VAN BAEL & BELLIS

VOLUME 2017,
Nº 6

June 2017

Van Bael & Bellis on Belgian Business Law

HIGHLIGHTS

COMMERCIAL LAW: Bill concerning Electronic Identification

COMPETITION LAW: Belgian Competition Authority Rejects Request for Interim Measures but Considers That Pharmacists May Have Breached Competition Law

DATA PROTECTION: Article 29 Data Protection Working Party Issues Opinion Concerning Data Processing at Work

ENERGY: Reformed Flemish Energy Levy Annulled By Constitutional Court With Effect From 2018

INTELLECTUAL PROPERTY: Court of Justice of European Union Holds That Online Sharing Platform "The Pirate Bay" Is Making Acts of Communication to the Public

LITIGATION: Yukos Case: Brussels Court of First Instance Unfreezes Russia's Assets

MARKET PRACTICES: Brussels Court of Appeal Sides with Ferrero in Hazelnut Spread Saga Against Delhaize and Partly Overturns Judgment Brussels Commercial Court

PRODUCT LIABILITY: Court of Justice of European Union Lowers Evidence Standard in Vaccine-Liability Case

PUBLIC PROCUREMENT: Completion and Entry into Force of New Regulatory Framework Governing Public Procurement

STATE AID: Constitutional Court Declares Arco Guarantee Granted By Belgium Unconstitutional

TOPICS COVERED IN THIS ISSUE

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

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

vbb@vbb.com
www.vbb.com

VAN BAEL & BELLIS

VOLUME 2017,
Nº 6

June 2017

Van Bael & Bellis on Belgian Business Law

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

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

vbb@vbb.com
www.vbb.com

VBB on Belgian Business Law | Volume 2017, Nº 6

| COMMERCIAL LAW

Bill concerning Electronic Identification

On 8 June 2017, a Bill concerning electronic identification (*Wetsontwerp inzake elektronische identificatie/Projet de loi relative à l'identification électronique* – the "Bill") was submitted to the Federal Chamber of Representatives.

The purpose of the Bill is twofold.

Further Implementation of eIDAS Regulation

First, it intends to give full effect to Chapter II "*Electronic identification*" of Regulation (EU) No. 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (the "eIDAS Regulation"). This chapter of the eIDAS Regulation aims to remove existing barriers to the cross-border use of means of electronic identification used to authenticate natural and legal persons in the context of public services in EU Member States. To give full effect to Chapter II of the eIDAS Regulation, the Bill includes rules on (i) the mutual recognition of means of electronic identification; (ii) the assurance levels of electronic identification schemes; (iii) the supervision of such schemes; (iv) the cooperation with other EU Member States; and (v) the interoperability between different electronic identification schemes.

The other aspects of the eIDAS Regulation, including the rules on trust services (Chapter III of the eIDAS Regulation), have already been implemented in Belgian law by the Law of 21 July 2016 which (i) implements and complements the eIDAS Regulation; and (ii) supplements the eIDAS Regulation to create legal equivalence between electronic and non-electronic legal transactions (*Wet van 21 juli 2016 tot uitvoering en aanvulling van de Verordening (EU) nr. 910/2014 van het Europees Parlement en de Raad van 23 juli 2014 betreffende de elektronische identificatie en vertrouwensdiensten voor elektronische transacties in de interne markt en tot intrekking van Richtlijn 1999/93/EG, houdende invoeging van titel 2 in boek XII "Recht van de elektronische economie" van het Wetboek van Economisch Recht, en houdende invoeging van de definities eigen aan titel 2 van boek XII en van de rechtshandhavingsbepalingen eigen aan titel 2 van boek XII, in de boeken I, XV en XVII van het Wetboek van Economisch Recht/Loi du 21 juillet 2016 mettant en œuvre et complétant le Règlement (UE) n° 910/2014 du Parlement européen et du Conseil du 23 juillet 2014 sur l'identification électronique et les services de confiance pour les transactions électroniques au sein du marché intérieur et abrogeant la Directive 1999/93/CE, portant insertion du titre 2 dans le livre XII "Droit de l'économie électronique" du Code de droit économique et portant insertion des définitions propres du titre 2 du livre XII et des dispositions d'application de la loi propres au titre 2 du livre XII, dans les livres I, XV et XVII du Code de droit économique – See, this Newsletter, Volume 2015, No 12, p. 4-5 and Volume 2016, No. 6, p. 5-6, No. 7, p. 3 and No. 10, p. 3*).

Electronic Identification for Digital Public Services

Second, the Bill provides a regulatory framework on electronic identification for digital public services in Belgium. This part of the Bill, which has no direct link with the eIDAS Regulation, includes rules on the functioning of the authentication service used in Belgium and the recognition of mobile and non-mobile electronic identification means.

The Bill has been adopted by the competent parliamentary committee on 27 June 2017 but still has to be discussed and adopted in a plenary session of the Chamber of Representatives of the federal Parliament.

VBB on Belgian Business Law | Volume 2017, Nº 6

| COMPETITION LAW

Belgian Competition Authority Conditionally Clears Acquisition in Market for Full-Line Distribution of Pharmaceutical Products

The Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence*) ("BCA") published a non-confidential version of its 20 April 2017 decision to clear the acquisition of Belmedis, Espafarmed, Cophana, Alpha Partners and a controlling stake in Sofiadis by McKesson (*See, this Newsletter, Volume 2017, No. 4, p. 3*).

The proposed transaction concerns pharmaceutical wholesalers and immediately drew attention. Information emerging in the notification process caused the BCA to open a separate competition investigation of illegal pricing agreements and, in November 2016, to carry out surprise inspections at the premises of several wholesalers.

The merger review process itself went into a second phase after the initial stage of the inquiry had given rise, in December 2016, to a decision by the BCA that was highly critical of the proposed transaction. The BCA found that the structural characteristics of the full-line wholesale market for pharmaceutical products are conducive to tacit coordination of market conduct by the wholesalers. The BCA reached the conclusion on the basis that the proposed transaction would give rise to a "quasi duopoly" in the market for full-line wholesale distribution of medicines, which made a second phase of in-depth review necessary.

McKesson responded to the BCA's concerns by offering the following commitments:

1. McKesson will allow its wholesaler clients to seek supplies from another wholesaler and designate that wholesaler as a primary or secondary wholesaler (McKesson agreed not to apply exclusivity clauses; clauses providing for a notice period of more than one month; or minimum purchase obligations).

2. McKesson will not apply to clients of wholesaler-distributors other than Febelco distinct and more aggressive commercial conditions than those applied to Febelco's clients in a similar situation.

3. McKesson will divest a warehouse in the Ghent area.

4. McKesson will, during a period of maximum 5 years following the closing of the transaction, supply the pharmacist-clients of wholesaler-distributors CERP and Lifé that are on call. This obligation will come to an end once CERP or Lifé acquire a warehouse in Flanders.

Compliance with all of these commitments will be overseen by a trustee. The BCA found that the parties successfully addressed its concerns and cleared the acquisition, subject to the fulfilment of these commitments.

Belgian Competition Authority Rejects Request for Interim Measures but Considers That Pharmacists May Have Breached Competition Law

On 19 June 2017, the Competition College (*Mededingingscollege/Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit/ Autorité belge de la Concurrence*) (BCA) rejected the request of Medicare-Market SA ("Medicare-Market") for interim measures against the Order of Pharmacists (*Orde der Apothekers/ Ordre des Pharmaciens*).

