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COMMERCIAL LAW

Flemish Decree Abolishes Requirement to Prove Management Skills

On 11 June 2018 the Flemish Decree of 18 May 2018 regarding the abolishment of the statutory provisions on basic management skills was published in the Belgian Official Journal (*Decreet van 18 mei 2018 tot opheffing van de wettelijke bepalingen over de basiskennis van het bedrijfsbeheer/Décret du 18 mai 2018 abrogeant les dispositions légales relatives aux connaissances de base de la gestion d'entreprise*; the "Decree").

While small and medium sized companies, private individuals and legal entities carrying out activities that must be registered in the commercial or trade register (*handels- of ambachtsregister/registre du commerce ou de l'artisanat*) must at present provide evidence of basic management skills, the Decree abolishes this requirement in the Flemish region.

The Decree will enter into force on 1 September 2018.

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COMPETITION LAW

Belgian Supreme Court Removes One More Hurdle in European Commission's Quest for Damages against Elevator Companies

On 22 March 2018, the Supreme Court (*Hof van Cassatie/ Cour de Cassation* – the "Supreme Court") dismissed an appeal against an interim judgment given by the Brussels Court of Appeal (the "Court of Appeal") on the damages claim introduced by the European Commission (the "Commission") following a decision of 21 February 2007 in which the Commission had fined four elevator companies, Kone, Otis, Schindler and ThyssenKrupp (the "Defendants"), a total of EUR 992 million for their participation in a cartel on the markets for the sale, installation, maintenance and renewal of lifts and escalators in Belgium, Germany, Luxembourg and The Netherlands (the "Cartel Decision").

In June 2008, the Commission brought an action for damages before the Brussels Commercial Court (the "Commercial Court") based on its Cartel Decision as it considered that it had suffered injury because of the cartel activities of the Defendants. On 24 November 2014, after having requested a preliminary ruling from the Court of Justice of the European Union (*See, this Newsletter, Volume 2012, No. 12*), the Commercial Court dismissed the Commission's action for damages for lack of sufficient evidence (*See, this Newsletter, Volume 2014, No. 11*).

The Commission appealed the judgment of the Commercial Court to the Court of Appeal. On 28 October 2015, the Court of Appeal handed down an interim judgment ordering the four Defendants to disclose documents from the Commission's cartel file (the "Judgment"). The order covered (i) specific paragraphs of the Commission's Cartel Decision discussing the Belgian market; and (ii) a copy of the documents from the Commission's investigation file as referred to in the Cartel Decision. Following the Judgment, the Defendants were required to hand over two versions of each set of documents: one complete version and one version leaving out specific confidential information identified in the Judgment (*e.g.* personal data of natural persons, information that could lead to the identification of the leniency applicant and internal documents of the Commission).

The four Defendants lodged an appeal before the Supreme Court to annul the Judgment, based on two grounds. First, the Defendants argued that the Court of Appeal's interpretation of the documents of the leniency programme that benefit from the confidentiality obligation is too narrow. The Supreme Court held that, in accordance with the judgment of the Court of Justice of the European Union in *Donau Chemie and Others* (C-536/11, *Donau Chemie and Others*, EU:C:2013:366), it is up to the national courts to balance (i) the interests of the claimant to review the documents in view of the preparation of its claim to seek damages, taking into account any possible alternatives at the claimant's disposal; and (ii) the concrete potential negative effects of disclosure to the public interest or legitimate interests of third parties. According to the Supreme Court, merely invoking the risk that the disclosure may undermine the leniency programme is insufficient. Non-disclosure is justified only if there is a risk that a specific document may actually undermine the public interest relating to the effectiveness of the leniency programme.

Second, the Court dismissed the Defendants' argument that the Court of Appeal did not take into account the extent to which the public interest would be affected by ordering the disclosure of evidence which the Commission had obtained in the framework of the leniency programme. According to the Supreme Court, the Court of Appeal did consider the specific circumstances of the case justifying the disclosure of the documents. It referred to the following considerations in the Judgment:

- the specificity of the follow-on procedure and the fact that no evidence could be collected at the time when the harmful practices occurred and that the relevant evidence therefore necessarily came into possession of the parties in an asymmetrical manner;
- the burden of proof in these proceedings requires a factual and economic analysis which is generally too complex for a claimant to produce on its own;
- the relevance of the documents to be disclosed which will likely serve to substantiate the claim of the Commission;

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- the Cartel Decision mentions that the cartel has effectively had anticompetitive effects, confirms the existence of the cartel and assumes that the cartel has negatively impacted the Belgian market; and

- The opinion of the Commission constitutes at least *prima facie* evidence that the harmful practices have caused injury to the market players.

The judgment of the Supreme Court came as a welcome ruling for the Commission, which had to overcome several hurdles to recover damages before the Belgian courts. In addition, the judgments of both the Court of Appeal and of the Supreme Court illustrate the hybrid role of the Commission, which first acted as prosecutor and then as claimant, when trying to gain access to its own investigation file through the participants in the cartel for the purpose of supporting a damage claim based on its own decision to fine those same participants in that cartel. Finally, the judgment of the Supreme Court is a valuable tool for claimants seeking to substantiate their damage claims with documentation which the Commission obtained through the leniency programme.

The Supreme Court referred the case back to the Court of Appeal which will further handle the Commission's claims for damages.

Belgian Competition Authority Publishes Annual Report for 2017

On 16 May 2018, the Belgian Competition Authority ("BCA") published its annual report for the year 2017 (the "Report"). The Report reveals an increase in personnel available for investigations, a slight decrease in competition investigations (resulting however in a noticeably higher amount in fines) and a slight increase in merger control notifications.

The Report also includes the BCA's enforcement priorities for 2018, as previously published on 27 April 2018 (*See, this Newsletter, Volume 2018, No. 4, p. 5*).

