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CAPITAL MARKETS

Financial Services and Markets Authority Issues Opinion on Standstill Period Provided For in Royal Decree on Take-over Bids

On 14 May 2019, the Financial Services and Markets Authority (the "FSMA") issued an opinion on the scope of the standstill period provided for in Article 50, §7, 1° of the Royal Decree on takeover bids (*Koninklijk Besluit van 27 april 2007 op de openbare overnamebiedingen/Arrêté royal du 27 avril 2007 relatif aux offres publiques d'acquisition* – the "Royal Decree").

According to this provision, persons acting in concert on the basis of an agreement (*"akkoord van onderling overleg"/"accord d'action de concert"*) who jointly hold more than 30% of the securities with voting rights in a listed company must not acquire additional securities during a period of 3 years following the date of the agreement (the "Standstill Period"). If the parties do not respect the Standstill Period, they are obliged to mount a takeover bid for all securities in the listed company.

This requirement raises the question whether the Standstill Period also applies to parties that jointly hold more than 30% of the securities with voting rights in the listed company but entered into an agreement less than 3 years before the first listing of the securities on the stock exchange.

In response, the recently issued FSMA opinion holds that the Standstill Period does not apply to such parties. It sets out that the provisions on mandatory takeover bids contained in the Royal Decree only start to apply as from the moment the company is listed. This point of view is in line with Article 74 of the Law on Takeover Bids (*Wet van 1 april 2007 op de openbare overnamebiedingen/Loi du 1 avril 2007 relative aux offres publiques d'acquisition* – the "Law on Takeover Bids") which provides that parties who jointly held more than 30% of the securities with voting rights on the date of entry into force of the Law on Takeover Bids are not obliged to issue a takeover bid (also not if they acquire additional securities with voting rights at a later stage).

COMPETITION LAW

Publication of Two Laws Reforming Belgian Competition Law

On 24 May 2019, two laws that complete and recast Belgian competition law were published in the Belgian Official Journal.

The first law introduces in the Code of Economic Law ("CEL"), which contains the Belgian competition rules, new provisions governing abuses of a position involving economic dependence, significantly unbalanced contract terms and unfair practices in business to business relationships. This law (i) seeks to establish an additional competition law infringement, namely the abuse of a position of economic dependence towards other businesses; and (ii) creates a prohibition of both unbalanced contract terms and unfair, misleading and aggressive practices in a business to business relationship. (*See, this Newsletter, Volume 2019, No. 2, pp. 3-4*).

The prohibition of unfair, misleading and aggressive practices will enter into force on 1 September 2019, the prohibition of abuse of economic dependence on 1 June 2020 and the prohibition of unbalanced contract terms on 1 December 2020.

The second law published on 24 May 2019 will recast Book IV of the CEL. This law does not bring about major substantive, procedural or institutional changes to the current competition rules. However, it replaces in full Book IV of the CEL, adds new definitions to Book I of the CEL, and amends Book XV of the CEL which governs the enforcement of laws. (*See, this Newsletter, Volume 2018, No. 11, p. 3 and Volume 2019, No. 2, pp. 4-5*).

The second law entered into force on 3 June 2019, except for the provisions sanctioning the abuse of economic dependence which, logically, will enter into force simultaneously with the law introducing the concept of abuse of economic dependence in Belgium, *i.e.*, as noted, on 1 June 2020.

Belgian Competition Authority Clears Telenet's Acquisition of De Vijver Media Subject to Commitments

On 13 May 2019, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") conditionally approved the acquisition by Telenet Group Holding NV (controlled by Liberty Global Plc - "Telenet") of sole control over De Vijver Media NV ("DVM").

DVM is a holding company active in the media sector. Since 2015, it has been jointly owned by Telenet (50%), Mediahuis NV (30%) and Waterman & Waterman (20%). DVM owns the television production company Woestijnvis NV, the broadcasting company SBS Belgium NV (which operates Dutch-language television channels such as Vier, Vijf and Zes) and the advertising sales company SBS Belgium Sales NV.

Telenet initially notified the proposed acquisition to the European Commission on 3 October 2018. On 12 October 2018, the BCA requested the Commission to refer the case to it pursuant to Article 9 of the EU Merger Regulation (*See, this Newsletter, Volume 2018, No. 10, p. 4*). On 23 November 2018, the Commission agreed that the BCA was best placed to review the proposed concentration and accepted to transfer the case (*See, this Newsletter, Volume 2018, No. 11, p. 3*). As a result, Telenet had to notify the transaction a second time to the BCA, which it did on 21 January 2019.

During the course of the procedure before the BCA, several market players raised concerns about the acquisition, including the Dutch-language public broadcaster VRT, the professional association for Flemish independent film and television producers (VOFTP), telecommunications firm Proximus NV (which operates a competing distribution platform) and the broadcasting company Medialaan NV (active in the Dutch-language region managing television channels such as VTM).

In its decision, the Competition College first made it clear that it was not bound by the findings made by the European Commission in its 2015 decision conditionally approving the acquisition by Telenet of a controlling stake in DVM. The College added that the acquisition by Telenet of sole control over DVM could have an impact on competition even though Telenet already was one of the parties exercising joint control.