Medicare-Market essentially complained that, together with several pharmacists, the Order of Pharmacists was thwarting the commercial policy of Medicare-Market and harassing it with a view to drive it out of the market. Medicare-Market noted, *inter alia*, a collective complaint of several pharmacists accusing Medicare-Market of not respecting "fixed prices." According to Medicare-Market, the Order of Pharmacists also sued Medicare-Market for offering discounts, imposed disciplinary sanctions against a pharmacist forming part of Medicare-Market chain for causing "confusion" between pharmacies and supermarkets, pressured a pharmacist of Medicare-Market for not having the same opening hours as "traditional" pharmacists and organised a slander campaign against Medicare-Market.

The Competition College of the BCA first made it clear that, in order to be successful, a request for interim measures must satisfy two conditions: (i) there must be *prima facie* indications of an infringement of the competition rules; and

(ii) the adoption of interim measures must be urgent in order to avoid a prejudice to the applicant that would be serious, imminent and difficult to repair, or in order to prevent harm to the general economic interest.

The Competition College first considered that there are prima facie indications that bodies of the Order of Pharmacists may have infringed Article IV.1 of the Code of Economic Law (*Wetboek van Economisch Recht/Code de droit économique*) and the equivalent provision under EU Law, Article 101 of the Treaty on the Functioning of the European Union (TFEU). The Order of Pharmacists may have violated competition law when combatting the discount policy of Medicare-Market, its opening hours and the organisation of its pharmacy and parapharmacy activities. The Competition College also noted that the Order of Pharmacists seemed eager to extend its statutory monopoly over pharmacies to adjacent activities, which might constitute an abuse of dominance contrary to Article IV.2 of the Code of Economic Law and to Articles 102 and 106 TFEU.

However, the Competition College observed that Medicare-Market had been able to continue its operations in spite of these practices. As a result, the Competition College found that it was not established that Medicare-Market suffered a prejudice that is serious, imminent and difficult to repair, or that the general economic interest required the adoption of interim measures. As a result, the Competition College rejected Medicare-Market's request for interim measures.

Brussels Court of Appeal Confirms Decision of Belgian Competition Authority Which Had Rejected Allegedly Abusive Character of Acquisition

On 28 June 2017, the Brussels Court of Appeal (*Hof van Beroep te Brussel/Cour d'appel de Bruxelles*) confirmed the decision of the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence*) ("BCA") which had rejected the interim measures Brouwerijen Alken-Maes NV ("Alken-Maes") requested against the acquisition of Brouwerij Bosteels ("Bosteels") by Anheuser-Busch InBev NV ("AB InBev").

On 21 November 2016, the Competition College (*Mededingingscollege/Collège de la concurrence*) of the BCA rejected the request of Alken-Maes to suspend the acquisition of Bosteels by AB InBev. AB InBev's takeover of Bosteels was not subject to merger control since it did not meet the notification thresholds. However, Alken-Maes still requested the suspension of the acquisition, arguing that even if this acquisition was not caught by merger control rules, it had to be reviewed under Article IV.2 of the Code of Economic Law (*Wetboek van Economisch Recht/Code de droit économique*) and Article 102 of the Treaty on the Functioning of the European Union (TFEU), which both prohibit the abuse of a dominant position. Alken-Maes contended that the acquisition infringed these provisions as it allegedly strengthened AB InBev's dominant position. The BCA rejected this request for interim measures, finding that an acquisition that is not subject to merger control can only be assessed *prima facie* under the rules prohibiting the abuse of a dominant position if there are possible restrictions of competition that can be distinguished from the mere effect of the concentration and which might by themselves qualify prima facie as an abuse of a dominant position (*See, this Newsletter, Volume 2016, No. 11, pp. 6-7*).

The Brussels Court of Appeal confirmed the reasoning of the BCA. The Court held that an acquisition that creates a concentration which falls outside the scope of the merger control rules does not "as such" amount to an abuse of a dominant position absent "accompanying but decisive conduct." The Court went on to say that such conduct must qualify as a *prima facie* abuse of dominant position, rather than being capable of being abusive. Additionally, the alleged abuse must be distinguishable from the actual effect of the concentration. In response to the objections raised by Alken-Maes, the Court specified that this is not a test which is more stringent than the test habitually used for determining an infringement of Article IV.2 of the Code of Economic Law and Article 102 TFEU. Lastly, the Court made it clear that the BCA had some room for maneuver in that it is allowed to make policy choices that fall outside the scrutiny of the Court.

Alken-Maes has the possibility to appeal this judgment before the Supreme Court. However, such an appeal is limited to points of law: the Supreme Court cannot review facts. In addition, Alken-Maes may still try and pursue a complaint on the merits with the BCA.

VBB on Belgian Business Law | Volume 2017, Nº 6

| DATA PROTECTION

Article 29 Data Protection Working Party Issues Opinion Concerning Data Processing at Work

On 8 June 2017, the Article 29 Data Protection Working Party ("WP29"), which is an independent European advisory body on data protection and privacy issues, issued Opinion 2/2017 considering data privacy at work. This Opinion complements Opinion 8/2001 concerning personal data in the employment context, in addition to the 2002 Working Document on the surveillance of electronic communications in the workplace. The Opinion considers the Data Protection Directive and the General Data Protection Regulation ("GDPR") in examining the balance between the employers' legitimate business interests and the employees' privacy expectations in the light of the emergence of new technologies in the workplace.

The Opinion outlines the importance of key data protection principles, such as emphasising that consent is unlikely to be a legal basis for data processing at work. The Opinion further notes the importance of complying with transparency requirements – employees must be informed of any monitoring, the purpose for which personal data are to be processed and any other information necessary to guarantee fair processing. Given the new technologies, there is a greater need for transparency to avoid the collection and processing of large amounts of personal information "*in a covert way*".

In outlining the GDPR requirements, the Opinion notes:

- the requirement for data controllers to implement privacy by design and by default. For example, if an employer issues devices to employees, the most privacy-friendly solutions should be selected if tracking technologies are involved;
- the requirement for a data controller to conduct a Data Protection Impact Assessment ("DPIA"), where appropriate, for instance when using new technologies or in case of systematic and extensive evaluation of personal aspects based on profiling or other automated processing;
- the potential under Article 88 of the GDPR for Member States to introduce their own rules in specific areas in order to ensure the protection of the rights and freedoms of the personal data of staff.

In addition, with regard to the proposed ePrivacy Regulation, the Working Party calls on European legislators to create a specific exception for interference with devices issued to employees.

The Opinion discusses numerous risk areas relating to modern technologies and employees being tracked over time, across workplaces and within their homes. In particular, extensive monitoring technologies may result in reducing the potential for genuine anonymization. This may in turn impact upon whistle blowing.

The Opinion additionally discusses issues relating to employer data processing, such as: processing operations during the recruitment process; processing operations resulting from monitoring ICT usage in and outside the workplace; and processing operations involving international transfers of HR and other employee data.