The BCA's Report is available in Dutch and in French.

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CONSUMER LAW

European Commission Publishes Harmonised Testing Methodology for Dual Quality Food Products

On 25 April 2018, the Joint Research Centre ("JRC"), the European Commission's Science and Knowledge service, published a report outlining a harmonised methodology for comparing the composition and characteristics of food products sold with similar packaging across the EU (the "Report").

The Report is part of a series of measures issued by the European Commission (the "Commission") to tackle the issue of "dual quality products", *i.e.,* products being marketed under the same brand and packaging across several EU Member States while the quality is not uniform across these markets. This issue was first raised in March 2017 and has since gained significant momentum. On 13 September 2017, in his State of the Union Address, Commission President Juncker stressed that it is not acceptable that "*in some parts of Europe, people are sold food of lower quality than in other countries, despite the packaging and branding being identical*".

Following this, the Commission has taken several actions to ensure that consumers can trust the products which they buy, including (i) guidance on how to apply and enforce the relevant EU food and consumer protection laws to dual quality products; and (ii) a proposal to amend Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the "UCPD") (*See, this Newsletter, Volume 2018, No. 4, p. 7*).

The development of a harmonised testing methodology was seen to be the next step in order to assess the magnitude of the issue and to provide a sound evidentiary basis for further action. The methodology will also allow enforcement authorities to perform market tests involving product comparisons across different regions and countries in order to decide whether differentiation practices of a particular food business operator constitute unfair commercial practices.

While the methodology for selecting, sampling and testing of products is flexible so that it can be adapted to the requirements of the particular testing exercise, it is premised on six general principles: (i) transparency; (ii) due consideration of fixed components in an assessment procedure; (iii) comparability; (iv) appropriate selection, sampling and testing procedures; (v) engagement of involved parties, including food business operators and consumer representatives; and (vi) fairness. Furthermore, in relation to the design and practical implementation of a campaign to assess quality-related characteristics of food, the Report outlines recommendations for national authorities regarding the selection, sampling and testing of products, the sensory analysis of products and data interpretation.

The Report specifies that the harmonised testing methodology will be implemented in an EU-wide testing campaign. Based on this, the JRC will have objective evidence regarding possible differences in quality-related characteristics of food. Furthermore, the results will lead to the specification of requirements allowing differences to be regarded as "significant". This is a key element of the proposed amendment in relation to dual quality products of the UCPD. That amendment seeks to qualify as a "misleading commercial practice" any attempt to market a product as "identical" to a similar product marketed in several other EU Member States, while those products have a "significantly different" composition or characteristics causing or likely to cause the average consumer to take a transaction decision that he would not have taken otherwise (*See, this Newsletter, Volume 2018, No. 4, p. 7*).

Bill Seeks to Extend Scope for Class Actions in Data Protection and Organised Travel

On 8 June 2018, the Government submitted a Bill containing miscellaneous provisions in relation to the economy to the Chamber of Representatives (*Wetsontwerp houdende diverse bepalingen inzake Economie/Projet de loi portant dispositions diverses en matière d'Economie* - the "Bill"). In addition to changes of a formal nature, the Bill proposes legislative amendments in a wide range of economic areas, including that of consumer law, to reflect developments at the national and European level.

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In the field of consumer protection, most notably, the Bill proposes to amend Article XVII.37 of the Code of Economic Law (the "CEL") to allow class actions for infringements of (i) Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation); and (ii) the Law of 21 November 2017 on the sale of travel packages, travel arrangements related thereto and travel services (*Wet van 21 november 2017 betreffende de verkoop van pakketreizen, gekoppelde reisarrangementen en reisdiensten/Loi du 21 novembre 2017 relative à la vente de voyages à forfait, de prestations de voyage liées et de services de voyage*). This amendment will facilitate private enforcement in the sphere of data protection and organised travel.

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CORPORATE LAW

Bill Providing for New Companies' Code Submitted to Federal Parliament

On 4 June 2018, a Bill in relation to the new Code of companies and associations (the "New Belgian Companies' Code" or "NBCC") and containing miscellaneous provisions was submitted to the federal Parliament (*Wetsontwerp van 4 juni 2018 tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen/Projet de loi du 4 juin 2018 introduisant le Code des sociétés et des associations et portant des dispositions diverses* – the "Bill").

The Bill will introduce a new Belgian company law code that will bring together the rules included in the existing company law code and the law on non-profit organisations, while overhauling a significant number of existing rules.

If the Bill is passed by Parliament, it is expected to enter into force on 1 January 2019.

Changes to Scope of Obligation to Register with Crossroads Bank for Enterprises and Business' Counter

On 27 April 2018, the Law on the reform of business law was published in the Belgian Official Journal (*Wet van 15 april 2018 houdende hervorming van het ondernemingsrecht/Loi du 15 avril 2018 portant réforme du droit des entreprises* – the "Law").

The Law provides for modifications to the scope of businesses subject to the obligation to register with (i) the Crossroads Bank for Enterprises (*Kruispuntbank van Ondernemingen/Banque-Carrefour des entreprises* – "CBE") and (ii) a business' counter (*ondernemingsloket/guichet d'entreprises*).

First, in addition to the businesses currently subject to the obligation to register with the CBE, the Code of Economic Law now also requires companies without legal personality to register with the CBE if they engage in legal relations and legal transactions with third parties.

Second, the Law also modifies the scope of the existing registration obligation for businesses with a business' counter. Subject to specific exceptions, the following businesses must register with a recognised business' counter before starting any activities:

- any legal person, whether under private or public law;
- any other organisation without legal personality, with the exception of organisations without legal personality which neither aim to provide benefits nor actually provide benefits to their members or to any other person with a decisive influence on the management of the organisation (*i.e.,* organisations with a for-profit purpose); and
- every business that has a seat, branch or establishment in Belgium.