The Competition College then examined the potential non-coordinated vertical effects of the transaction. The College found that, post-transaction, Telenet would be fully vertically integrated, while producing television content, operating television channels and running a dominant distribution platform. As a result, Telenet would be able to foreclose competing distribution platforms from access to its channels. Telenet could also foreclose competing broadcasters from access to (i) its distribution platform; (ii) its AVAD platform (advanced advertising platform, which allows broadcasters whose channels are distributed on Telenet's distribution platform to direct targeted advertising to its viewers) and (iii) its user data.

The Competition College noted that the concerns formulated by the European Commission in its 2015 decision (basically, that DVM would refuse to license its channels to distributors that compete with Telenet and that Telenet would disadvantage the channels and programmes of Medialaan and VRT) were still valid. The College also found that the commitments made binding by the Commission in its 2015 decision remained relevant and that additional commitments were needed to remedy the competition concerns identified.

In order to alleviate these concerns, Telenet offered the following commitments, which were accepted and made binding by the BCA:

1. *Access to television channels* – Telenet committed to (i) approve reasonable requests by distributors to distribute Telenet's television channels at fair, reasonable and non-discriminatory conditions; (ii) make new television channels available to distributors without discrimination; and (iii) refrain from decreasing the quality of television channels Vier, Vijf and Zes;

2. *Telenet distribution platform* – Telenet committed to (i) not discriminate against the television channels operated by VRT and Medialaan through the user interface of its distribution platform; and (ii) not use newly negotiated fees for the distribution of television channels as a reference in the negotiations of agreements for the distribution of television channels of VRT and Medialaan on its distribution platform;

3. *AVAD Platform* – Telenet committed to issue a binding offer for a duration of six months to provide AVAD-services to any Flemish television channel that requests it in writing within three months after the decision, provided that the applicant includes a credible and substantiated business plan that demonstrates a return on investment for Telenet; and

4. *Ratings* – Telenet committed not to share data or analysis in relation to ratings of Flemish television channels with its own television channels and with Woestijnvis and to install Chinese walls preventing such internal exchange of information.

A trustee will be appointed to monitor Telenet's compliance with these commitments which will expire seven years after the BCA decision, unless the BCA decides to lift or to amend them at Telenet's request.

Belgian Competition Authority Carries Out Series of Dawn Raids in Retail Sector

On 20 and 21 May 2019 the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") carried out on-site inspections at the premises of companies active in the retail sector. Although the BCA did not reveal the identity of the companies concerned, it appears that at least supermarket chain Carrefour and central purchasing company Provera Belux were visited by the BCA.

Provera groups purchases for the retail stores operated by the Louis Delhaize group, such as Cora, Louis Delhaize, Match, Smatch and Delitraiteur. In January 2019, Carrefour and Provera combined their purchasing teams and started buying products together from approximately 140 suppliers for their respective retail stores in Belgium and Luxembourg. The BCA suspects the targeted companies of "anticompetitive practices related to a purchase partnership concerning consumer goods".

Markets Court Dismisses Appeal of The Great Circle Against Belgian Competition Authority's Interim Measures Decision and Explains Limits of its Jurisdiction

On 8 May 2019, the Markets Court of the Brussels Court of Appeal (*Marktenhof / Cour des marchés*) rejected as inadmissible the appeal lodged by The Great Circle against the decision of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") to reject its request for interim measures against the Royal Meteorological Institute of Belgium (*Koninklijk Meteorologisch Instituut / Institut Royal Météorologique*) ("RMI").

The Great Circle is a company offering meteorological software based on raw meteorological data. It complained before the BCA that RMI had allegedly abused its dominant position on the market for the supply of raw meteorological data and/or entered into an anticompetitive agreement with other national meteorological services and intergovernmental organisation ECMWF. The Great Circle therefore requested the BCA to order RMI to supply it with raw meteorological data originating from ECMWF. On 15 February 2019, the BCA rejected this request for interim measures as there was no *prima facie* evidence of an infringement of competition law (*See, this Newsletter, Volume 2019, Issue No. 4, pp. 5-6*). The Great Circle appealed this decision to the Markets Court.

The Markets Court took this opportunity to clarify its review powers in appeals of decisions of the BCA. The Court explained that its "full jurisdictional review" under Article IV.90(2)(2) of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*) ("CEL") (former Article IV.79(2)(2) CEL) allows it to review all the facts of a case. However, the Court will only verify whether the facts are accurately described and are not assessed manifestly incorrectly. Overall, the Court's role is to verify whether the decision under appeal is illegal or defective and not to give the applicant a "new chance" to make its case. The applicant must prove that the decision under appeal is defective or illegal *sensu lato* as the Court is not concerned with issues of mere policy or suitability. The Court confirmed that it has the power to substitute its own decision for that of the BCA but stressed that this is only a faculty, not the essence of its jurisdiction, and that it can only do so if it first finds that the decision under appeal is illegal or defective.

