequence of marketing choices and fashion trends.

The President then held that the defendant was not guilty of parasitism or free-riding practices, within the meaning of Articles VI.98,1°; VI.100,13° and VI.104 of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*). This is since the elements of the Key Cy jogging can be found in several joggings from various brands, and the claimant did not show that its products have a reputation with the relevant public. Hence, the defendant could not unduly benefit from this reputation.

Accordingly, the President rejected the claimant's action.

Antwerp Court of Appeal Rules on Procedural Costs Indemnity in Intellectual Property Litigation

On 8 May 2017, the Court of Appeal of Antwerp (the "Court") delivered a judgment, following a preliminary ruling from the Court of Justice of the European Union (the "ECJ") (*See, this Newsletter, Volume 2016, No. 8, p. 12*) as regards the recovery of legal fees in intellectual property cases.

The ECJ had held that the Belgian rules limiting the amount of lawyer's fees that can be recovered by a successful party (contained in Article 1022 of the Judicial Code) could run contrary to Article 14 of Directive 2004/48 of 29 April 2004 on the enforcement of intellectual property rights (the "Enforcement Directive"), if they did not allow the prevailing party to recover "a significant and appropriate part of the reasonable costs [it] incurred". The ECJ furthermore held that this provision of the Enforcement Directive could also rule out Member State legislation requiring a fault on the part of the other party for the costs of a technical adviser incurred by the prevailing party to be reimbursed (Case C-57/15 *United Video Properties v. Telenet NV*). The case law of the Belgian Supreme Court holds that such fees can only be recovered where: (i) the other party acted wrongfully; and (ii) these fees were a necessary consequence of the action initiated by the other party

The case went back to the Court which held as follows.

As regards lawyer's fees, the Court stressed that because the Enforcement Directive does not have horizontal effect, it does not give the Court the power to rule *contra legem*. Hence, the Court applied Article 1022 of the Judicial Code and refused to grant the prevailing party reimbursement of all its legal fees. The prevailing party was only awarded the maximum procedural indemnity (*i.e.*, EUR 12,000).

As regards the costs of the technical adviser, the Court granted the entire amount claimed by the prevailing party (*i.e.*, EUR 63,804.25). It based its decision on the fact that these costs contributed to the resolution of the dispute. The Court did not deem a referral to the Belgian Constitutional Court as necessary.

Dutch Court Seeks Guidance from Court of Justice of European Union regarding Copyright Protection of Taste

On 23 May 2017, the Arnhem-Leeuwarden Court of Appeal referred questions for a preliminary ruling to the Court of Justice of the European Union (the "ECJ") relating to the extent to which a specific taste may qualify for protection under copyright law.

The dispute involves, on the one hand, Levola Hengelo BV ("Levola"), the parent company of a group producing and marketing fresh foodstuffs and, on the other hand, Smilde Food BV ("Smilde") which produces food products under its own trademark and under private labels and supplies these products to supermarkets such as Aldi and Lidl.

Levola had purchased all rights related to a popular cream cheese named "*Heksenkaas*" and had put this product on the market in 2012. In January 2014, Smilde started the production and sale of a similar product, "*Witte Wievenkaas*". Convinced that these practices infringed its copyright in the taste of "*Heksenkaas*", Levola brought an action against Smilde for copyright infringement.

The first court held that it was unable to assess whether the taste of the product is covered by copyright and, therefore, dismissed the action on 10 June 2015. It held that it was not for the judge to taste and try to describe the savour of a product and that Levola had not put forward any elements capable of proving the original character and personal imprint of its product's taste. Levola appealed from this judgment.

The Arnhem-Leeuwarden Court of Appeal decided to stay the proceedings and referred questions for a preliminary ruling to the ECJ asking, in essence (i) whether the taste of a product – as its author's own intellectual creation – qualifies for copyright protection; and (ii) whether the intrinsic instability of taste can interfere with such protection. If the ECJ were to answer positively to the first question, the Court of Appeal enquired (i) which requirements should the taste of a product satisfy to be covered by copyright; and (ii) whether the protection would apply to the taste as such or rather to the recipe of the product. The Court of Appeal also sought guidance as to how a court should assess the taste of a product in practice and, likewise, which elements an applicant should put forward when seeking protection.