Finally, the WP29 Opinion provides a number of noteworthy recommendations and conclusions:

- electronic communications made from business premises may be covered by the notions of "*private life*" and "*correspondence*" within the meaning of Article 8 paragraph 1 of the European Convention on Human Rights;
- employees are never in a position to give, refuse or revoke consent freely, given the dependency that results from the employer/employee relationship;
- data processing at work must be a proportionate response to the risks faced by an employer, and a blanket ban on communication for personal reasons is impractical;
- the tracking of the location of employees through their self-owned or company issued device should be limited to where this is strictly necessary for a legitimate purpose;

- data minimisation should be taken into account when deciding on the deployment of new technologies;
- employers should consider designating specific private spaces (such as private mail or document folders) that cannot be accessed;
- the transfer of personal data to a third country outside the EU can only occur if there are adequate levels of protection. The data shared outside the EU/EEA that is accessed by other entities should remain limited to the minimum necessary for the intended purposes.

Click **here** to view the Opinion.

Belgian Privacy Commission On Compatibility of Appointing a Data Protection Officer With Existing Functions

On 24 May 2017, the Belgian Privacy Commission released a recommendation regarding the appointment of a data protection officer ("DPO") as required under the EU General Data Protection Regulation ("GDPR"). The recommendation clarifies whether the function of DPO may be combined with other functions within a company (*e.g.* compliance officer, HR director, IT director, etc.).

First, the Belgian Privacy Commission explains that data controllers and processors should document the selection process of the DPO. Furthermore, with regard to the compatibility of the function of the DPO with other functions within a company, the Belgian Privacy Commission holds that controllers and processors must assess whether a combination of functions is permitted in the light of the requirements of the GDPR. Security officers (*veiligheidsconsulent/ conseiller en sécurité*) that are designated under the current Belgian Privacy Law of 8 December 1992 ("BPL") cannot be automatically designated as DPO under the GDPR.

Data controllers and processors must assess such compatibility on a case-by-case basis. In this regard, the Belgian Privacy Commission sets out the essential elements of the function of the DPO, which include (i) monitoring compliance with the GDPR; (ii) assisting with data protection impact assessments, (iii) assisting with internal record-keeping obligations and (iv) cooperating with data protection authorities.

Second, the recommendation states that the DPO must be consulted for questions regarding the protection of personal data and that data controllers and processors must provide the DPO with sufficient resources. More importantly, data controllers and processors must ensure the autonomy of the DPO within the company.

Third, as best practice, the Belgian Privacy Commission recommends data controllers and processors identify internal incompatibilities with the function of DPO.

VBB on Belgian Business Law | Volume 2017, Nº 6

| ENERGY

Reformed Flemish Energy Levy Annulled By Constitutional Court With Effect From 2018

On 22 June 2017, the Constitutional Court annulled the reformed Flemish Energy Levy, as it had been applicable since 1 March 2016. The levy is generally called the "Turteltaks," after the former Flemish Minister for Energy Annemie Turtelboom, who introduced the levy in 2014.

When it was first introduced, the Flemish Energy Levy was construed as a monthly flat rate levy on electricity offtake points. By Decree of 18 December 2015, and with effect from 1 March 2016, the Flemish Energy Levy was changed to an annual levy on electricity offtake points, the amount of which was made dependent on the energy consumption on that offtake point. This new calculation method assured the Flemish government of higher revenues from the Flemish Energy Levy. The income from the levy was since its introduction collected in the Flemish Energy Fund. This fund serves the implementation of a number of energy policies in Flanders. It is however primarily intended to finance the recovery of a historical debt incurred by the distribution system operators, following the obligation imposed on distribution system operators to purchase green energy certificates at a guaranteed minimum purchase price from anyone who offers certificates to them.

In the first half of 2016, several parties, including the consumer organisation Test-Aankoop, lodged suspension and annulment procedures before the Constitutional Court. The applicants contended that the Flemish Energy Levy constitutes double taxation, thereby breaching the constitution and the division of competences between the federal and regional governments.

The Constitutional Court sided with the applicants. It compared the Flemish Energy Levy with the so-called federal levy, *i.e.*, a levy on the consumption of electricity introduced by the federal Parliament in 2005. While the Flemish Energy Levy was originally levied on the mere existence of an offtake point, since the 2015 reform, which took effect on 1 March 2016, the Flemish Energy Levy is intrinsically linked to the amount of electricity consumed. Accordingly, holders of offtake points are taxed on the consumption of electricity both at federal and regional level. According to the Constitutional Court, such a form of double taxation violates the constitution and the rules on the division of competences. Therefore, the Constitutional Court annulled the Flemish Energy Levy.

An annulment by the Constitutional Court normally has retroactive effect, which, in this case, would mean as from 1 March 2016. However, for the sake of legal certainty and in order to avoid administrative and legal difficulties, the Constitutional Court decided to maintain the effects of the annulled provisions for the fiscal years 2016 and 2017. Therefore, the reformed Flemish Energy Levy will no longer be levied as from 1 January 2018. It is as yet unclear how the green energy certificates debt will be dealt with following this judgment.

VBB on Belgian Business Law | Volume 2017, Nº 6

| INTELLECTUAL PROPERTY

Advocate-General of Court of Justice of European Union Issues Opinion on Louboutin's Red Sole

On 22 June 2017, Advocate-General Szpunar (the "AG") gave his opinion in a dispute between Christian Louboutin ("Louboutin") and Van Haeren Schoenen BV ("Van Haeren") (the "Opinion").

In 2012, Van Haeren started selling high-heeled women's shoes with red soles. Faced with an action by Louboutin on the basis of trade mark infringement, the Rechtbank of Den Haag (the "Court") stayed the proceedings and referred a question for a preliminary ruling to the Court of Justice of the European Union (the "ECJ") with regard to the interpretation of Article 3(1)(e)(iii) of Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks (the "Trade Mark Directive"). This provision states that signs consisting exclusively of a shape which gives substantial value to the goods must not be registered or, if registered, must be declared invalid. Among other things, the Court asked whether the notion of "shape" within the meaning of that provision was limited to the three-dimensional properties of the goods or if it included other (non three-dimensional) properties of the goods such as their colour.

In his Opinion, the AG first underlined the potential anti-competitive effects of signs that may not be dissociated from the appearance of the goods and the need to keep specific signs in the public domain.

Second, the AG held that the Louboutin trade mark should be considered as a trade mark combining colour and shape, rather than consisting of a colour *per se*.

As a consequence, the AG examined whether the prohibition of functional signs laid down in Article 3(1)(e) of the Trade Mark Directive applied to signs in which colours are integrated into the shape of the goods. The AG recalled that the purpose of that provision was to prevent trade mark protection from granting its proprietor a monopoly on technical solutions or functional characteristics of a product which a user is likely to seek in the products of competitors. Technical solutions and functional characteristics must be kept in the public domain.

Because Article 3(1)(e) of the Trade Mark Directive only prohibits signs which consist exclusively of functional features, it is settled case-law that this provision does not prevent registration of signs that, although consisting of a shape of a good, also incorporate a significant non-functional element. The AG therefore suggested that it belongs to the national courts to assess whether the colour integrated into a shape is a functional element.

Third, the AG clarified the concept of shapes that "give substantial value" to the goods, given that it is a ground for refusal under Article 3(1)(e)(iii) of the Trade Mark Directive. The AG first recalled that this provision is designed to prevent the monopolisation of external features of goods which are essential to their market success, and thus to prevent that the trade mark protection be used to gain an unfair advantage. However, he added that this provision only applies when the advantage stems from the intrinsic value of the shape and not from the reputation of the trade mark or its proprietor.