In this case, the Markets Court found that The Great Circle had requested the amendment of the BCA decision under appeal without first seeking its annulment. The Great Circle essentially requested the Court to re-examine its request for interim measures rather than criticizing the legality of the contested decision. In this respect, the Court noted that The Great Circle had not submitted any grounds of appeal based on any fault or illegality of the decision under appeal. As a result, the Court found that, even if the applicant's request for the review and amendment of the BCA decision had also, implicitly, included a request for annulment, the Court would not have been able to grant The Great Circle the interim measures that it requested.

Finally, the Markets Court added that, pursuant to Article IV.90(2)(3) CEL (former Article IV.79(2)(3) CEL), the Court can only annul a decision (not amend it) when the Court finds that, contrary to the contested decision, there is an infringement of competition law. Granting The Great Circle the interim measures which it requested would have required a finding that there was, *prima facie*, an infringement of competition rules. As a result, the Court could only annul the contested decision (which The Great Circle did not ask the Court to do), not amend it as The Great Circle had wanted.

Based on the above, the Court rejected as inadmissible The Great Circle's appeal of the decision of the BCA. The Great Circle still has the possibility to appeal this judgment to the Supreme Court on points of law (and not facts).

CONSUMER LAW

New European Union Directives Increase Consumer Protection for Supply of Digital Content and Services and Sale of Goods

On 22 May 2019, the Official Journal of the European Union published two new directives (together, the "Directives"), which had been adopted on 20 May 2019 by the European Parliament and the EU Council of Ministers as part of the Digital Single Market Strategy:

- Directive (EU) 2019/770 of 20 May 2019 on specific aspects concerning contracts for the supply of digital content and digital services, which ensures better access to digital content and services for consumers and facilitates the supply of such content and services for businesses ("Directive 2019/770"). This Directive not only applies to contracts under which the trader supplies against monetary payment digital content or services to the consumer, but also to contracts under which the trader supplies digital content or services in exchange for access to the consumer's personal data.

- Directive (EU) 2019/771 of 20 May 2019 on specific aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, which aims to establish a high level of consumer protection and reinforcing the trust of consumers and sellers of goods, bearing in mind cross-border e-commerce transactions ("Directive 2019/771").

The Directives are meant to complement each other in tackling some of the major obstacles to the development of cross-border e-commerce in the EU. They provide rules on (i) the conformity with the contract of the good, digital content or service; (ii) the remedies in the event of a lack of conformity or a failure to supply; and (iii) the terms for the exercise of those remedies. In addition, Directive 2019/770 provides conditions applicable to the modification of digital content or services (e.g., updates or upgrades).

Contrary to the current Directive 1999/44/EC of 25 May 1999 on specific aspects of the sale of consumer goods and associated guarantees ("Directive 1999/44/EC"), both new Directives provide for the maximum harmonisation of consumer protection levels in the EU Member States, except when expressly provided for otherwise. The Directives both create a legal warranty period of two years as of the delivery of the good, digital content or service. However, as an exception to the maximum harmonisation principle, EU Member States may introduce or maintain longer legal warranty periods, but only as far as contracts for the sale of goods are concerned. The Directives also establish a one-year time period during which the trader has the burden of proving that the lack of conformity did not exist at the time of supply.

The two-year legal warranty period is in line with the legal warranty period currently applicable to the sale of goods in Belgium which finds its origin in Directive 1999/44/EC (See, Article 1649*quater,* §1 of the Civil Code). In contrast, the one-year presumption as to the lack of conformity of the good at the time of delivery raises the level of consumer protection in Belgium given that this presumption currently falls on the trader for only six months (See, Article 1649*quater*, §4 of the Civil Code). As far as the supply of digital content and services are concerned, the legal warranty period and the presumption as to the lack of conformity are complete novelties in Belgium.

The provisions of the Directives, as well as their national implementing measures, will apply to contracts for the sale of goods concluded, and to digital content and services provided, as of 1 January 2022.

Court of Justice of European Union Clarifies Interpretation of Consumer Sales and Guarantees Directive

On 23 May 2019, the Court of Justice of the European Union (the "ECJ") held that EU Member States are competent to establish the place where the consumer is required to make goods acquired under a distance contract available to the seller, in order for these goods to be brought into conformity in accordance with Article 3 of Directive

1999/44/EC of 25 May 1999 on specific aspects of the sale of consumer goods and associated guarantees (the "Directive"). This provision entitles the consumer to "*require the seller to repair the goods or* [...] *to replace them, in either case free of charge, unless this is impossible or disproportionate*". The ECJ also held that the consumer's right to having goods brought into conformity "free of charge" does not include the seller's obligation to pay for the cost of transporting those goods (subject to limited exceptions) (ECJ, 23 May 2019, case C-52/18, *Christian Fülla v. Toolport GmbH*).