Save for limited exceptions, the Law will enter into force on 1 November 2018 (*See, this Newsletter, Volume 2017, No. 12, p. 3-4; Volume 2018, No. 3, p. 3; and Volume 2018, No. 4, p. 4*).

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DATA PROTECTION

Court of Justice of European Union Holds that Administrator of Facebook Fan Page Is Controller

On 5 June 2018, the Court of Justice of the European Union (the "ECJ") delivered a judgment in response to a request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany – the "Court") concerning the interpretation of Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the "Directive") (ECJ, 5 June 2018, case C-210/16, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein GmbH*).

The case concerned a fan page hosted on Facebook by Wirtschaftsakademie Schleswig-Holstein GmbH, a company operating in the field of education ("Wirtschaftsakademie"). The Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein (the supervisory authority within the meaning of Article 28 of the Directive, with the task of supervising the application of data protection rules in the German Bundesland of Schleswig-Holstein (Germany), the "ULD") ordered Wirtschaftsakademie to deactivate the fan page it had set up on Facebook. According to the ULD, this processing was illegal since neither Wirtschaftsakademie nor Facebook had informed the fan page visitors that Facebook collected personal data concerning them through the use of cookies.

Wirtschaftsakademie challenged that decision, arguing essentially that it was not responsible under data protection law for the processing of the data by Facebook or the cookies which Facebook installed. In a judgment of 9 October 2013, the Verwaltungsgericht (Administrative Court) annulled the challenged decision. The ULD appealed to the Oberverwaltungsgericht (Higher Administrative Court), but the Oberverwaltungsgericht dismissed the ULD's appeal against the judgment. Finally, the ULD appealed to the Court which then decided to stay the proceedings and refer a number of questions to the ECJ for a preliminary ruling.

The ECJ held that the concept of "controller" in the Directive must be interpreted broadly, and must be interpreted in such a manner that it encompasses the administrator of a fan page hosted on a social network such as Facebook. Consequently, Wirtschaftsakademie must be regarded as a controller under the Directive.

Furthermore, with regard to the competence of the ULD, the ECJ held that Articles 4 and 28 of the Directive must be interpreted in such a manner that the ULD has jurisdiction to enforce Facebook's compliance with data protection laws because Facebook has an establishment in Germany. The ECJ specified that the fact that Facebook's establishment in Germany is responsible solely for the sale of advertising space and other marketing activities in Germany, while the exclusive responsibility for collecting and processing data belongs, for the entire territory of the European Union, to an establishment situated in Ireland, is not relevant to this question.

Finally, the ECJ concluded that the ULD is competent to assess the lawfulness of the data processing, independently of the supervisory authority of another member state, and may exercise its powers of intervention with respect to the entity in its territory (in the case at hand, Facebook) without first calling on the supervisory authority of the other Member State to intervene. In other words, the ECJ held that the ULD is competent to assess Facebook's compliance with data protection laws, without having to take into account the opinion of, for example, the Irish data protection regulator.

European Data Protection Board Guidance on Derogations for International Data Transfers

On 25 May 2018, the European Data Protection Board (the "EDPB") adopted its "Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679" with regard to international data transfers (the "Guidelines").

Derogations Are Last Resort

Under Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the "GDPR"), the general rule is that data can only be transferred to non-

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EEA countries if these countries offer an "adequate level of protection". The existence of an adequate level of protection can either follow from an adequacy decision issued by the European Commission, or be a consequence of specific measures taken by the data controller, *i.e.*, if the data controller has put in place "adequate safeguards" such as the implementation of binding corporate rules or the use of standard model clauses. Article 49 of the GDPR provides for specific derogations by virtue of which data controllers may still transfer personal data to non-EEA countries even if these do not offer an adequate level of protection for such personal data.

In the Guidelines, the EDPB first recalls that recourse to the derogations of Article 49 should always constitute a last resort and can never result in a situation where fundamental rights can be breached. The EDPB also underlines that all derogations of Article 49 should be interpreted restrictively so that the exception does not become the rule. The EDPB adds that, while it is true that Recital 111 of the GDPR differentiates among the derogations by expressly stating that the "contract" and "legal claims" derogations (Article 49 (1)(b), (c) and (e)) should be limited to "occasional" transfers, the other derogations of Article 49, which are not expressly limited, still have to be interpreted in a way which does not contradict the very nature of the derogations as being exceptions to the rule.

Which Derogations Does GDPR Allow For?

The EDPB then addresses each of the derogations under Article 49 of the GDPR.

Explicit Consent

Article 49 (1)(a) authorises data transfers if the data subject has given his or her "explicit consent" and confirms the high threshold applied for the use of such a derogation. The EDPB underlines that consent should be specifically given for the particular data transfer and that, with this is mind, it might sometimes be impossible to obtain the data subject's consent for a future transfer at the time of collection of the personal data, e.g. if the occurrence and specific circumstances of the transfer remain unclear at that time. The EDPB also stresses that it is crucial that the data subject should be properly informed in advance of the specific circumstances of the transfer (including, but not limited to, the data recipients and the countries to which the data are transferred) and that, therefore, he or she should also be informed of the specific risks of a transfer to a country not providing an adequate protection in the absence of adequate safeguards. If such information is not supplied, the derogation will not apply.

Contract

Article 49 (1)(b) of the GDPR permits a derogation for transfers that are necessary for the performance of a contract between the data subject and the controller or for implementing pre-contractual measures. The EDPB explains that such transfers must be strictly "necessary" for the contractual purpose and that the derogation only permits "occasional" transfers for this purpose. By way of example, the EDPB indicates that this basis cannot be used for international transfers in order to centralise payment and human resource management functions within a group of companies. For such a situation, standard contractual clauses or binding corporate rules may provide a more suitable basis, according to the EDPB.