European Commission Launches Public Consultation on Database Directive

The European Commission launched on 24 May 2017 a public consultation to assess Directive 96/9/EC of 11 March 1996 on the legal protection of databases (the "Database Directive") and consider whether the Directive has to be changed. The Directive was adopted in 1996 and the Commission points out with a sense of understatement that "the database market, and more generally the role of data in the economy, has evolved."

At present, the Directive provides for copyright protection of "original" databases in line with established standards of copyright law above and beyond the possible copyright protection afforded to the content of the database. In addition, the Directive offers what it refers to as "*sui generis*" protection to sets of data that are the result of substantial investment. At the same time, the Directive also safeguards users' rights by creating specific exceptions to the rights of the database owner in the fields of teaching, scientific research, public security and private use.

The consultation runs from 24 May 2017 until 30 August 2017 on the basis of a questionnaire that can be found **here**.

Earlier this month, the European Commission published the mid-term review of its wide-ranging Digital Single Market ("DSM") strategy for Europe. The Commission considers the data economy as one of the key areas of the DSM, along with cybersecurity and the operation of online platforms. Its work on the data economy includes an initiative on the cross-border free flow of non-personal data (expected in the Fall of 2017) as well as an initiative on accessibility and re-use of public and publicly funded data (foreseen for the Spring of 2018). Furthermore, the Commission is occupied with other data issues such as liability.

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| LABOUR LAW

New List of Eco-voucher Products on 1 June 2017

On 23 May 2017 the National Labour Council (*Nationale Arbeidsraad/Conseil National du Travail*) adopted Collective Bargaining Agreement No. 98*quinquies* (*Collectieve Arbeidsovereenkomst tot wijziging van de collectieve arbeidsovereenkomst nr. 98 van 20 februari 2009 betreffende de ecocheques/Convention collective de travail modifiant la convention collective de travail n° 98 du 20 février 2009 concernant les éco-chèques*) (*CBA No. 98quinquies*) which entered into force on 1 June 2017. CBA No. 98*quinquies* is intended to improve and simplify the system of eco-vouchers following a thorough review of the list of products and services that can be purchased with such vouchers.

A task force within the National Labour Council elaborated the new list, reducing the previous seven generic product categories to three and limiting the number of sections in each category:

1. *Ecological products and services*: 'handle water and energy sustainably', 'energy-efficient electrical', 'European Eco-labelled products and services', 'biological products' and 'environmentally friendly wood products and paper with FSC or PEFC-labels'.

2. *Sustainable mobility and free time*: 'environmentally friendly and sustainable mobility', 'sustainable gardening' and 'ecotourism'.

3. *Re-use, recycling and waste prevention*: 'purchase of second hand products', 'purchase of products specifically intended for re-use or composting', 'purchase of recycled products or products consisting of recycled or recuperative material, compostable or biodegradable material' and 'repairs'.

The product categories have therefore been simplified and expanded. For example, it will now be possible to pay for almost all second hand products with eco-vouchers. Until now this was only possible for clothes, books, furniture and textiles. Eco-vouchers will also apply to repair services.

The new list can be found in the annex to CBA No. 98quinquies (www.cnt-nar.be/CAO-ORIG/cao-098-quin-quies-(23-05-2017).pdf).

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| LITIGATION

Court of Justice of European Union Rules on Lis Pendens Doctrine After Initiation of Interlocutory Proceedings

On 4 May 2017, the Court of Justice of the European Union (the "ECJ") delivered a judgment interpreting and clarifying the rules on parallel litigation and *lis pendens* in trans-European civil and commercial litigation.

Parallel litigation and *lis pendens* refer to a situation in which different legal proceedings relating to the same object and cause of action are brought between the same parties in the courts of different forums. In such a situation, in order to reduce concurrent proceedings before the courts of various Member States and to avoid irreconcilable decisions, Article 27 and following Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels Regulation") provide that the first court seized with the dispute will have the exclusive power to establish whether it is competent to rule on the particular dispute. It is only if the first court finds that it does not have jurisdiction to hear the case that the other courts will regain the power to hear that case. However, if the court first seized confirms its jurisdiction, then the other courts will have to decline jurisdiction in favour of that court.

In the case at hand, the ECJ was asked to interpret Article 27 and following of the Brussels Regulation in order to decide whether interlocutory proceedings brought before the courts of one Member State pre-empted legal proceedings to be brought before the courts of the other Member States in a dispute involving the same parties and the same cause of action.