Court of Justice of European Union Holds That Online Sharing Platform "The Pirate Bay" Is Making Acts of Communication to the Public

On 14 June 2017, the Court of Justice of the European Union (the "ECJ") handed down a preliminary ruling in case C-610/15 with regard to the interpretation of the concept of "communication to the public" within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of specific aspects of copyright and related rights in the information society (the "Infosoc Directive").

The preliminary ruling stems from a dispute between, on the one hand, Stichting Brein, a Dutch foundation which safeguards the interests of copyright holders ("Brein") and, on the other hand, Ziggo BV ("Ziggo") and XS4ALL Internet BV ("XS4ALL"), two internet access providers. Brein requested before the Dutch courts that Ziggo and XS4ALL be ordered to block the domain names and IP addresses of the notorious online sharing platform "The Pirate Bay" ("TPB"). The case went up to the Supreme Court of the Netherlands (the "Court"). The Court first decided that TPB had made

protected works available to the public without the right holders' consent. The Court then added that subscribers to Ziggo and XS4ALL had also made protected works available, through the online platform TPB, without the right holders' consent, which meant that they infringed the copyright and related rights of these right holders. Nevertheless, the Court referred a request for a preliminary ruling to the ECJ asking whether the concept of "communication to the public" should be interpreted as including the making available and management of an internet sharing platform which, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network.

The ECJ first recalled that the concept of "communication to the public" must be interpreted broadly and that there are two cumulative criteria, namely (i) an "act of communication" of a work; and (ii) the communication of that work to a "(new) public".

Act of Communication

In order to determine whether the first requirement was met, the ECJ applied the complementary criteria that it had developed in *Stichting Brein v Jack Frederik Wullems*, i.e., the importance of the role played by the user and the deliberate nature of his intervention (*See, this Newsletter, Volume 2017, No. 4, p. 13*). Then, making reference to its judgment in Svensson and Others, the ECJ stated that any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute an "act of communication" (*See, this Newsletter, Volume 2014, No. 2, p. 6*).

Applying these principles to the case at hand, the ECJ first found that users of TPB were given access to copyright protected works at all times and in all places. The ECJ then decided that TPB could not be considered as merely providing physical facilities for enabling or making a communication. It indexed and filtered torrent files which allowed users of the platform to locate and download those works and to share them within the peer-to-peer network. Consequently, without the operators of TPB, users could not share the works as easily. Hence, although TPB did not itself host content, by making available and managing an online sharing platform, the operators of TPB intervened, in full knowledge of the consequences of their conduct, to provide access to protected works. The ECJ therefore found that TPB performed an essential role in making available copyright protected works and that there was an "act of communication".

Communication to the Public

With regard to the second criterion, the ECJ found that a large number of subscribers to Ziggo and XS4ALL (tens of millions of users) had downloaded media files using TPB and that *de minimis* threshold was therefore met. The ECJ held that the operators of TPB could not have been unaware that their platform provided access to works published without the consent of the right holders. Therefore, the ECJ concluded that the protected works had been communicated to users who had not been taken into account by the right holders and therefore constituted a "new public."

Lastly, the ECJ held that the making available and management of TPB was carried out by its operators with the purpose of making a profit since the platform generates considerable advertising revenues.

In the light of the above, the ECJ concluded that the concept of "communication to the public" also includes the making available and management, on the internet, of a sharing platform which, by means of indexation of metadata referring to protected works and the provision of a search engine, allows its users to locate those works and share them within a peer-to-peer network.

EU Publishes Codified Version of EU Trade Mark Regulation

On 16 June 2017, Regulation (EU) No 2017/1001 of the European Parliament and of the Council on the European Union trade mark of 16 March 2016 (the "Regulation") was published in the Official Journal of the European Union. This Regulation forms part of the EU trade mark reform package adopted by the European Parliament on 15 December 2015 (*See, this Newsletter, Volume 2015, No. 12, p. 17*). It will replace Council Regulation (EC) No 207/2009 as from 1 October 2017. As of that date, the following changes will enter into force:

- the removal of the graphical representation requirement for trade mark registrations (which will make it possible to register sound or motion trade marks given that, contrary to smells, they can be represented "*in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded*");

- the obligation to include priority claims in the application at the time of filing (instead of 2 months after the filing) and;

- the abolishment of the possibility to disclaim elements of a trade mark in order to overcome objections.

Brussels Court of Appeal Applies Belgian Copyright Law Despite Contrary Guidance by Court of Justice of European Union

On 12 May 2017, the Brussels Court of Appeal (the "Court") handed down a judgment following a preliminary ruling from the Court of Justice of the European Union (the "ECJ") in a dispute between Hewlett-Packard Belgium ("HP") and Reprobel. The latter, a Belgian copyright management company, had ordered HP to pay a levy for the sale of multifunctional printers. Since both parties did not reach an agreement on the amount due, HP brought an action against Reprobel. In this context, the Court had referred several questions to the ECJ on the interpretation of Articles 5(2)(a) and 5(2)(b) of Directive 2001/29/EC on the harmonisation of specific aspects of copyright and related rights in the information society ("the InfoSoc Directive").

On 12 November 2015, the ECJ ruled that the combined levy system of fair compensation granted to right holders for specific reproductions of their works under Belgian law (i.e., the reprography and private copying exceptions) was incompatible with the InfoSoc Directive (*see, this Newsletter, Volume 2015, No 11, p. 13*).

The case went back to the Court which held that Belgian law had to be applied insofar as it could be interpreted consistently with the InfoSoc Directive. Conversely, it added that non-consistent Belgian legislation could only be set aside if the InfoSoc Directive had direct effect. The Court found that the InfoSoc Directive did not have such direct effect and, therefore, did not give the Court power to rule *contra legem*.

As a result, the Court departed from HP's argument that Belgian legislation compelling it to pay a lump-sum must not be applied as it entailed overcompensation in violation of the InfoSoc Directive. Rather, the Court held that HP remained liable for payment of the lump-sum to Reprobel for its multifunctional printers.

VBB on Belgian Business Law | Volume 2017, Nº 6

| LABOUR LAW

Innovative and Flexible Measures immediately applicable to Employers and Employees

The Law of 5 March 2017 on workable and flexible work (*Wet van 5 maart 2017 betreffende werkbaar en wendbaar werk/Loi du 5 mars 2017 concernant le travail faisable et maniable*), ("Law on Workable and Flexible Work") came, subject to a few exceptions, into force with retroactive effect on 1 February 2017. It has three objectives: the creation of workable work for all; the increase of sustainable jobs; and social innovation. The Law on Workable and Flexible Work consists of two parts: the basis (*de sokkel/le socle*), *i.e.*, a general section with measures that are immediately applicable, and the menu, *i.e.*, a series of measures that can only be activated at sector or company level.

The measures that are immediately applicable in relation to working time and occasional teleworking are listed below.

Modification of Overtime Limit

The internal overtime limit (*interne overurengrens/limite interne des heures supplémentaires*) provided for by the Labour Law of 16 March 1971 (*Arbeidswet van 16 maart 1971/Loi sur le travail du 16 mars 1971*) ("Labour Law") must ensure that there are no long periods of overtime without compensatory rest.