The ECJ delivered its judgment in response to a request for a preliminary ruling from the District Court of Norderstedt in Germany (the "Court") in a dispute between a consumer, Christian Fülla, and a German company, Toolport GmbH ("Toolport") regarding the purchase of a defective tent. After having bought the tent from Toolport by telephone and having had it delivered to his place of residence, Mr. Fülla discovered that the tent was defective. He asked Toolport to bring the tent into conformity at his place of residence. Toolport, however, considered that Mr. Fülla's claims were unfounded, following which Mr. Fülla requested the rescission of the contract and reimbursement of the purchase price of the tent. Toolport failed to comply with that request and Mr. Fülla consequently brought an action against Toolport before the Court. The main issue at hand regarded the place where the tent was to be brought into conformity.

Under German law, the consumer is required to place the item in question at the seller's place of business for it to be brought into conformity. The Court, however, was unsure whether such a requirement would be compatible with Article 3 of the Directive, as transport is likely to be seen as a significant inconvenience for the consumer, which the Directive seeks to avoid. Furthermore, the Court was uncertain as to whether the mention "free of charge" under Article 3 of the Directive implies that the seller also has to take charge of the consumer's transportation fee. Finally, the Court raised doubts as to when to ensure the consumer's right to rescission of the contract. The Court thus decided to stay the proceedings and refer these questions of interpretation to the ECJ for a preliminary ruling.

At the outset, the ECJ explained the purpose of Article 3 of the Directive: if the goods delivered are not in conformity, the consumer has the right to require the goods to be brought into conformity by repair or replacement, without any significant inconvenience to the consumer. If that is not possible, Articles 3(5) and (6) dictate that an appropriate reduction in price or the rescission of the contract must be granted.

Finding that the place in question can vary depending on the specific circumstances of each individual case, the ECJ left it up to the national court to specify such a place, taking into account the three-pronged requirement that the goods must be brought into conformity: (i) free of charge; (ii) within a reasonable time; and (iii) without significant inconvenience to the consumer.

With respect to the "free of charge" requirement, the ECJ clarified that it refers to the costs necessary to bring the goods into conformity, such as the cost of postage, labour and materials. The ECJ concluded that this does not include the seller's obligation to pay for the cost of transporting those goods to the seller's place of business, unless such a cost constitutes such a burden as to deter the consumer from asserting his rights. According to the ECJ, this is for the national court to determine.

Finally, with respect to the rescission of the contract, the ECJ first noted that the consumer may require the seller to repair or replace the goods, unless this is impossible or disproportionate. The ECJ made clear that rescission is only available if neither of the two options is convenient, or if the seller fails to comply with the requirements set out above. Accordingly, the ECJ favours the performance of the contract instead, rescission should be considered as a solution of last resort.

In the case at hand, where Toolport did not respond to Mr. Fülla's request nor specify any appropriate steps to bring Mr. Fülla's tent into conformity, Mr. Fülla was unable to have his item repaired or replaced within a reasonable time. In these circumstances, the ECJ found that the Court should ensure Mr. Fülla's right to a rescission of the contract.

CORPORATE LAW

Incomplete or Incorrect Registration of Plaintiff in Crossroads Bank for Enterprises No Longer Causes Action To Be Inadmissible

On 17 May 2019, the Law amending the Code of Economic Law (*Wetboek van Economisch Recht/Code de droit économique* – the "CEL") regarding the registration of enterprises in the Crossroads Bank for Enterprises (*Kruispuntbank van Ondernemingen/Banque-Carrefour des entreprises* – the "CBE") was published in the Belgian Official Journal (*Wet van 2 mei 2019 tot wijziging van het Wetboek van Economisch Recht wat de inschrijving in de Kruispuntbank van Ondernemingen betreft/ Loi du 2 mai 2019 modifiant le Code de droit économique en ce qui concerne l'inscription dans la Banque-Carrefour des Entreprises* - the "Law").

The Law abolishes Article III.26, §62 of the CEL which provided that an action of a firm in relation to an activity for which that firm was not registered in the CBE may be declared void by the court at the request of the defending party before that party raises any other defences.

The removal of this provision causes an inconsistency in the CEL to disappear. The CEL allowed a firm to remedy the inadmissibility of its action if that firm was not at all registered with the CBE, but did not permit a firm to remedy the inadmissibility of an action if its registration was incomplete or incorrect.

The amendment to the CEL entered into force on 27 May 2019.

Adoption of Royal Decree Implementing New Belgian Companies' and Associations' Code

On 30 April 2019, the Royal Decree implementing the Belgian Companies' and Associations' Code was published in the Belgian Official Journal (*Koninklijk Besluit van 29 april 2019 tot uitvoering van het Wetboek van vennootschappen en verenigingen/Arrêté royal du 29 avril 2019 portant exécution du Code des sociétés et des associations* – the "Royal Decree").

The Royal Decree consists of nine books and incorporates most parts of the existing Royal Decrees governing the implementation of the current Belgian Companies' Code. Furthermore, it implements the new provisions of the new Belgian Companies' and Associations' Code (the "BCAC"). These deal with issues such as not for profit associations and international not for profit associations, listed companies and squeeze-out bids.