Contract in Interest of Data Subject

Next, Article 49(1)(c) of the GDPR permits transfers that are necessary for the conclusion or performance of a contract concluded *in the interest of the data subject*. This derogation is interpreted similarly as the above, meaning that the transfer of personal data must be occasional and necessary, *i.e.*, there must be a close and substantial link between the transfer and the contract concluded in the interest of the data subject.

Public Interest

Article 49(1)(d) of the GDPR allows transfers that are necessary for important reasons of public interest. Here, the EDPB reiterates earlier guidelines issued by the Article 29 Working Party, the predecessor of the EDPB, that the "*derogation only applies when it can also be deduced from EU law or the law of the Member State to which the controller is subject*". Accordingly, foreign interests do not qualify to permit the transfer, but the EDPB nevertheless indicates that account should be taken of "*the spirit of reciprocity for international cooperation*".

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Legal Claims

Under Article 49 (1)(e) of the GDPR, transfers may take place when the transfer is "*necessary for the establishment, exercise or defence of legal claims*". This derogation provides an important basis for international transfers in the context of international litigation as well as criminal or administrative investigations in a third country (including antitrust law, corruption and insider trading investigations). Transfers for the purpose of pre-trial discovery procedures may also fall under this derogation. However, the EDPB states that such transfers must still be "*occasional and necessary*", and it points out that the transfer of all personal data that is possibly relevant to the legal proceedings "*would not be in line with this derogation or with the GDPR more generally*". Indeed, the data minimisation principle also applies to this situation. Therefore, the EDPB sets out a "layered approach" for transfers under this derogation: first, a careful assessment should be made whether anonymised data would be sufficient for the particular case. If not, the transfer of pseudonymised data should be considered. If this is also not possible, and personal data must be transferred to a recipient in a third country in non-pseudonymised form, the transfer should be limited to only those data that are actually necessary for the purpose at hand.

Protection of Vital Interests of Data Subject or Other Persons

Article 49 (1)(f) of the GDPR applies to transfers necessary in order to protect the vital interests of the data subject or other persons, if the data subject is physically or legally incapable of giving consent. This derogation applies, for instance, in the event of a medical emergency.

Compelling Legitimate Interest of Controller

Finally, international transfers may be permitted where there are compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject (Article 49 (1), §2 of the GDPR). The Guidelines confirm that this derogation can only be relied upon in residual cases, where none of the other derogations applies. In this respect, the EDPB states that the data exporter should be able to demonstrate its serious attempts to rely on the other grounds for transfer or the impossibility to rely on such grounds. For example, the EDPB notes that binding corporate rules may often not be a feasible option for small and medium-sized enterprises due to the considerable administrative investments they entail. Also, the EDPB stresses that not all "legitimate interests" can be qualified as "compelling" and that a higher threshold applies in such an assessment. An example of a compelling legitimate interest would be, according to the EDPB, if a data controller is forced to transfer the personal data in order to protect its organisation or systems from serious immediate harm or from a severe penalty which would seriously affect its business. The EDPB adds that such a transfer can only concern a limited number of data subjects. Moreover, this derogation also requires the transfer to be "not repetitive". The EDPB clarifies this requirement as being similar to the "occasional" condition included in Recital 111. According to the EDPB, these terms indicate that transfers may happen more than once, but not regularly. It is also required that these transfers occur "outside the regular course of actions", *e.g.* under random, unknown circumstances and within arbitrary time intervals. As an example, the EDPB indicates that granting direct access to a data base (via an interface or IT-application) on a general basis or effecting transfers within a stable relationship between a data exporter and importer, would not be considered occasional or not repetitive.

These Guidelines provide a welcome insight, especially since derogations for data transfers could gain importance over time in view of the challenges currently faced by existing transfer mechanisms. Indeed, the validity of both the EU-US Privacy Shield and the European Commission model clauses is currently being questioned (*See, this Newsletter, Volume 2017, No. 12, p. 9 and this Newsletter, Volume 2018, No. 4, p. 11*).The full text of the Guidelines can be found here.

European Data Protection Board Adopts Guidelines on Certification

On 25 May 2018, the European Data Protection Board ("EDPB") adopted guidelines on certification under the General Data Protection Regulation ("the Guidelines") (Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, "GDPR").

Article 42 of the GDPR provides for the possibility of establishing data protection certification mechanisms and of data protection seals and marks, for the purpose

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of demonstrating compliance with the GDPR of processing operations by controllers and processors. According to Article 42 of the GDPR, this should be encouraged by Member States, the supervisory authorities, the European Data Protection Board and the European Commission.

The Guidelines elaborate on this provision by offering background on the purpose of certification and providing guidance on the interpretation of key concepts such as "certification" and "certification mechanisms". Additionally, the Guidelines explain the role of the supervisory authorities which will either conduct the certification themselves or approve criteria for certification of specialised bodies and exercise corrective powers with regard to certification.

The Guidelines then explain the role of the certification body, which is to issue, review, renew and withdraw certifications and set up certification procedures. More information is also provided on the approval of the certification criteria, such as the timing of the approval and the relevant competent supervisory authority. Furthermore, guidance is provided on the criteria, the scope and the object of the certification, evaluation methods, the methodology of assessment, and the documentation of assessment and results.

Finally, the Guidelines contain advice on defining certification criteria. It is recommended that general considerations be taken into account when approving or defining certification criteria, such as uniformity, auditability and relevance to the targeted audience. The EDPB adds that, even though certification criteria must be reliable, they should be subject to revision in specific instances, such as when the regulatory framework is amended, relevant judgments of the Court of Justice of the European Union come down, or the technical state of the art evolves.