The internal overtime limit has been increased to 143 hours (and can be increased further at sector level), regardless of the reference period (maximum one year). This is the maximum number of hours that an employee can perform on top of the normal weekly working time without having a right to compensatory rest. The first 25 (or maximum 60 if provided for by a collective bargaining agreement ("CBA") at sector level) 'voluntary' overtime hours do not count for the calculation of the internal overtime limit of 143 hours.

Flexible Labour ("Small Flexibility")

Employers who often face peaks and drops of activity in their company, can use the existing system of 'small flexibility' (*kleine flexibiliteit/petite flexibilité*) as regulated in Article 20*bis* of the Labour Law. This system allows companies to adjust the work schedules and working hours, depending on the fluctuating needs of the company. In particular, employers are allowed to exceed the basic working hours limit of 8 hours per day and 40 hours per week, provided that an average weekly working time is respected during the reference period. As a result, the employees can perform more hours during peak periods, but are compensated by performing fewer hours during quieter periods.

The daily difference cannot be more than two hours more or less, while the weekly difference cannot exceed five hours more or less. Moreover, the number of hours worked each day cannot be more than nine hours, while the weekly total cannot exceed 45 hours. Henceforth, the reference period will be one year (1 calendar year or 12 consecutive months) and it will not be possible to determine a shorter reference period. This system must be included in a CBA at company level or in the work rules. It is recommended to verify whether a CBA at sector level has been concluded in this regard.

The Law on Workable and Flexible Work provides for a transitional provision for CBA's that implemented this system and that were filed with the Registry of the Federal Public Service Employment, Labour and Social Dialogue by 31 January 2017 as well as for the provisions in relation to this system contained in the work rules by 31 January 2017. As a result, the shorter reference periods provided herein remain in force until they are modified.

Hundred Paid Hours of Voluntary Overtime

Employees are allowed, at their initiative, to perform maximum 100 overtime hours per calendar year. A sectoral CBA may raise this limit to maximum 360 hours. These voluntary overtime hours should not necessarily be justified by an extraordinary increase in work or by an unforeseen necessity (in contrast to classic overtime hours), but the limits of 11 hours per day and 50 hours per week must be observed.

The agreement of the employee must be laid down in writing for a renewable term of 6 months and be concluded expressly and prior to the start of the period in question.

The employer must not grant compensatory rest for the voluntary overtime hours performed by the employee, but

must pay an overtime wage equal to 50% or 100%. The voluntary overtime hours should not be taken into account for the calculation of the average weekly working time.

Occasional Telework

Occasional telework is a method of organising and/or carrying out work under an employment contract using information technology, in which activities, which could also be carried out at the premises of the employer, are carried out, on an occasional and non-regular basis, outside these premises, either in the employee's home or at another location chosen by the employee.

Occasional telework can only be exercised in two scenarios, *i.e.*, in case of force majeure (*e.g.* unexpected train strike, blocking of the industrial zone by striking workers, etc.) or for personal reasons (*e.g.* consultation with a physician or dentist) that prevent the employee from carrying out his or her work at the employer's premises, on condition that the function/activity that the employee carries out is compatible with occasional telework. The telework should therefore not be steady, regular or continuous, unlike "regular telework", which is regulated by CBA No. 85 of 9 November 2005 on Telework (*Collectieve arbeidsovereenkomst nr. 85 van 9 november 2005 betreffende het telewerk/Convention collective de travail n°85 du 9 novembre 2005 concernant le télétravail*).

The initiative for this system lies with the employee who must send a reasoned request to the employer, who has the right to refuse. In case of a refusal, the employer must inform the employee in writing (by letter or by e-mail) about the reason for the refusal (*e.g.* business needs of the company/service).

When the employer accepts the request of the employee, the parties must agree on the practical aspects of the occasional telework such as the required equipment (*e.g.* laptop) provided by the employer, technical support, the reachability of the employee while teleworking and the payment by the employer of any expenses connected with telework (*e.g.* if the employee uses his/her own laptop and internet connection). It is recommended that employers should establish a clear framework for occasional telework in the work rules or in a CBA at the company level in which the functions/activities compatible with occasional telework, the procedure for requesting and granting this type of work, and other practical deals are specified.

Article 29 Data Protection Working Party Issues Opinion Concerning Data Processing at Work

See, this Newsletter, Data Protection.

VBB on Belgian Business Law | Volume 2017, Nº 6

| LITIGATION

Yukos Case: Brussels Court of First Instance Unfreezes Russia's Assets

On 8 June 2017, the Brussels Court of First Instance (the "Court") handed down a judgment on the legality of the seizures of assets belonging to Russia carried out by *Yukos Universal Ltd* ("YUL") in the context of the Belgian enforcement proceedings in the *Yukos* case.

The *Yukos* case refers to an arbitral saga that saw three arbitral tribunals issuing three arbitral awards which cumulatively ordered Russia, in 2014, to pay USD 50 billion as reparation for the irregularities committed during the nationalisation of the Russian oil company *Yukos*.

Following the issuance of the awards in 2014 in its favour, YUL (one of *Yukos*'s former shareholder) sought the *exequatur* and the enforcement of the award in several countries, including Belgium. The Belgian *exequatur* of the award was granted to YUL in June 2015. In addition, YUL was also allowed to freeze and seize several key assets belonging to Russia and to two Russian press agencies (*ITAR TASS* and *Ria Novosti*).

Russia responded and started third-party opposition proceedings before the Court in which it challenged the legality of those seizures. Russia's claim was substantiated by the fact that the three awards in favour of *Yukos*' former shareholders had all been annulled by the District Court of The Hague (The Netherlands being the seat of the arbitration) in April 2016. Based on this judgment, Russia argued that the Belgian *exequatur* order which had initially been granted to YUL in June 2015 was null and void and YUL was thus not entitled to proceed with the seizure of Russia's assets.

In its judgment of 8 June 2017, the Court sided with Russia on this point.

The Court referred to Article 1494, Belgian Judicial Code, which provides that in order to proceed with a seizure, a creditor must rely on a valid enforcement order. In the case of arbitration, such a valid enforcement order includes not only the *exequatur* order but also the award itself. In the case at hand, however, the Court held that since the District Court of the Hague had annulled the award, this award was considered to have completely disappeared from the Dutch judicial order. In addition, the Court also held that the judgment given by the District Court of the Hague (which annulled the award in YUL's favour) had to be fully recognised in Belgium in application of a 1925 bilateral convention between Belgium and The Netherlands on the recognition and the enforcement of arbitral awards and judicial decisions.

Consequently, and without prejudice to the fact that the validity of the *exequatur* order had been confirmed a few months ago by the same court, the Court held that YUL could not rely on a valid enforcement order and proceed with the seizures since it lacked a valid arbitral award. The Court therefore ordered YUL to unfreeze all the assets which it had aimed to attach.

This judgment is controversial. The Court of First Instance dismissed, in December 2016, the third-party opposition filed by Russia against the *exequatur* order granted for the benefit of YUL. However, the same court (although composed of a different judge) has now ruled that this order is not capable of enforcement, thereby depriving its judgment of December 2016 of any effectiveness. While the judgment of 8 June 2017 does not contravene the previous judgment of 9 December 2016 (which is under appeal), there is at least in spirit an incoherence between both judgments.