The case concerned HanseYachts, a German motorboat and yachts manufacturer, which had sold a boat to its French dealer (Port D'Hiver Yachting), which, in turn, resold the boat to a company called SMCA in April 2010. In 2011, after damage had appeared on the boat's engine, SMCA filed a claim for interlocutory proceedings before the Marseilles Commercial Court (France) against (among others) Port D'Hiver Yachting and HanseYachts, seeking measures of enquiry and preservation of evidence. It was only in 2015 that a substantive application seeking compensation for the alleged loss was filed before the French courts.

In the meantime, after the initiation of the interlocutory proceedings but before the initiation of the substantive proceedings, HanseYachts had brought an action before a German court seeking a negative declaration that it was not liable for the loss suffered.

Objecting to the German proceedings, Port D'Hiver Yachting and SMCA argued that Articles 27 and following of the Brussels Regulation required the German court to stay its proceedings since it was not the first court seized of this matter.

The German court then referred the matter to the ECJ for a preliminary ruling.

In reaching its judgment, the ECJ examined the French statutory provision which permits a party in a dispute to request interlocutory proceedings (Article 145 of the French Code of Civil Procedure). The ECJ found that although a connection could be found between the interlocutory proceedings and the substantive proceedings, both were independent from one another. Consequently, the ECJ held that the Brussels Regulation did not preclude the initiation of legal proceedings in a second Member State, even though interlocutory proceedings had already been brought in the same dispute before the courts of a first Member State. The legal proceedings brought by HanseYachts before the German court were therefore valid.

It is important to note that although the Brussels Regulation has been replaced by Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels Ibis Regulation"), the findings of the ECJ in this case fully apply to the Brussels Ibis Regulation since the latter contains provisions similar to those contained in Article 27 and following of the Brussels Regulation.

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Constitutional Court Rules on State Immunity From Execution

In a judgment dated 27 April 2017, the Constitutional Court (*Grondwettelijk Hof / Cour Constitutionnelle*) (the "Constitutional Court") largely confirmed the validity of the statutory provision governing State immunity from execution (Article 1412*quinquies* of the Belgian Judicial Code) which became law in September 2015.

As a general rule, Article 1412*quinquies* of the Belgian Judicial Code provides that assets located in Belgium that belong to a foreign State are immune from execution and cannot be subject to enforcement proceedings by creditors.

There are, however, exceptions to that rule under strict conditions: a party wishing to seize the assets belonging to a State needs to obtain a prior authorisation from a judge (*Beslagrechter / Juge des saisies*). This judge will only authorise the seizure if: (i) the foreign State has "*expressly*" and "*specifically*" consented to the seizure of the assets; (ii) the foreign State has specifically allocated those assets to the enforcement of the claim which gives rise to the seizure; or (iii) the assets are located in Belgium and were allocated to or are used for an economic or commercial activity while relating to the entity against which execution is sought.

Given the difficulty of meeting these requirements, two entities, *NML Capital Limited* ("NML"), an American hedge fund which holds debts securities against Argentina, and *Yukos Universal Limited* ("YUL"), an entity that had been granted a multi-billion arbitral award against Russia, had brought annulment proceedings before the Constitutional Court against Article 1412*quinquies* of the Belgian Judicial Code.

Their arguments centered around two questions.

Does Article 1412quinquies of Belgian Judicial Code Violate Principle of Equality and Non-discrimination?

Both NML and YUL argued that Article 1412*quinquies* of the Belgian Judicial Code violated Articles 10 and 11 of the Belgian Constitution (*i.e.*, the provisions on equality and non-discrimination) since that provision prohibited a creditor of a foreign State from seizing the assets belonging to that State while such a prohibition does not apply to a creditor of any other person or entity.

In response, the Constitutional Court first relied on its long established case-law, according to which the principle of equality and non-discrimination does not preclude a difference in treatment, so long as this difference is based on objective criteria, is legitimate and is proportionate.

In applying these principles to the case at hand, the Constitutional Court first found that the distinction at hand relied on an objective criterion (*i.e.*, the nature of the debtor – a foreign State).

Second, the Constitutional Court also found that the distinction was legitimate since it aimed to protect international comity, ensure good relationships between Belgium and foreign States and avert diplomatic incidents.

Third, with respect to the proportionality requirement, both NML and YUL argued that the requirements, laid down in Article 1412*quinquies* of the Belgian Judicial Code, to seize the assets of a foreign State were disproportionate and violated the European Convention of Human Rights since they precluded a creditor from enforcing a judgment or an award rendered against the foreign State. However, the Constitutional Court dismissed this argument and considered instead that the case-law of the European Court of Human Rights, the United Nations Convention on Jurisdictional Immunities of States and Their Property (which has not yet been ratified by Belgium) and customary international law allowed for limitations to the right to execution of court judgments and arbitral awards.

