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| COMMERCIAL LAW

Chamber of Representatives Adopts Bill Concerning Electronic Identification

On 6 July 2017, the federal Chamber of Representatives adopted the Bill concerning electronic identification (*Wetsontwerp inzake elektronische identificatie/Projet de loi relative à l'identification électronique* – the "Bill").

The Bill is designed 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 repeal Directive 1999/93/EC (*See, this Newsletter, Volume 2017, No. 6, p. 3*). Chapter II 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. In addition, the Bill provides a regulatory framework governing the electronic identification for digital public services in Belgium.

The Bill is now awaiting publication in the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*).

Default Commercial Interest Rate for Second Semester of 2017

On 13 July 2017, the default interest rate for commercial transactions applying during the second half of 2017 was published in the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*). This is in accordance with Article 5, indent 2 of the Law of 2 August 2002 on combating late payment in commercial transactions (*Wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties/Loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales*).

The default commercial interest rate remains unchanged from the first half of 2017 (*See, this Newsletter, Volume 2017, No. 1, p. 7*). For the period of 1 July 2017 to 31 December 2017, it will amount to 8%. The interest rate applies only to compensatory payments in commercial transactions (*handelstransacties/transactions commerciales*), *i.e.*, transactions between companies or between companies and public authorities.

By contrast, relations between private parties and companies or between private parties only are subject to the statutory interest rate. In 2017, this interest rate equals 2% (*See, this Newsletter, Volume 2017, No. 1, p. 7*).

Council of Ministers Adopts Two Draft Bills in Area of Commercial Law

On 20 July 2017, the Council of Ministers adopted two Draft Bills affecting commercial law.

Business Law

First, it adopted a Draft Bill on the reform of business law (*Voorontwerp van wet tot hervorming van het ondernemingsrecht/Avant-projet de loi portant réforme du droit des entreprises*). This Draft Bill pursues three objectives.

1. First, it dismantles what remains of the Commercial Code (*Wetboek van Koophandel/Code de commerce*) and incorporates it into the Code of Economic Law (*Wetboek van Economisch Recht/Code de droit économique*).

2. Second, it amends the definition of an "*enterprise*" (*onderneming/entreprise*). According to the Council of Minister's press release, the term "*enterprise*" will be defined as "*any natural person who is self-employed; any legal person, with the exception of entities of public law which do not offer goods or services on a market; any other organisation without legal personality, but with a 'for profit' character*". The revised notion will apply to all fields of economic law, subject to possible derogations in specific legislation.

3. Third, it converts the commercial court (*Rechtbank van Koophandel/Tribunal de commerce*) into an enterprise court (*Ondernemingsrechtbank/Tribunal de l'entreprise*).

Civil Law

Second, the Council of Ministers adopted a Draft Bill containing various provisions regarding civil law (*Voorontwerp van wet houdende diverse bepalingen inzake burgerlijk recht/Avant-projet de loi portant dispositions diverses en matières de droit civil*) which contains two measures in the realm of commercial law.

1. It implements and complements Regulation (EU) No. 655/2014 of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (*See, this Newsletter, Volume 2017, No. 1, p. 6*); and

2. it promotes alternative forms of dispute resolution, including conciliation and collaborative negotiations.

Both Draft Bills will be submitted to the Council of State for advice.

Study on Built-in Obsolescence of Electrical and Electronic Devices

On 12 May 2017, the Minister of Economic and Consumer Affairs Kris Peeters and the Minister for Energy, Environment and Sustainable Growth Marie-Christine Marghem released the results of a study on built-in obsolescence which they had commissioned in the aftermath of the VW Diesel scandal (the study is available **here**). The term "built-in obsolescence" refers to any technique used by manufacturers to limit deliberately the lifetime of a product, thereby accelerating its replacement.

The primary aim of the study was to investigate to what extent manufacturers program the obsolescence of their electrical and electronic devices. Although the study found little proof of programmers actually building-in obsolescence, it notes that it cannot be ruled out that built-in obsolescence actually exists. Moreover, the study finds that consumers are genuinely frustrated when the actual lifetime of the products which they purchase does not correspond to their expected lifetime. Therefore, the study's scope was expanded into investigating possible measures to extend the lifetime of products. This is noteworthy given that, at least conceptually, there is a significant difference between combating built-in obsolescence and extending the lifetime of products.