The Guidelines can be found here.

Bill Seeks to Extend Scope for Class Actions in Data Protection and Organised Travel

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INSOLVENCY

Court of Justice of European Union Provides Guidance Regarding Applicable Law in Proceedings against Insolvent Debtors

On 6 June 2018, the Court of Justice of the European Union (the "ECJ") handed down a judgment concerning the interpretation of Council Regulation No 1346/2000 of 29 May 2000 on insolvency proceedings (the "Insolvency Regulation") (ECJ, 6 June 2018, case C-250/17, *Virgílio Tarragó da Silveira v. Massa Insolvente da Espírito Santo Financial Group SA*).

The judgment was delivered in response to a request for a preliminary ruling from the Supremo Tribunal de Justiça (Supreme Court of Portugal, the "Court") in proceedings between Virgílio Tarragó da Silveira and the bankrupt estate of Espírito Santo Financial Group SA ("Espirito Santo"). Mr. Tarragó da Silveira claimed payment of a sum due in remuneration for services provided to Espírito Santo before the latter's insolvency as well as payment for damages for the loss suffered due to the non-performance of a contract for the provision of services.

The claim was initially brought on 25 July 2008 before the Tribunal de Comarca de Lisboa (Commercial Court of Lisbon, Portugal). During those proceedings, Espírito Santo was, however, declared insolvent by the tribunal d'arrondissement de Luxembourg (District Court of Luxembourg).

Article 15 of the Insolvency Regulation provides that the effects of insolvency proceedings on a pending lawsuit concerning an asset or a right of which the debtor has been divested are solely governed by the law of the Member State in which that lawsuit is pending. While the Insolvency Regulation has been repealed by Regulation 2015/848 of 20 May 2015 on insolvency proceedings (the "New Insolvency Regulation"), the content of Article 15 has been transposed in Article 18 of the New Insolvency Regulation and remains materially unchanged.

Mr. Tarragó da Silveira argued that the effects of the insolvency proceedings on the Portuguese proceedings were not governed by Article 15 (which would designate Portuguese law as the applicable law and result in the termination of the proceedings brought by Mr. Tarrago da Silveira). He maintained that the scope of the provision was limited to lawsuits concerning a specific asset or right. As a result, a lawsuit concerning an obligation of a monetary nature, such as his claim, would not fall within the scope of that provision. He further contended that in accordance with the general rule on conflict of laws under Article 4 of the Insolvency Regulation, his claim would therefore be governed by the law of the Member State where the insolvency proceedings had been initiated, the Grand Duchy of Luxembourg. Contrary to Portuguese law, the application of Luxembourg law would not have resulted in the termination of the pending lawsuits.

Holding that Article 15 of the Insolvency Regulation applied in this case and that, consequently, Portuguese Law applied, the Tribunal de Comarca de Lisboa held that there was no longer need to adjudicate since the action had become moot in the light of the opening of insolvency proceedings in Luxembourg. Mr Tarragó da Silveira lodged an appeal before the Tribunal da Relação de Lisboa (Court of Appeal of Lisbon, Portugal), which upheld the decision. Mr Tarragó da Silveira eventually appealed to the Supreme Court, which decided to stay the proceedings and refer the question of the applicability of Article 15 to the ECJ for a preliminary ruling.

Noting that the wording of Article 15 was somewhat ambiguous, the ECJ nevertheless rejected the argument that its scope was limited to lawsuits relating to specific assets or rights. The ECJ nonetheless added that this broad interpretation did not entail the applicability of Article 15 to all types of proceedings. In particular, the ECJ highlighted that its scope did not extend to enforcement proceedings as this would encroach upon the equal treatment of creditors. Consequently, the ECJ concluded that all proceedings merely determining the rights and obligations of the insolvent debtor, without involving their enforcement, fall within the scope of Article 15 and are therefore governed by the law of the Member State in which that lawsuit is pending.

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INTELLECTUAL PROPERTY

Bill Implementing Trade Secrets Directive Submitted to Federal Parliament

On 12 June 2018, the Government submitted to the Chamber of Representatives a bill implementing Directive 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (the "Trade Secrets Directive") (*Wetsontwerp betreffende de bescherming van bedrijfsgeheimen/Projet de loi relatif à la protection des secrets d'affaires*) (*See, this Newsletter, Volume 2016, No. 5, pp. 10 and 11 and Volume 2016, No. 6, p. 19*) (the "Bill").

The Trade Secrets Directive requires Member States to ensure effective, equitable, efficient and dissuasive redress measures in case of infringement as well as interim measures in case of *prima facie* infringements.

Accordingly, the Bill confers on the judge the power to (i) order provisional and protective measures; (ii) issue injunctions in order to protect trade secrets (including cease-and-desist order in the case of a future or imminent acquisition of trade secrets); and (iii) grant corrective measures (including recall or destruction of the infringing goods, assignment of the infringing equipment, damages, etc.) (*See, this Newsletter, Volume 2018, No. 1, p. 12*). These procedural remedies mirror those available for infringements of intellectual property rights, with the exception of anti-counterfeiting seizures (*beslag inzake namaak/saisie en matière de contrefaçon*). Such seizures are not available for the protection of trade secrets.

The substantive provisions on trade secrets will be included in Book XI of the Code of Economic Law (*Wetboek van Economisch Recht/Code de droit économique*), the title of which will be changed to "Intellectual Property and Trade Secrets".

The confidentiality of trade secrets in legal proceedings will be discussed in the "Litigation" section.

Parallel Trade: Rebranding of Generic Medicine to Originator Brand Name Constitutes Trade Mark Infringement

On 12 April 2018, the Dutch-language Commercial Court of Brussels (the "Court") gave judgment in a dispute between Novartis AG ("Novartis"), a pharmaceutical company developing, manufacturing and distributing innovative medicines, and Impexeco NV ("Impexeco"), a wholesaler of medicines active in the parallel trade of medicines within the European Union.