The Royal Decree entered into force together with the BCAC on 1 May 2019 and applies to all new companies incorporated on or after that date. Further, the BCAC and the Royal Decree will apply to existing companies as from 1 January 2020. In case the articles of association of a given company contain provisions that are incompatible with the mandatory provisions of the BCAC, the latter will prevail over such incompatible provisions. The supplementary provisions of the BCAC will also apply to existing companies as from 1 January 2020, but the articles of association may deviate from these provisions. Existing companies have until 1 January 2024 to bring their articles of association in line with the BCAC.

Adoption of Belgian Corporate Governance Code 2020 for Listed Companies

On 17 May 2019, a new Royal Decree laying down the corporate governance code to be observed by listed companies was published in the Belgian Official Journal (*Koninklijk Besluit van 12 mei 2019 houdende aanduiding van de na te leven code inzake deugdelijk bestuur door genoteerde vennootschappen/Arrêté royal du 12 mai 2019 portant désignation du code de gouvernement d'entreprise à respecter par les sociétés cotées* – the "Royal Decree").

The new corporate governance code 2020 (the "Code 2020") replaces the existing Corporate Governance Code published in 2009. It will serve as the new reference code for listed companies within the meaning of Article 3:6, § 2 of the new Belgian Companies' and Associations' Code (the "BCAC") as far as corporate governance is concerned.

The Code 2020 reflects the changes in the Belgian and European regulatory framework since 2009, including the new provisions on listed companies in the BCAC. For example, under the BCAC, limited liability companies can opt for a governance model of either two tiers (with a supervisory board and management board) or one tier (with only a board of directors). The Code 2020 now provides that listed companies must explicitly opt for one of the two governance models. In general, the alignment of the Code 2020 with the BCAC ensures that listed companies can operate within a clear framework of both hard and soft law.

Additionally, the Code 2020 places more emphasis on long-term strategy and long-term value creation, taking account of the interests of all shareholders and other stakeholders.

As was the case for the Code 2009, the Code 2020 is based on the "comply or explain" principle.

In line with the transitional provisions of the BCAC, the Code 2020 will apply to the financial year starting on or after 1 January 2020. However, listed companies may choose to apply the Code 2020 to the financial year that started on or after 1 January 2019.

New Law Prohibits Companies from Exercising Public Mandates

On 29 May 2019, the law prohibiting the use of management companies by government officials was published in the Belgian Official Journal (*Wet van 17 mei 2019 tot het verbieden van een beroep op managementvennootschappen door overheidsbestuurders/Loi du 17 mai 2019 interdisant le recours à des sociétés de gestion aux administrateurs publics* - the "Law").

The Law contains a general prohibition for companies to exercise a public mandate. Pursuant to the Law, the following mandates are considered to be public and are consequently caught by the prohibition:

- to the extent that they receive a remuneration for the performance of that mandate, members of the board of directors, executive committee or advisory board of (i) intermunicipal or -provincial cooperatives and (ii) legal entities which are controlled by a government or several governments jointly, *i.e.*, when the(se) government(s) have the power to appoint the majority of the board of directors or hold the majority of the share capital or voting rights; and

- government commissioners and members of the board of directors, executive committee or advisory board of a legal entity that through a governmental decision forms part of the government and receives a remuneration in that context.

This prohibition seeks to prevent individuals appointed to a public mandate from taking up that mandate through a management company in order to benefit from the more advantageous company tax regime. However, the final wording of the Law prohibits companies in general, and not only management companies, from taking up a public mandate. As a result, this does not seem to be in line with the title and the objective of the Law.

The Law will enter into force on 1 January 2020.

DATA PROTECTION

European Data Protection Board Publishes Enforcement Activities Since Application of General Data Protection Regulation

On 22 May 2019, the European Data Protection Board ("EDPB") published a survey on the enforcement actions taken by the national supervisory authorities within the European Economic Area ("EEA"), summarising their achievements over the past 12 months.

The survey shows that the EDPB registered a total of 446 cross-border cases since the entry into application of the GDPR on 25 May 2018. 205 of them have led to a One-Stop-Shop ("OSS") procedure, *i.e.,* a mechanism enabling companies that engage in cross-border processing to interact only with the national authority of their "main establishment". So far, 19 OSS procedures have reached a final outcome.

At the level of the national supervisory authorities, more than 144,000 queries and complaints and more than 89,000 data breaches were communicated since May 2018. 63% of the national cases were closed, while 37% are in progress.

Members of Executive Committee Belgian Data Protection Authority Appointed

On 9 May 2019, the appointment of the new members of the executive committee (*directiecomité/comité de direction*) of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit/L'Autorité de protection des données* - DPA) was published in the Belgian Official Journal.