In the light of these requirements, the Constitutional Court found that Article 1412*quinquies* does not violate the principle of equality and non-discrimination.

Are Requirements Allowing Seizure Legal?

The Constitutional Court then moved to examine the three conditions that have to be satisfied pursuant to Article 1412*quinquies* of the Belgian Judicial Code in order to allow a seizure of a foreign State's assets.

The Constitutional Court was particularly critical of the first requirement according to which the foreign State must have "*expressly*" and "*specifically*" consented to the seizure of the assets.

In particular, the reference to the word "*specifically*" proved to be problematic since this word does not appear in the United Nations Convention on Jurisdictional Immunities of States and Their Property. The Constitutional Court also noted that the International Court of Justice never referred to this word within this context. On this basis, the Constitutional Court annulled the word "*specifically*" in Article 1412*quinquies* of the Belgian Judicial Code.

Ultimately, the Constitutional Court largely confirmed the validity of Article 1412*quinquies* of the Belgian Judicial Code (despite the annulment of the word "*specifically*"). As a result, the possibilities to enforce judgments and arbitral awards taken against sovereign States in Belgium are reduced.

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PUBLIC PROCUREMENT

Royal Decree on Award of Public Procurement Contracts in Classical Sectors

On 9 May 2017, the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*) published a Royal Decree of 18 April 2017 on the award of public procurement contracts in the classical sectors (*Koninklijk Besluit van 18 april 2017 plaatsing overheidsopdrachten in de klassieke sectoren/Arrêté royal du 18 avril 2017 relatif à la passation des marchés publics dans les secteurs classiques,* the "Royal Decree").

The Royal Decree implements Title II of the Law of 17 June 2016 on public procurement (*Wet inzake overheidsopdrachten van 17 juni 2016/Loi du 17 juin 2016 relative aux marchés publics,* the "Law") which, in turn, implements into Belgian law Directive 2014/24/EU of 26 February 2014 on public procurement ("Directive 2014/24/EU").

The Royal Decree does *not* deal with the performance of public procurement contracts. This matter will be governed by a distinct Royal Decree, which was approved in second reading by the Council of Ministers on 28 April 2017, but still has to be published in the Belgian Official Journal. In addition, the Council of Ministers has to adopt two further implementing decrees, namely those on the award of concession contracts and additionally on procurement by entities operating in the water, energy, transport and postal services sectors (*i.e.*, in the so-called "special sectors").

The Royal Decree repeals and replaces the current Royal Decree of 15 July 2011 on the award of public procurement contracts in the classical sectors (*Koninklijk Besluit van 15 juli 2011 plaatsing overheidsopdrachten klassieke sectoren/Arrêté royal du 15 juillet 2011 relatif à la passation des marchés publics dans les secteurs classiques*), except for its Chapter 10 on public works concessions (*See, this Newsletter, Volume, 2011, No. 8, p. 9*).

The Royal Decree adopts the terminology of Directive 2014/24/EU such as the new term "*negotiated procedure with prior publication*" and the Directive's provisions on "*variants*", "*common technical specifications*" and "*technical reference*".

Furthermore, the Royal Decree introduces provisions concerning the following subjects:

- Communication, in particular communication by electronic means.
- Techniques and instruments for electronic procurement, such as dynamic purchasing systems.
- Measures for preventing, identifying and remedying conflicts of interest in the context of procurement procedures such as the revolving-door mechanism, *i.e.*, a mechanism to avoid that past staff members of a contracting authority participate in procurement procedures and/or the performance of the public contracts tendered by the same contracting authority.
- Grounds for exclusion - Regarding the choice of participants and the award of contracts, the Royal Decree specifies the grounds for exclusion from participation in a procurement procedure. In this regard, it goes beyond the requirements of Directive 24/2014/EU in that it does not only govern abnormally low tenders, but also abnormally high tenders.
- Small sum contracts and legal service contracts.

The Royal Decree will enter into force on 30 June 2017, just as the new regulatory framework on public procurement. It is timely for this to happen as Directive 24/2014/EU was required to be implemented in national law by 18 April 2016 at the latest. Belgium is more than one year late in implementing the Directive.

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