Novartis produces and distributes a prescription-only medicine indicated for the treatment of breast cancer with the active substance "letrozol". In Belgium and in the Netherlands, Novartis first brought this medicinal product on the market under the name "Femara". Novartis had obtained trade mark protection for Femara and Femara's active substance was protected by a patent. After the expiry of Femara's patent, the Novartis group brought a generic version of the medicine on the market under the name of the active substance letrozol as "Letrozol Sandoz". Letrozol Sandoz was produced in Germany by a subcontractor and then bought by Sandoz BV in the Netherlands and by Sandoz NV in Belgium. Novartis and Sandoz belong to the same group of companies.

The dispute at hand arose after Impexeco bought the generic medicine Letrozol Sandoz from Sandoz in the Netherlands and then introduced and sold it on the Belgian market under Novartis' trade mark Femara. Novartis claimed that such a practice constituted a trade mark infringement. Novartis added that the European rules on free movement of goods did not allow Impexeco to sell generic medicines as brand name medicines, especially since Impexeco made a profit margin of 3,000% on the sale of these products.

The Court first upheld Novartis' argument that the principle of exhaustion of trade mark rights, as provided for by Article 13.1 of Regulation 207/2009 on the Community trade mark (the "Regulation"), did not apply to this case. The Court found that it was not disputed that the Femara trade mark had not been used by Novartis with respect to the generic medicines bought by Impexeco in the Netherlands. Therefore, the trade mark rights of Novartis in that

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trade mark were not exhausted with respect to these products. As a consequence, the Court held that Impexeco had infringed Novartis' trade mark rights.

The Court then went on to examine whether Impexeco could rely on an exception, *i.e.*, the principle of free movement of goods, to sell these generic medicines. Referring to the case-law of the Court of Justice of the European Union, the Court recalled that the principle of free movement of goods would allow Impexeco's practice only if the exercise of its trade mark rights by Novartis resulted in an artificial partitioning of the markets. In this respect, the Court also recalled that an artificial partitioning of the markets necessarily implied that the markets in question be identical or, at the very least, that the products be perfectly substitutable.

In this respect, the Court found that generic medicines and brand name medicines belong to different markets since they are not substitutable.

In reaching this conclusion, the Court referred to the Belgian regulatory framework which embraces the principle of "therapeutic freedom" which, as a rule, prohibits substitution in the deliverance of medicines. Subject to some strict exceptions, the pharmacist must not deliver a generic medicine if a physician prescribed the original, branded product. Furthermore, substitution of a brand name medicine by a generic medicine is strictly advised against, especially in oncology. Finally, generic medicines and brand name medicines are regulated differently. The finding of the Court that there are two distinct markets was not altered by the fact that the products were identical and bioequivalent.

The Court was of the opinion that Impexeco was fully capable of accessing the generic medicines market by using (i) the original name of the products, i.e. letrozol, in combination with the Sandoz trade mark; or (ii) a trade mark of its own. Hence, Impexeco's access to the market for generic medicines was not unlawfully hindered by the exercise of Novartis' trade mark rights.

In view of the above, the Court held that

- Novartis' trade mark rights in Femara were not exhausted since the products at hand had not been brought on the market under that trade mark in the European Union;
- by rebranding the generic medicine Letrozol Sandoz as Femara, Impexeco had infringed Novartis' trade mark rights; and
- the exercise by Novartis of its trade mark rights in Femara did not artificially partition the market for letrozol products.

As a consequence, the Court sided with Novartis and ordered Impexeco to cease the importation and rebranding of Letrozol Sandoz under forfeiture of a penalty payment of EUR 1,000 for each violation.

Court of Justice of European Union Holds that Louboutin Red Soles Qualify for Trade Mark Protection

On 12 June 2018, the Court of Justice of the European Union (the "ECJ") handed down a judgment in response to a request for a preliminary ruling from the District Court of The Hague (*Rechtbank Den Haag*) concerning a trade mark consisting of the colour red applied to the sole of a shoe (Case C-163/16, *Christian Louboutin and Christian Louboutin SAS v Van Haren Schoenen BV*).

The case concerned a Benelux trade mark registered by Mr. Louboutin, a well-known shoe designer, for footwear (in 2010) and high-heeled shoes (in 2013). The trade mark consisted of "the colour red (Pantone 18-1663 TP) applied to the sole of a shoe" and was graphically represented as follows, with the proviso that "the contour of the shoe is not part of the trade mark but is intended to show the positioning of the mark":

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Mr. Louboutin brought proceedings in the Netherlands against Van Haren Schoenen BV ("Van Haren"), claiming that their selling of non-Louboutin red-soled shoes infringed his trade mark. Van Haren claimed that Mr Louboutin's trade mark was invalid pursuant to Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (the "Trade Mark Directive"). Article 3(1)(e)(iii) of the Trade Mark Directive provides that registration of a trade mark may be refused or that a trade mark may be declared invalid if it consists "exclusively of [a] shape […] which gives substantial value to the goods". Given that the trade mark at issue was inextricably linked to its appearance on the sole of a shoe, the District Court of The Hague sought guidance as to whether the concept of a shape should be limited to three-dimensional qualities or could also include other characteristics such as colours.

In its judgment, the ECJ noted that the Trade Mark Directive does not define the concept of 'shape'. Instead, a definition must be provided by considering the usual meaning of the word 'shape' in everyday language. On these grounds, the ECJ held that a colour alone (that is, a colour without an outline) cannot constitute a 'shape'. This is especially so when the colour at issue is designated by an internationally recognised code such as Pantone Matching System.