Court of Justice of European Union Rules on Mandatory Mediation before Court Proceedings involving Consumer Claims

On 14 June 2017, the Court of Justice of the European Union (the "ECJ") handed down a judgment interpreting, in the light of Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes ("Directive 2013/11/EU"), the conditions under which mandatory out-of-court mediation should take place before a consumer can initiate court proceedings against a trader.

In the case at hand, Livio Menini and Maria Antonia Rampanelli, two Italian nationals, had brought proceedings before the Verona District Court against a bank in order to have

a loan repayment order set aside. However, under Italian law, such an application had to be preceded by a mediation procedure under which the parties had to be accompanied by a lawyer and were only allowed to withdraw from the process if they put forward a valid justification.

Uncertain as to whether those requirements complied with Directive 2013/11/EU – which aims to ensure that consumers can, on a voluntary basis, submit complaints against traders to alternative dispute resolution procedures, provided that such procedures are independent, impartial, transparent, effective, fast and fair – the Verona District Court referred the matter to the ECJ for a preliminary ruling.

In reaching its judgment, the ECJ found that the requirement under Italian law that mandatory out-of-court mediation be initiated before bringing court proceedings may be compatible with the principle of effective judicial protection provided that such mediation (i) does not result in a binding decision on the parties; (ii) does not cause substantial delay; (iii) does not suspend the period for the time-barring of claims; and (iv) does not give rise to high costs. In addition, urgent interim measures should be possible.

The ECJ also noted that the contested Italian legislation could not require a consumer taking part in an alternative dispute resolution procedure to be assisted by a lawyer. In addition, the ECJ found that the Italian requirement that a consumer need demonstrate a valid reason before withdrawing from the mediation procedure violated Directive 2013/11/EU.

Bailiffs Now Entitled to Serve Documents Electronically

On 22 June 2017, the statutory provisions allowing bailiffs to serve documents electronically have been published in the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*) (*Koninklijk Besluit houdende uitvoering van de artikelen 32quater/1, § 1 en 32quater/2, §§ 1 en 6 van het Gerechtelijk Wetboek/Arrêté royal portant exécution des articles 32quater/1, § 1er, et 32quater/2, §§ 1er et 6, du Code judiciaire*). Bailiffs will now be entitled to serve documents electronically provided that the addressee consented beforehand to the electronic service and registered his or her electronic details in a specific database.

VBB on Belgian Business Law | Volume 2017, Nº 6

| MARKET PRACTICES

Brussels Court of Appeal Sides with Ferrero in Hazelnut Spread Saga Against Delhaize and Partially Overturns Judgment Brussels Commercial Court

On 2 June 2017, the Brussels Court of Appeal (the "Court of Appeal") sided with Ferrero, producer of Nutella®, in the cease-and-desist proceedings which it had brought against retailer Delhaize regarding its communications involving its private-label hazelnut spread and the absence of palm oil in its products (Brussels Court of Appeal, 2 June 2017, 2016/AR/703, *Ferrero SA v. Delhaize Le Lion/De Leeuw SCA*).

The dispute concerned various marketing communications of Delhaize emphasising the absence of palm oil in its private-label hazelnut spread. Ferrero, whose flagship hazelnut spread Nutella® contains palm oil, claimed that these communications were illegal, misleading, denigrating and provocative and that they misused the consumer's feelings of fear or worry regarding the use of products containing palm oil (First Claim). Furthermore, Ferrero challenged what it considers to be an unlawful use by Delhaize of the term "choco" for describing its hazelnut spread, which contains cocoa powder but no "chocolate" (Second Claim).

Delhaize won the battle at first instance before the President of the French-speaking section of the Brussels Commercial Court (the "President"), who dismissed Ferrero's cease-and-desist action on 25 November 2015 (*See, this Newsletter, Volume 2016, No. 4, p. 15*).

In its judgment of 2 June 2017, the Court of Appeal partially overturned the decision of the President and ordered Delhaize to cease and desist from making further use of its communications regarding its private-label hazelnut spread.

First Claim

With respect to Ferrero's First Claim, the Court of Appeal analysed, amongst other communications, Delhaize's press release of 19 September 2013 regarding its private-label hazelnut spread, which provided that "[t]*he cooperation between nutritionists, doctors and suppliers enabled us to develop a spread with a smooth and melting texture, rich in hazelnuts (13%) and skinny cocoa (7%) but definitely without palm oil*", that "[t]*hanks to the removal of palm oil, Delhaize's spread contains 43% less fat*" and that its spread would be "[b]*etter for your health and better for the planet*." In addition, the Court analysed a promotional poster of September 2014 of Delhaize as well as various other communications.

The Court of Appeal concluded that the press release of 19 September 2013 constitutes unlawful comparative advertising because it fails to compare in an objective manner the essential, relevant, verifiable and representative characteristics of both hazelnut spreads, including the environmental impact of palm oil (as contained in Nutella®) and that of sunflower oil, cocoa butter and coconut oil (as contained in Delhaize's private-label spread). The Court of Appeal noted that the press release (i) qualifies as advertising within the meaning of the Royal Decree of 17 April 1980 on advertising for food products (*Koninklijk Besluit van 17 april 1980 betreffende de reclame voor voedingsmiddelen/Arrêté royal du 17 avril 1980 concernant la publicité pour les denrées alimentaires*); the Code of Economic Law (*Wetboek van Economisch Recht/Code de droit économique* – the "CEL"); and Regulation No. 1924/2006 of 20 December 2006 on nutrition and health claims made on foods (the "Food Regulation"); and (ii) identifies a competing product to the extent that, even though the name Nutella® was not mentioned, consumers would inevitably establish a link with Nutella® since Nutella® is the market leader of hazelnut spreads and is well known to contain palm oil.

The Court of Appeal held that these communications infringed the Food Regulation in that they (i) suggest a link between hazelnut spread without palm oil and health; and (ii) refer to the recommendation of a health professional. Amongst others things, the communications concerned suggested that Delhaize's hazelnut spread would have a beneficial effect on consumers' health. Yet, they failed to use the specific health claims that are permissible pursuant to the Food Regulation. Furthermore, the Court of Appeal considered that the message contained in these communications was provocative or misused the consumers' feelings of fear or worry. Hence, the Court of Appeal concluded that Delhaize had failed to behave diligently and committed an unfair market practice towards consumers.

Further, with respect to Delhaize's promotional poster of September 2014, the Court of Appeal found the claim that

Delhaize's private-label spread would "*contain 48% less fat than traditional spreads*" qualifies as false and misleading comparative advertising within the meaning of Articles VI.17, 1° and 3° and VI.104 CEL. Therefore, the Court of Appeal ordered Delhaize to cease and desist from making any further use of this poster.

The Court of Appeal dismissed Ferrero's claims to the extent that they were directed against (i) Delhaize's general communications regarding palm oil, such as its communication on its website regarding sustainable entrepreneurship and its goal to replace palm oil in every product as far as possible; and (ii) Delhaize's communications regarding palm oil in products other than hazelnut spreads, such as pizzas and frozen fries.