According to the study, the main obstacle to extending the lifetime of electrical and electronic devices is that their repair may be technically difficult and/or too expensive. For some products, the environmental benefit of repair can be non-existent or negative. With this in mind, the study puts forward possible measures to achieve three key objectives that contribute to extending the lifetime of electrical and electronic devices:

1. promote eco-design and sustainable purchases by consumers;

2. promote a better use of products; and

3. promote the repair of products.

The study notes that the first objective can be achieved most effectively by (i) requiring manufacturers to specify the expected lifetime of the products based on an objective assessment method; and (ii) extending the statutory warranty period (in a variable way depending on the expected lifetime of the products concerned). In addition, the study advocates extending from six months to two years the time period during which a specific type of defect, namely the lack of conformity of the good supplied with the good ordered, is presumed to exist at the time of delivery.

According to the study, the second objective can be achieved only by setting up an information campaign to create awareness amongst consumers.

Furthermore, the third objective can be achieved most effectively by requiring manufacturers to (i) specify the level of reparability of their products based on an objective assessment method; (ii) specify the period during which they commit themselves to supply replacement parts; and (iii) make replacement parts, product plans and tools necessary for replacement to be available at a reasonable price.

All three objectives can be furthered by information campaigns and measures to stimulate a functional economy. The notion of a "functional economy" is an innovative economical model (IEM) aimed at optimising the costs and revenues of manufacturers by selling the service provided by a product rather than the product itself. In this model, the manufacturer remains the owner of the product. As a result, he is encouraged to extend the product's lifetime, foster reparability and ensure the optimal use of the product by the consumer. Other possible supporting measures put forward by the study are (i) reducing the VAT rate for the repair of products; (ii) reducing the social security costs for the repair of products; and (iii) enabling consumers to deduct the costs of repair from their tax bill.

Referring to calculations of the European Commission, the study notes that strong measures incentivising more repairs of products could create up to 1,300 jobs in the

repair industry in Belgium. However, approximately 450 jobs would disappear in other sectors such as production and distribution, which would result in a net job gain of about 850 jobs.

Ministers Peeters and Marghem have already announced that they will further investigate the proposed measures. Meanwhile, Minister Peeters is working on an extension of the warranty obligations of sellers (*See, this Newsletter, Volume 2017, No. 1, p. 11*).

Separately, on 22 January 2016, members of the French-speaking Christian Democrat party (cdH) had already submitted a Bill to the Chamber of Representatives to combat built-in obsolescence (*Wetsvoorstel tot wijziging van het Burgerlijk Wetboek en van het Wetboek van Economisch Recht, teneinde ingebouwde veroudering tegen te gaan/Proposition de loi modifiant le Code civil et le Code de droit économique, visant à lutter contre l'obsolescence programmée – See, this Newsletter, Volume 2016, No. 1, p. 3*). It remains to be seen whether it stands any chance of becoming law.

It is interesting to note that, on 4 July 2017, the European Parliament adopted a Resolution on a longer lifetime for products, in which it calls on measures to extend product lifetimes (available **here**). Moreover, in December 2016, Belgium, Luxembourg and the Netherlands signed a Benelux Directive on the practical application of the circular economy in which they agreed to cooperate closely in the period 2017-2020 in order to accelerate the transition to a circular economy.

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| COMPETITION LAW

Publishing Company De Persgroep Withdraws Appeal Against Clearance of Mediahuis Merger

On 28 June 2017, the Brussels Court of Appeal (*Hof van beroep te Brussel/Cour d'appel de Bruxelles*) gave a judgment sanctioning the decision of media company De Persgroep to withdraw its appeal against the decision of the Belgian Competition Authority (*Belgische Mededingingsautoriteit/ Autorité belge de la Concurrence*) ("BCA") to clear the creation of "Mediahuis".

In 2013, the BCA reviewed a notification concerning the proposed creation of Mediahuis, a joint venture of multimedia companies Corelio NV (publisher of, *inter alia*, newspapers De Standaard and Het Nieuwsblad) and Concentra NV (publisher of, *inter alia*, newspapers Gazet van Antwerpen and Het Belang van Limburg). During the merger review process, competing media company De Persgroep expressed concerns that Mediahuis would hold a dominant position on the Belgian market of regional thematic advertisement in Dutch-speaking newspapers (including free newspapers). De Persgroep feared that such a dominant position would enable Mediahuis to offer advertising bundles at very attractive prices, thereby excluding its competitors from the market.