The ECJ elaborated its reasoning, holding that, even if the shape of a product (such as the sole of a shoe) plays a role in creating an outline to contain a colour, it does not follow that a sign consists of that shape in cases where the registration of the mark does not seek to protect that shape but only seeks to protect the application of a colour to a specific part of the product. In the case at hand, therefore, Mr Louboutin's trade mark did not relate to the shape of the sole, as the description of the trade mark clearly stated that the contour of the shoe was intended purely to show the positioning of the trademarked red colour.

In finding that the trade mark consisted of a colour per se and, hence, was not a sign consisting exclusively of the shape of the goods, the ECJ concluded that the grounds for refusal or invalidity of registration laid down in Article 3(1)(e)(iii) of the Trade Mark Directive did not apply to Mr. Louboutin's red sole trade mark. It thus also rejected the opinions of Advocate General Szpunar of 22 June 2017 and 6 February 2018 (*See, this Newsletter, Volume 2017, No. 6, pp. 10 and 11; and Volume 2018, No. 2, pp. 7 and 8*).

Bill Introducing Open Access to Scientific Publications

On 8 June 2018, a bill modifying specific provisions of the Code of Economic Law (*Wetsontwerp houdende diverse bepalingen inzake Economie/Projet de loi portant dispositions diverses en matière d'Économie*) (the "Bill") was submitted to the Chamber of Representatives. One of the proposed changes involves the introduction of open access to scientific publications.

The Bill provides that authors of scientific publications resulting at least partly from publicly funded research may make their manuscripts available to the public six months after having published their research in a periodic review (that period is extended to twelve months for social sciences and humanities) (the "embargo period"), provided that the name of the first publication is mentioned. Authors and publishers may agree on a shorter embargo period if they wish.

The aim of the Bill is to allow for greater access to publicly funded scientific information while preserving the attractiveness and economic viability of editors publishing scientific publications through an embargo period. Indeed, during that period, subscribers are granted exclusivity in the content of the research.

The Bill follows the Recommendation of the European Commission of 17 July 2012 on access to and preservation of scientific information and the Communication of the European Commission of 17 July 2012 towards better access to scientific information: Boosting the benefits of public investments in research.

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LABOUR LAW

Revision of European Posting of Workers Directive Approved

In 1996, Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (the "Posting of Workers Directive") established that, even though workers who are temporarily posted to another Member State to perform work in that country are still employed by the sending company and therefore subject to the law of that Member State, they are entitled by law to a set of core rights (such as minimum rates of pay, maximum work periods and minimum rest periods, minimum paid leave, health, safety and hygiene at work, etc.) in force in the host Member State.

On 8 March 2016, the European Commission presented a targeted revision of the Posting of Working Directive seeking to facilitate the provision of services across borders within a climate of fair competition and respect for the rights of posted workers. Fair competition implies fair wage conditions and a level playing field between posting companies and local companies in the host Member State.

On 21 June 2018 the Council of the European Union and the European Parliament adopted the Directive amending the Posting of Workers Directive (the "Revised Posting of Workers Directive").

The Revised Posting of Workers Directive will enter into force 20 days after its publication in the EU Official Journal. Member States will have two years to implement the Directive into local legislation.

The key changes in the Revised Posting of Workers Directive can be summarised as follows:

Equal Remuneration for Posted Workers

Before the adoption of the Revised Posting of Workers Directive, posted workers were only entitled to the same minimum wage as national workers. By contrast, under the new rules, posted workers will be entitled to the same remuneration as local workers for the same work at the same place. The concept of remuneration must be determined by the national law and/or practice of the host Member State and must include all constituent elements of remuneration rendered mandatory by national law, regulation or administrative provision, or by collective agreements and not only the minimum rates of pay.

When comparing the remuneration paid to a posted worker and the remuneration due in accordance with the national law and/or practice of the host Member State, the gross amount of remuneration should be taken into account. Allowances specific to the posting may be included in the comparison, unless they cover expenses actually incurred on the account of posting, such as travel, board and lodging. The employer must reimburse such expenses in accordance with the national law and/or practice which applies to the employment relationship. If the conditions applicable to the employment relationship do not determine which elements of the allowance covers expenses and which are part of the remuneration, the entire allowance is considered to cover expenses actually incurred on account of the posting.

Equal Allowances for Travel, Board and Lodging Expenses for Posted Workers

Posted workers should also receive at least the same allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons that apply to local workers in that Member State. The same should apply to the expenditure incurred by posted workers required to travel to and from their regular place of work in the host Member State.

Temporary Agency Workers

The principle of equal treatment also applies to posted temporary agency workers. Pursuant to the Revised Posting of Workers Directive, the service recipient in the host Member State should inform the temporary workers agency regarding the working conditions and remuneration applicable to its own employees.

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Universally Binding Collective Bargaining Agreements

In all Member States, industry-wide collective bargaining agreements which are declared universally applicable must also apply to posted workers in all sectors and not only in the construction industry. This is already the case in Belgium.

Long-term Posting

If posting lasts for periods longer than 12 months, the host Member State should ensure that firms which post workers to their territory guarantee those workers an additional set of terms and conditions of employment that are mandatorily applicable to workers in the Member State where the work is carried out, except for the conditions and procedures of the conclusion and termination of the employment contract and supplementary occupational retirement pension schemes. Under strict circumstances, this 12-month period can be extended to 18 months.

Transport Sector

The Posted Workers Directive will continue to apply in the transport sector until the sector-specific European legislation, which is still under negotiation, comes into force.

Although specific modifications of the Revised Posting of Workers Directive already apply in Belgium, employers should bear in mind that the Belgian legislation will be updated in the coming two years in order to be fully compliant with the new rules.