Second Claim

With respect to Ferrero's Second Claim, the Court of Appeal held that Delhaize's communications constitute unfair commercial practices regarding a main characteristic of the product. The Court of Appeal specified that, by using the terms "*with choco*" and "*with chocolate*", Delhaize had led consumers into believing that the spread contained hazelnuts and choco, as an abbreviation of chocolate, within the meaning of the Royal Decree of 19 March 2004 relating to cocoa and chocolate products intended for human consumption (*Koninklijk Besluit van 19 maart 2004 inzake cacao- en chocoladeproducten voor menselijke consumptie/ Arrêté royal du 19 mars 2004 relatif aux produits de cacao et de chocolat destinés à l'alimentation humaine* – the "Royal Decree"). According to the Court of Appeal, this led consumers to make a commercial decision which they would not have made otherwise and also damaged or potentially damaged Ferrero to the extent that it may provide a competitive advantage to Delhaize.

In relation to the use of the single term "*choco*", the Court of Appeal confirmed the ruling of the President that this term is not protected by the Royal Decree and merely refers to chocolate spread or choco spread, which is perceived by consumers as a spread containing sugar, vegetable oil and cocoa powder. Also the expression "*with chocolate taste*" was considered to be acceptable by the Court given that this expression refers to the mere taste of the product and does not assert that the product would actually contain chocolate.

In view of the above, the Court of Appeal ordered Delhaize to cease-and-desist from making any further use of its unlawful communications, subject to a penalty of between EUR 500 and EUR 25,000 per infringement.

The judgment offers a fresh illustration of the fraught relationship between brand owners and retailer customers which are at the same time private-label competitors.

VBB on Belgian Business Law | Volume 2017, Nº 6

PRODUCT LIABILITY

Court of Justice of European Union Lowers Evidence Standard in Vaccine-Liability Case

On 21 June 2017, the Court of Justice of the European Union (the "ECJ") ruled on a request for a preliminary ruling from the French Supreme Court (*Cour de cassation*) on the burden of proof faced by patients who have suffered harm from a defective vaccine. The ECJ decided that the defect of a vaccine and the causal link between this defect and a disease can be demonstrated by serious, specific and consistent evidence, in the absence of scientific consensus about a causal relationship (ECJ, 21 June 2017, Case C-621/15, *N.W, L.W en C.W v. Sanofi Pasteur MSD SNC, Caisse primaire d'assurance maladie des Hauts-de-Seine and Carpimko*).

The background of the request is as follows: Mr. W was injected with a vaccine against hepatitis B. A year later, Mr. W started presenting various symptoms leading to the diagnosis of multiple sclerosis. Mr. W and his family brought proceedings seeking compensation for the damage caused to him by the vaccine on the basis of Article 1386 (currently Article 1245) of the French Civil Code. However, the Paris Court of Appeal held that there was no scientific consensus regarding a causal link between the vaccination against hepatitis B and the occurrence of the disease. On appeal, the French Supreme Court requested the ECJ to interpret Article 4 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (the "Directive"). The French Supreme Court sought to know whether that provision stands in the way of national evidentiary rules under which a court may consider that, notwithstanding the finding that medical research neither establishes nor rules out the existence of a link between the administering of the vaccine and the occurrence of the victim's disease, specific factual evidence relied on by the applicant could constitute serious, specific and consistent evidence in support of the conclusion that there is a defect in the vaccine and that there is a causal link between that defect and that disease.

Under Article 4 of the Directive, a person injured by a defective product should prove the damage, the defect and the causal relationship between defect and damage. The ECJ noted that while under the Directive the burden of proof rests on the victim, the Directive does not address how this burden must be met. Hence, the ECJ found that an evidentiary rule based on serious, specific and consistent evidence, in the absence of scientific consensus, does not violate the Directive as it remains for the victim to prove the various elements of his or her case. The ECJ continued that excluding any method of proof other than proof based on medical research would be inconsistent with the objectives of the Directive as this could make it excessively difficult to establish producer liability in many situations.

Nevertheless, the ECJ added that national courts should ensure that the evidence provided is indeed sufficiently serious, specific and consistent to conclude that, notwithstanding the evidence and arguments put forward by the producer, the existence of a defect in the product is the most plausible explanation for the occurrence of the damage. The ECJ also ruled out the use of automatic and irrefutable presumptions based on predetermined factual evidence as this would deprive the producer of the possibility of adducing facts and arguments to rebut that presumption.

In the case at hand, the ECJ considered that (i) the temporal proximity between the administration of the vaccine and the occurrence of a disease; (ii) the absence of personal and familial history of that disease; and (iii) the existence of a significant number of reported cases in which this disease occurred after such vaccinations could suggest that the administration of the vaccine is the most plausible explanation for the occurrence of the disease and that, therefore, the vaccine would be defective.

This preliminary ruling leaves the pharmaceutical sector more vulnerable to product liability claims as it significantly broadens the range of evidence that individuals allegedly injured by vaccines can rely upon. It is important to note that the ECJ indicated that the evidence submitted under this evidentiary rule can be used not only to establish the causal link but also the defectiveness of the vaccine. However, the ECJ formulated a crucial caveat since such an evidentiary rule can only apply when medical research neither confirms nor rules out the existence of a causal link between the disease and the vaccine.

VBB on Belgian Business Law | Volume 2017, Nº 6

| PUBLIC PROCUREMENT

Completion and Entry into Force of New Regulatory Framework Governing Public Procurement

On 30 June 2017, the new Belgian regulatory framework on public procurement entered into force. This follows the publication of three Royal Decrees which complete the new regulatory framework:

- On 23 June 2017, the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*) published a Royal Decree of 18 June 2017 on the award of public procurement contracts in the special sectors (*Koninklijk Besluit van 18 april 2017 plaatsing overheidsopdrachten in de speciale sectoren/Arrêté royal du 18 avril 2017 relatif à la passation des marchés publics dans les secteurs spéciaux* – the "Special Sectors Royal Decree");

- On 27 June 2017, the Belgian Official Journal published a Royal Decree of 22 June 2017 which contains new rules on the performance of the public works contracts and concession contracts (*Koninklijk Besluit van 22 juni 2017 tot wijziging van het Koninklijk Besluit van 14 januari 2013 tot bepaling van de algemene uitvoeringsregels van de overheidsopdrachten en van de concessies voor openbare werken en tot bepaling van de datum van inwerkingtreding van de Wet van 16 februari 2017 tot wijziging van de Wet van 17 juni 2013 betreffende de motivering, de informatie en de rechtsmiddelen inzake overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten/Arrêté royal du 22 juin 2017 modifiant l'Arrêté royal du 14 janvier 2013 établissant les règles générales d'exécution des marches publics et des concessions de travaux publics et fixant la date d'entrée en vigueur de la Loi du 16 février 2017 modifiant la Loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics et de certains marchés de travaux, de fournitures et de services* – the "Royal Decree on Contract Performance"); and

- On 29 June 2017, the Belgian Official Journal published a Royal Decree on 25 June 2017 on the award and performance of concession contracts (*Koninklijk Besluit van 25 juni 2017 betreffende de plaatsing en de algemene uitvoeringsregels van de concessieovereenkomsten/Arrêté royal du 25 juin 2017 relatif à la passation et aux règles générales d'exécution des contrats de concession* – the "Royal Decree on Concession Contracts").