However, the BCA considered that it was unlikely that Mediahuis would engage in exclusionary commercial practices and therefore decided to approve the creation of Mediahuis on 25 October 2013, subject to conditions aiming at ensuring that Mediahuis' newspapers would continue to exist for at least five years (*See, this Newsletter, Volume 2013, No. 10, p. 4*). De Persgroep initially decided to appeal this decision before the Brussels Court of Appeal. For undisclosed reasons, De Persgroep has now decided to withdraw its appeal.

In its judgment of 28 June 2017 confirming this withdrawal, the Court of Appeal included at the request of the parties a statement in which the BCA recalls that, although the Mediahuis joint venture was cleared, Belgian and European competition laws continue to apply to Mediahuis, and that bundles including dominant products are anticompetitive unless objectively justified. This statement, unusual because of its incorporation in a judgment taking note of the withdrawal of an appeal, echoes the concerns expressed by De Persgroep in 2013.

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| CONSUMER LAW

Publication and Entry into Force of Royal Decree on "Mystery Shopping"

On 5 July 2017, the Belgian Official Journal published Royal Decree of 22 June 2017 "*determining the infringements of the Code of Economic Law and its implementing provisions for which the officials as meant in Article XV.2 are authorised to approach companies by presenting themselves as customers or potential customers" (Koninklijk Besluit van 22 juni 2017 tot vaststelling van de inbreuken op het Wetboek van Economisch Recht en zijn uitvoeringsbesluiten waarvoor de in artikel XV.2 bedoelde ambtenaren de bevoegdheid hebben de onderneming te benaderen door zich voor te doen als cliënten of potentiële cliënten/Arrêté royal du 22 juin 2017 déterminant les infractions au Code de droit économique et à ses arrêtés d'exécution pour lesquelles les agents visés à l'article XV.2 disposent de la compétence d'approcher l'entreprise en se présentant comme des clients ou des clients potentiels* – the "Royal Decree").

The Royal Decree implements Article XV.3/1 of the Code of Economic Law ("CEL"), which provides the statutory basis for so-called "mystery shopping" by inspectors of the Economic Inspection (*See, this Newsletter, Volume 2017, No. 4, p. 7*). Mystery shopping can only be used when it is necessary to determine the actual circumstances encountered by regular customers or potential customers.

The Royal Decree lists the specific infringements for which mystery shopping is possible as follows:

- Infringements of the prohibition on discrimination of customers based on their nationality or place of residence (Article III.81 CEL);
- Infringements of the general pre-contractual information requirements, to the extent that the information is provided orally (Article VI.2 CEL);
- Infringements of the pre-contractual information requirements with respect to distance contracts, to the extent that the information is provided by telephone (Articles VI.45, VI.46, VI.55 and VI.56 CEL);
- Infringements of the rules on unfair trade practices against consumers (Articles VI.95, VI.100 and VI.103 CEL);
- Infringements of the Royal Decree of 20 June 2002 establishing the operating conditions of sunbed centres (Koninklijk Besluit van 20 juni 2002 houdende voorwaarden betreffende de exploitatie van zonnecentra/ Arrêté royal du 20 juin 2002 relatif aux conditions d'exploitation des centres de bronzage);
- Infringements of the rules on information and transparency as applicable to providers of information society services (Articles XII.6 through XII.8 CEL);
- Infringements of specific rules on trust services (Articles XII.25, §§9 and 10 and XII.26, second indent CEL);
- Infringements of the rule that, to be authorised to describe themselves as "qualified", trust service providers must be included in the "trusted list" as provided for by Article 22 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" (Article XII.28 CEL);
- Infringements of the general pre-contractual information requirements applicable to practitioners of a liberal profession, to the extent that the information is provided orally (Article XIV.3 CEL);
- Infringements of the pre-contractual information requirements with respect to distance contracts applicable to practitioners of a liberal profession, to the extent that the information is provided by telephone (Articles XIV.27 and XIV.28 CEL); and
- Infringements of the rules on unfair trade practices against consumers as applicable to practitioners of a liberal profession (Articles XIV.62, XIV.67 and XIV.70 CEL).

The Royal Decree entered into force on 15 July 2017.