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LITIGATION

Bill Implementing Trade Secrets Directive Submitted to Federal Parliament - Confidentiality of Trade Secrets in Legal Proceedings

On 12 June 2018, the Government submitted to the Chamber of Representatives a bill implementing Directive 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (*Wetsontwerp betreffende de bescherming van bedrijfsgeheimen/Projet de loi relatif à la protection des secrets d'affaires*) (*See, this Newsletter, Volume 2016, No. 5, pp. 10 and 11 and Volume 2016, No. 6, p. 19*) (the "Bill").

The Bill provides that the parties, their lawyers or other representatives, court officials, witnesses, experts and any other person participating in legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret, or who has access to documents which form part of those legal proceedings, are not permitted to use or disclose any trade secret which, in response to a reasoned application by an interested party, a court has identified as confidential and of which those parties have become aware as a result of their participation in the legal proceedings.

However, the Bill also provides that this confidentiality obligation will cease to exist if either (i) the information does not qualify as a trade secret; or if (ii) the information in question becomes, over time, generally known among or readily accessible to persons within the circles that normally deal with that kind of information.

In addition, the court may also, on a reasoned application by a party, take the following measures in order to preserve the confidentiality of any trade secret used or referred to in the course of legal proceedings:

- restrict access to any document containing trade secrets submitted by the parties or third parties, in whole or in part, to a limited number of persons;
- restrict access to hearings, when trade secrets may be disclosed, and the corresponding record or transcript of those hearings, to a limited number of persons;
- make available to any person (other than those referred to in the two bullet points above) a non-confidential version of any judicial decision, from which the passages containing trade secrets have been removed.

When deciding those measures and assessing their proportionality, the court will have to consider the need to ensure the right to an effective remedy and to a fair trial, the legitimate interests of the parties and, where appropriate, of third parties, and any potential harm for either of the parties, and, where appropriate, for third parties, resulting from the granting or rejection of such measures.

Finally, the Bill provides that parties which fail to comply with the confidentiality requirement may be made subject to a fine ranging from EUR 500 to EUR 25,000 (in addition to potential damages sought by the injured party or parties).

Constitutional Court Finds Article 1385quinquies of Judicial Code To Be Unconstitutional

On 17 May 2018, the Constitutional Court found that Article 1385*quinquies* of the Judicial Code (*Gerechtelijk Wetboek/Code Judiciaire*) violates Articles 10 and 11 of the Belgian Constitution.

Article 1385*quinquies* of the Judicial Code provides that a court which has imposed a penalty payment (*dwangsom/astreinte*) may cancel and withdraw this penalty payment (or suspend its accrual or reduce its amount) if the party ordered to pay that penalty payment is, permanently or temporarily, entirely or partially unable to perform the principal obligation. As a result, pursuant to Article 1385*quinquies* of the Judicial Code, a court can only ameliorate the situation of the party ordered to pay the penalty payment and cannot worsen his case.

In its judgment of 17 May 2018, the Constitutional Court held that Article 1385*quinquies* of the Judicial Code was not compatible with Articles 10 and 11 of the Constitution (*i.e.*, the provisions concerning equality and non-discrimination). This is because Article 1385*quinquies* does not allow the party in favour of whom the penalty payment was ordered to seek an additional penalty payment or to

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increase the already imposed penalty payment when the other party is still in default. According to the Constitutional Court, this constitutes a form of discrimination since the party against whom the penalty payment has been ordered could seek an annulment or a reduction of this payment.

Parliament Adopts Law to Promote Alternative Dispute Resolution Mechanisms

On 7 June 2018, the Chamber of Representatives adopted the Law to promote alternative dispute resolution mechanisms (*Wetsontwerp houdende diverse bepalingen inzake burgerlijk recht en houdende wijziging van het Gerechtelijk Wetboek met het oog op de bevordering van alternatieve vormen van geschillenoplossing/Projet de loi portant dispositions diverses en matière de droit civil et portant modification du Code judiciaire en vue de promouvoir des formes alternatives de résolution des litiges*). (*See, this Newsletter, Volume 2018, No. 2, p. 2*).

The promotion of alternative dispute resolution mechanisms is seen by the Belgian government as a way to decrease the caseload of the courts.

The key aspects of the Law are as follows:

- Courts, lawyers and bailiffs will be compelled to ensure the promotion of amicable settlements. In particular, lawyers will be required to inform their clients of the alternative dispute resolution mechanisms available to them;
- Courts will be allowed to inquire whether the parties to a dispute have attempted to settle their dispute amicably;
- Courts will have the power to order the parties to a dispute to attempt to solve their dispute through mediation and to impose on such parties a requirement to attend an information session on mediation;
- Mediators will be better recognised and protected, and disciplinary measures and the Mediators' Code of Ethics will be reinforced;
- The role of the Federal Mediation Commission will be strengthened in order to allow it to promote mediation and oversee the accreditation process for mediators;

Finally, the Law seeks to develop a new form of alternative dispute mechanism known as collaborative law. A new dedicated section in the Judicial Code will bolster the voluntary and confidential settlement of disputes through interest-based negotiation.

Law Extending Collective Redress Mechanisms to SMEs Published in Belgian Official Journal

The Law making collective redress mechanisms available to SMEs (*Wet van 30 maart 2018 houdende wijziging, wat de uitbreiding van het toepassingsgebied van de vordering tot collectief herstel tot K.M.O.'s betreft, van het Wetboek van Economisch Recht/Loi du 30 mars 2018 portant modification, en ce qui concerne l'extension de l'action en réparation collective aux P.M.E., du Code de droit économique*) (*See, this Newsletter, Volume 2018, No. 1, p. 13 and Volume 2018, No. 4, p. 19*) was published in the Belgian Official Journal on 22 May 2018 and entered into force on 1 June 2018.

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