The Special Sectors Royal Decree and the Royal Decree on Contract Performance implement the Law of 17 June 2016 on public procurement (*Wet van 17 juni 2016 inzake overheidsopdrachten/Loi du 17 juin 2016 relative aux marchés publics* – the "Law on Public Procurement") which, in turn, implements into Belgian law (i) Directive 2014/24/EU of 26 February 2014 on public procurement (classical sectors) ("Directive 2014/24/EU); and (ii) Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (i.e., the so-called special sectors) ("Directive 2014/25/EU").

The Special Sectors Royal Decree is largely inspired by the Royal Decree of 18 April 2017 on the award of public procurement contracts in the classical sectors (the "Classical Sectors Royal Decree" – *See, this Newsletter, Volume, 2017, No. 5, p. 23*). In order to simplify the regulatory framework, the Special Sectors Royal Decree repeals and replaces the previous rules which differed depending on whether the entities procuring services in the special sectors were governed by public or private law. The Special Sectors Royal Decree adopts the terminology and content of Directive 2014/25/EU. It reproduces the rules set out in the Classical Sectors Royal Decree, except for a few provisions which are not taken over, such as the rule on preventing conflicts of interests.

The Royal Decree on Contract Performance complements the Classical Sectors Royal Decree, which does not deal with the performance phase. It applies to both the classical and special sectors. In particular, it contains rules on the modification of contracts during their term and rules on subcontracting that seek to combat what is referred to as "social dumping."

Finally, the Royal Decree on Concession Contracts implements the Law of 17 June 2016 on concession agreements (*Wet van 17 juni 2016 betreffende de concessieovereenkomsten/Loi du 17 juin 2016 relative aux contrats de conces-*

sions) which, in turn, implements into Belgian law Directive 2014/23/EU of 26 February 2014 on the award of concession contracts (*See, this Newsletter, Volume 2016, No. 3, p. 11; No. 6, p. 28; and No. 7, p. 18*). The Royal Decree on Concession Contracts provides a new regulatory framework which, to guarantee legal certainty, applies to all concession contracts but which is, at the same time, more flexible than that applicable to public works contracts. It is also innovative in that it regulates service concessions, which, before 2014, were not regulated at the EU level.

Following the entry into force of the new regulatory framework on public procurement, Belgium has finally implemented Directive 2014/23/EU, Directive 2014/24/EU and Directive 2014/25/EU. It was timely for this to happen as these Directives were required to be implemented into national law by 18 April 2016 (*See also, this Newsletter, Volume, 2017, No. 5, p. 23*).

For the sake of completeness, the new regulatory framework on public procurement will be complemented later this year by two additional Royal Decrees which are still under preparation:

- a Royal Decree on governance, giving effect to Title IV "*Governance*" of Directive 2014/24/EU and Directive 2014/25/EU; and

- a Royal Decree amending the Royal Decree of 3 April 2013 on the role of the Council of Ministers, the transfer of competencies and the authorisations with regard to the award and performance of public procurement contracts, design contests and public works concessions at the federal level (*Koninklijk Besluit van 3 april 2013 betreffende de tussenkomst van de Ministerraad, de overdracht van bevoegdheid en de machtigingen inzake de plaatsing en de uitvoering van overheidsopdrachten, ontwerpenwedstrijden en concessies voor openbare werken op federaal niveau/Arrêté royal du 3 avril 2013 relatif à l'intervention du Conseil des Ministres, aux délégations de pouvoir et aux habilitations en matière de passation et d'exécution des marchés publics, des concours de projets et des concessions de travaux publics au niveau federal*).

VBB on Belgian Business Law | Volume 2017, Nº 6

STATE AID

Constitutional Court Declares Arco Guarantee Granted By Belgium Unconstitutional

On 15 June 2017, the Constitutional Court delivered a judgment on the guarantee scheme granted by Belgium to three financial cooperatives of the ARCO group.

In November 2011, the Belgian authorities had decided to grant to the 800,000 ARCO shareholders the same protection provided for savings deposits and life insurance, *i.e.*, a protection of funds limited to EUR 100,000 per investor. In the event of default on the part of the ARCO cooperatives, the Belgian state would repay up to EUR 100,000 of the funds invested by natural persons in shares issued by the financial cooperatives. ARCO, one of the main shareholders of the Belgian-French Dexia Bank, was thus protected against the threat of flight by private investors from the three financial cooperatives.

In December 2011, several parties introduced actions for annulment against the ARCO guarantee before the Belgian Council of State. Faced with questions regarding the constitutionality of the guarantee, the Council of State decided to refer the case to the Constitutional Court for a ruling on the compatibility of the ARCO guarantee with Articles 10 and 11 of the Belgian Constitution, *i.e.*, the provisions on equality and non-discrimination. In a judgment of 5 February 2015, the Constitutional Court, in turn, asked the Court of Justice of the European Union ("ECJ") to rule on the compatibility of the ARCO guarantee with Directive 94/19/EC of 30 May 1994 on deposit-guarantee schemes ("Directive 94/19/EC") and on the validity of the decision of the European Commission (the "Commission") of 3 July 2014 (*See, this Newsletter, Volume 2016, No. 12, p. 24*).

In that decision of 3 July 2014, the Commission had classified the ARCO guarantee as unlawful state aid (since it had not been notified in a timely manner) and incompatible with the internal market. Belgium and the three financial cooperatives brought actions before the General Court for annulment of the Commission's decision (Cases T-664/14 *Belgium v Commission* and T-711/14 *Arcofin and Others v Commission*). Those proceedings were stayed pending the ECJ's response to the questions referred by the Belgian Constitutional Court.

On 21 December 2016, the ECJ gave judgment on the request for a preliminary ruling. The ECJ held that Directive 94/19 does not impose on Member States an obligation to adopt a guarantee scheme with regard to shares in recognised cooperatives operating in the financial sector, such as ARCO. Nor does the Directive, according to the ECJ, prevent Member States from extending the deposit-guarantee scheme to shares in recognised cooperatives operating in the financial sector. However, such an extension must not undermine the practical effectiveness of the scheme that Directive 94/10/EC requires Member States to establish and must be compatible with the Treaty, in particular the provisions relating to state aid. With regard to the state aid rules, the ECJ confirmed the validity of the Commission's decision of 3 July 2014, classifying the ARCO guarantee as state aid which was unlawfully put into effect by Belgium.

On the basis of the Commission decision of 3 July 2014 and the judgment of the ECJ of 21 December 2016 confirming that the selective advantage granted to the three financial cooperatives of the ARCO group constituted unlawful and incompatible state aid, the Constitutional Court held in its judgment of 15 June 2017 that the ARCO guarantee violated Articles 10 and 11 of the Belgian Constitution. The Constitutional Court added it was no longer necessary to assess whether the guarantee undermines the practical effectiveness of the scheme that Directive 94/10/EC requires Member States to establish. With regard to the pending actions for annulment before the General Court against the Commission decision of 3 July 2014, the Constitutional Court considered it not necessary to wait for the outcome of these procedures, since the ECJ, in its response to the request for a preliminary ruling, had not identified any facts or circumstances that could affect the validity of that decision.

The case will now be dealt with again by the Council of State, which will have to draw the necessary consequences from the finding of unconstitutionality by the Constitutional Court.

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

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

vbb@vbb.com