Five of the appointees will lead a specific internal body within the DPA. These five internal bodies are:

- the general secretariat (*algemeen secretariaat/secrétariat général*), which can be contacted, inter alia, to consult on the result of a data protection impact assessment as required under Article 36 of the GDPR (which will be led by David Stevens);
- the "first line service" (*eerstelijnsdienst/service de première ligne*) acting as a contact point for external stakeholders, dealing with complaints and requests, and examining their admissibility (which will be led by Charlotte Dereppe);
- the knowledge centre (k*enniscentrum/centre de connaissances*) issuing advice and recommendations on compliance with the GDPR (which will be led by Alexandra Jaspar);
- the inspection service (*inspectiedienst/service d'inspection*) which is bestowed with (i) investigative powers; (ii) powers to take corrective action and issue authorisations; and (iii) advisory powers (which will be led by Peter Van den Eynde); and
- a dispute chamber (*geschillenkamer/chambre contentieuse*): a legal and administrative body holding the prosecution and sanctioning powers. The dispute chamber also oversees the inspection service's investigative powers and its powers to take corrective action (which will be led by Hielke Hijmans).

Together, the five members form the executive committee, which will be led by David Stevens.

Belgian Data Protection Authority Publishes Annual Report for 2018

The Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit/L'Autorité de protection des données* - DPA) has published its annual report for 2018.

In its report, the DPA describes its activities in 2018 and offers a number of figures in this respect. For example, the DPA handled 215 requests for advice, compared to 90 in 2018. The DPA also handled 7,182 files, which is an

increase of 46% compared to 2017. The files concerned 6,224 requests for information, 295 requests for mediation, 218 verification files and 445 data breach notifications. Since the entry into application of the GDPR, 3,666 data protection officers have been registered (*functionarissen voor gegevensbescherming/ délégués à la protection des données*).

The annual report can be found here in Dutch and in French.

First Financial Sanction in Belgium for Violation of General Data Protection Regulation

On 28 May 2019, the Dispute Chamber of the Belgian Data Protection Authority (*geschillenkamer/chambre contentieuse* – the "Dispute Chamber") imposed its first administrative fine, a new sanctioning power that it was endowed with under the General Data Protection Regulation 2016/679 ("GDPR").

The subject-matter of the dispute was the use of e-mail addresses for electoral propaganda by a mayor who had used contact details obtained in the exercise of his/her public mandate. In this case, the mayor had acquired contact details from citizens who made an appointment in order to complain about an allotment change (*'verkavelingswijziging'/'modification des permis de lotir'*).

The Dispute Chamber found that there had been an infringement on the purpose limitation principles of Articles 5.1 (b) and 6.4 of the GDPR. This principle prohibits the use of personal data for purposes that are incompatible with the purpose for which the personal data were initially obtained. If the controller wishes to use personal data for a secondary, incompatible purpose, it should secure the consent of the data subjects. In the present case, the recipients had not opted in for receiving electoral materials.

When deciding to impose a financial penalty, the Dispute Chamber considered that the mayor holds an exemplary role with regard to compliance with the law and must be expected to be aware of his/her obligations under the GDPR, especially considering the substantial media attention given to the application of the GDPR. The Disputes Chamber concluded that there had been a serious breach of the GDPR and an administrative fine was appropriate. Taking into account the nature, the gravity and the duration of the infringement and the small number of people involved, the Disputes Chamber decided that the impact of the infringement was limited and decided to impose a fine of EUR 2,000.

The decision is still subject to appeal.

INTELLECTUAL PROPERTY

Greenpeace's Use of Maya the Bee Infringes Copyright

On 8 April 2019, the Enterprise Court (*ondernemingsrechtbank / tribunal de l'entreprise* - the "Court") held that the use by Greenpeace of a cartoon character named "Maya the Bee" infringed the copyright exploitation right of Studio 100, a Belgian production company in the entertainment sector, as well as the moral rights of Waldemar Bonsels Stiftung ("WBS"), a company governed by German law.

The fictional character, Maya the Bee, was created and described in 1912 by Mr. Waldemar Bonsels in his book '*The Adventures of Maya the Bee*'. WBS exercises Mr. Bonsels' moral rights in his works.

Studio 100 commercialises Maya the Bee movies and cartoon series in the Benelux. The company's general activities focus on children's entertainment. Studio 100 licenses the image and rights in Maya the Bee for various (merchandising) products, including poultry sausage, which indirectly led to the present dispute.

In May 2018, Greenpeace launched a video campaign in which Maya the Bee advertised "Maya the Bee cigarettes". With the campaign, the environmental organisation Greenpeace intended to raise awareness of meat consumption and its adverse effects on the environment and on individual health. It wanted to denounce Studio 100 for promoting products that are bad for children's health by licensing Maya the Bee's image for its meat products.

Before the Court, Studio 100 claimed that the "aggressive campaign" of Greenpeace infringed its copyright and stated that it could not tolerate its characters being abused or associated with tobacco products in any way. In its defence, Greenpeace argued that its video campaign was a parody allowed under copyright law.

For the assessment of the parody argument, the Court referred to the case law of the ECJ according to which the essential characteristics of a parody are that (i) it evokes an existing work, while being noticeably different from it; and (ii) it constitutes an expression of humour or mockery. On 3 September 2014, the ECJ handed down its judgment in case C-201/13 *Deckmyn en Vrijheidsfonds* in which it gave guidance regarding the parody exception to copyright under Article 5.3(k) of Directive 2001/29/EC ("InfoSoc Directive") (*See, this Newsletter, Volume 2014, No. 9*). The ECJ had also held that it is not required for the parody to (i) mock the copyrighted work; (ii) be an original work of art; (iii) be attributed to someone else than the author of the copyrighted work; or (iv) mention the source of the original work. Finally, the ECJ added that a fair balance had to be struck between the right of the author of the copyrighted work and the freedom of expression on which the parody relies.

In this case, the Court found the video campaign to present the essential characteristics of a parody under copyright law. However, it also reached the conclusion that the parody disproportionately affected the reputation and rights of Studio 100. Greenpeace opted for a format in which an indisputably harmful product ("*real cigarettes*") is advertised whose sale to minors in Belgium is prohibited by law and for which advertising is practically completely prohibited. Also, the campaign spread via a mass medium such as the Internet, which took insufficient account of the evident reach of young children, even though that was not the target audience. Young children were directly affected by a campaign which caused most children and some adults to associate their favourite character with smoking.

As regards the moral rights of WBS, the Court found that the use of the image of Maya the Bee in association with a particularly harmful product such as cigarettes (that is prohibited for children) is a contextual change that detracts from the child-friendly character associated with it. This is a violation of the moral rights associated with Mr. Waldemar Bonsels' work. According to the Court, the parody exception which Greenpeace relied on does not apply to an infringement of moral rights.

The Court ordered Greenpeace to stop the campaign subject to a penalty of EUR 2,500 per day and per infringement with a ceiling of EUR 1 million.

Pharmaceuticals - Export Manufacturing Waiver and Stockpiling Waiver Enter into Force on 1 July 2019

On 11 June 2019, the Official Journal of the European Union published Regulation (EU) 2019/933 of 20 May 2019 amending Regulation (EC) No 469/2009 concerning the supplementary protection certificate ("SPC") for medicinal products (the "Regulation"). The modifications introduced by the Regulation encroach on the normal operation of the SPC which, broadly, extends the patent protection afforded to active substances of medicines. More precisely, they allow EU-based companies to manufacture in the EU a generic or biosimilar version of an SPC-protected medicine during the term of the SPC, for the double purpose of either exporting to non-EU countries where protection has expired or never existed ("manufacturing waiver"), or stockpiling the medicine during the final 6 months of SPC protection ahead of entry on the EU market immediately after the SPC has lapsed (EU Day-1 entry) ("stockpiling waiver").

The manufacturing and stockpiling waivers extend to related acts that are "*strictly necessary*" for such manufacturing or storing, even though such acts would otherwise require the consent of the SPC holder. According to the preamble to the Regulation, such related acts could include possessing, offering to supply, supplying, importing, using or synthesising an active ingredient for the purpose of making a medicinal product, or temporary storing or advertising for the exclusive purpose of exporting to third-country destinations.

The Regulation requires producers of generic or biosimilar medicines to (i) notify the relevant competent authority in the EU Member State in which the manufacturing is to take place; and (ii) inform the SPC holder of their intention to manufacture a generic or biosimilar version of the protected medicine. Manufacturers will have to provide information on issues such as the markets where the new products will be exported to. For its part, the national authority will have to make that information publicly available. Further, in the case of products manufactured for the purpose of export to third countries, a specific logo will have to be affixed to the product's outer packaging and, if feasible, to its immediate packaging.

The Regulation will enter into force on 1 July 2019 and will become directly applicable in all EU Member States. However, the new rules will not apply to SPCs that have already taken effect before 1 July 2019. As regards SPCs that have *not* taken effect before that date, the following principles apply:

- immediate application to SPCs that are applied for *on or after* 1 July 2019; and
- application from 2 July 2022 to SPCs that have been applied for *before* 1 July 2019 and that take effect on or after that date.

According to the Regulation's preamble, the new rules are supposed to "*strike a balance between restoring a level playing field between* [producers of generic or biosimilar medicines established in the EU and those established in third countries, the former allegedly being "*at a significant competitive disadvantage*"] *and ensuring that the essence of the exclusive rights of* [SPC] *holders* [...] *is guaranteed in relation to the Union market*". However, advocates of intellectual property rights regard the manufacturing and stockpiling waivers as major victories for the generic and biosimilar industries and a dangerous step down the path of erosion of intellectual property rights.

LABOUR LAW

Court of Justice of European Union Delivers Judgment on Mandatory Nature of Time Registration for Employees

Judgment of Court of Justice of European Union

On 14 May 2019 the Court of Justice of the European Union (the "ECJ") gave judgment in *CCOO v. Deutsche Bank* regarding the compatibility of Spanish law with European legislation on working time and time registration.

The ECJ held that European legislation prohibits a national law that, according to the interpretation given to it in national case law, does not require employers to set up a system enabling the duration of time worked each day by each employee to be measured.

Consequently, in order to ensure the effectiveness of the rights provided for in European legislation, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each employee to be measured.

According to the ECJ, two reasons militate in favour of such a conclusion: the fundamental right of every employee to a limitation on the maximum number of working hours and to daily and weekly rest periods and the fact that the employee must be regarded as the weaker party in the employment relationship. The ECJ thus considered it necessary to prevent the employer from restricting the employee's rights in this regard.

However, the ECJ also clarified that it is up to the Member States to define the specific arrangements for implementing such a time registration system, in particular the form that it must take, having regard, as necessary, to the particular characteristics of each sector or activity concerned, or the specific characteristics of particular firms such as their size.

Implications for Belgium

Under current rules, a system of time registration is only required for specific employees, such as employees with floating working schedules ("*glijdende uurroosters*"/"*horaires flottants*") or part-time employees who also perform work beyond their normal working schedules.

By contrast, for full-time employees with a fixed working schedule, no system of time registration applies under Belgian law. Still, a fixed working schedule must form part of the work rules and any time worked in excess of such a schedule (*i.e.*, overtime) is only permissible in exceptional circumstances and often subject to compliance with several formalities.

Hence, in the light of the ECJ judgment, two positions would seem to be defensible:

1. Belgian law should be amended by providing that the working time of all employees, including those with a fixed working schedule, should be registered. This position is currently defended by specific trade unions; or

2. Belgian law is not affected by this case law, as European law gives the Member States a margin of discretion. The general scheme with a prohibition to work in excess of the working schedule as included in the work rules, unless a specific legal basis may be relied upon, may qualify as a valid system to measure the employees' working time. Additionally, the Belgian rules already require time registration for specific categories of employees. This reasoning is currently defended by the employers' federations and the Minister of employment.

It remains to be seen how rule makers and courts will react.

Increased Employee Protection in Belgian Insolvency Proceedings by Transfer of Undertakings Following Judgment of Court of Justice of European Union

Judgment of Court of Justice of European Union

On 16 May 2019, the ECJ held that European Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (the "Directive"), must be interpreted as precluding national

legislation, which, in the event of a transfer of a business which has taken place in proceedings for judicial restructuring by transfer under judicial supervision applied with a view to maintaining all or part of the transferor or its activity, entitles the transferee to choose the employees which it wishes to keep.

On 23 April 2012, Echo NV entered into a judicial reorganisation proceeding. A collective agreement could not be reached and on 19 February 2013, proceedings for judicial restructuring by transfer under judicial supervision ("JRTJ") were initiated. On 22 April 2013, Prefaco NV took over the business of Echo NV together with two-thirds of the total employees of the transferor.

Ms. Plessers who is one of the dismissed employees, argued that Article 61 § 3 of the Belgian Law on Business Continuity (now Article XX.86 § 3 of the Code of Economic Law) is in breach of the Directive. According to Article 61§ 3 of the Law on Business Continuity, the transferee can choose which employees it wishes to keep provided that the decision is dictated by technical, economic and organisational reasons and that the choice is carried out without unlawful distinction (the so-called "right of option"). This provision indeed deviates from the principle that the employee's rights and obligations arising from an employment contract existing on the date of a transfer will be transferred to the transferee (Article 3(1) of the Directive).

The question before the ECJ was whether the right of option for the transferee under Belgian law, insofar as the JRTJ is applied with a view to maintaining all or part of the transferor or its activities, is compatible with the Directive.

In order to answer this question, the ECJ had to determine whether:

- the "right of option" granted to the transferee falls under the exception laid down in Article 5 (1) of the Directive, which requires that the transferor (1) is subject to a bankruptcy proceeding or any analogous insolvency proceedings which have been instituted in view of the liquidation of the transferor's assets, and (2) are under the supervision of a competent public authority;

and if not whether:

- Articles 3 and 4 of the Directive preclude the Belgian "right of option".

The ECJ held that the choice granted by Belgian law to the transferee to not keep on all employees does not satisfy the cumulative conditions laid down in Article 5 (1) of the Directive and that, consequently, transfers carried out in such circumstances must comply with Articles 3 and 4 of the Directive. This implies that dismissals which occur in the context of the transfer of an undertaking must be justified by economic, technical or organisational reasons relating to employment which do not intrinsically relate to that transfer.

Yet, current Belgian legislation does not impose on the transferee a requirement to justify its choice with regard to the transferor's employees who are made redundant and to prove the economic, technical or organisational reasons of such redundancies.

As a result, according to the ECJ, the application of Article XX.86 § 3 of the Code of Economic Law seriously jeopardises the principal objective of the Directive, i.e., to protect employees against unjustified dismissals in the event of a transfer of undertaking. The ECJ concluded that the Directive prohibits the transferee from choosing the employees whom it wishes to keep after the transfer in the case at hand.

Implications for Belgium

Belgian law will have to be adapted to fall in line with the Directive.

As long as Article XX.86 §3 of the Code of Economic Law will not have been amended, employees who were dismissed in the framework of JRTJ may bring an action against the Belgian State to claim damages because (i) the State failed to correctly implement the Directive, or (ii) Belgian courts did not correctly interpret Article XX.86 §3 of the Code of Economic Law. However, in that latter case, the dismissed employees must also prove that they suffered damages due to this wrongful behaviour. In other words, they must demonstrate that they were not dismissed for economic, technical or organisational reasons, which might be a difficult hurdle to overcome.

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