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Court of Justice of European Union Clarifies Rules on Limitation Periods Under Sales and Guarantees Directive

On 13 July 2017, the Court of Justice of the European Union (the "ECJ") held that a limitation period for action by the consumer which is shorter than two years from the time of delivery of the goods is incompatible with Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (the "Directive") (ECJ, 13 July 2017, Case C-133/16, *Christian Ferenschild v. JPC Motor SA*).

The ECJ delivered its judgment in response to a request for a preliminary ruling from the Mons Court of Appeal in a dispute between Christian Ferenschild ("Mr. Ferenschild") and JPC Motor SA ("JPC"). Mr. Ferenschild had purchased a second-hand car from JPC on 21 September 2010 but was subsequently unable to register the vehicle on 22 September 2010 because of a lack of conformity of the documents accompanying the car. The vehicle bought by Mr. Ferenschild was ultimately registered on 7 January 2011.

Article 1649*quater*, §1 of the Civil Code provides that the duration of the guarantee period is two years from delivery of the goods. For second-hand goods, this period may be reduced to a period of not less than one year by mutual agreement between the parties. Mr. Ferenschild and JPC had supposedly made use of that possibility. Furthermore, Article 1649*quater*, §3 specifies that actions by the consumer become time-barred after a period of one year from the day on which the consumer detected the lack of conformity, but that such limitation period may not expire before the end of the two-year guarantee period referred to in Article 1649*quater*, §1.

To obtain the reimbursement of costs incurred as a result of the lack of conformity, Mr. Ferenschild brought proceedings on 12 March 2012 before the Mons Commercial Court which dismissed the action. Mr. Ferenschild appealed the judgment to the Mons Court of Appeal. The Court of Appeal found that the vehicle sold lacked conformity within the meaning of Article 1649*bis et seq*. of the Belgian Civil Code, but that the conformity appeared to have been resolved following registration of the vehicle. However, it decided of its own motion to allow the parties to make submissions on whether the action was time barred.

Pursuant to Article 5(1) of the Directive, "[t]*he seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery*". Moreover, in the second sentence of Article 7(1), the Directive authorises "*Member States* [to] *provide that, in the case of second-hand goods, the seller and consumer may agree contractual terms or agreements which have a shorter time period for the liability of the seller than that set down in Article 5(1). Such period may not be less than one year*".

In this context, the Mons Court of Appeal decided to stay the proceedings and questioned the ECJ on whether Article 5(1) of the Directive, read in conjunction with Article 7(1), precludes a provision of national law, such as Article 1649*quater*, §3 of the Belgian Civil Code, if it is interpreted as allowing, for second-hand goods, the limitation period for action by the consumer to expire before the end of the two-year period as from delivery of the goods, where the seller and the consumer have agreed on a guarantee period of less than two years.

At the outset, the ECJ noted that the Directive distinguishes two types of time limits, each with a specific purpose. While the time limit set out in the first sentence of Article 5(1) of the Directive refers to the period during which the seller is liable where a lack of conformity of the goods at issue becomes apparent, the second sentence of Article 5(1) provides for a limitation period which limits the time during which the consumer can actually exercise the rights that arose in the period of liability of the seller.

The ECJ then considered whether the decision to impose a limitation period for action by the consumer is a matter for national legislation. However, it follows from Article 5(1) of the Directive that if a limitation period is imposed under national law, that period cannot expire within two years from the time of delivery of the goods concerned, even if, under national law, the limitation period does not commence at the time of delivery of the goods. According to the ECJ, in order to ensure a uniform minimum level of consumer protection, the Directive established two distinctive time limits, namely a period of liability of the seller and a limitation period, the mandatory minimum duration of each

being, as a rule, two years from the time of delivery of the goods concerned.

Considering the above, the ECJ observed that (i) the limitation period of at least two years from the time of delivery of the goods is an important element of consumer protection guaranteed by the Directive; and (ii) the duration of that period is not contingent on that of the period of liability of the seller. The fact that the second sentence of Article 7(1) provides for the possibility of agreeing on a shorter liability period for second-hand goods does not warrant a different interpretation.

The ECJ noted that a national rule which would allow the limitation period offered to consumers to be shortened as a consequence of the reduction of the period of liability of the seller to one year would result in a lesser level of consumer protection and would undermine the guarantees afforded to consumers under the Directive. The ECJ therefore concluded that the Directive precludes a rule of an EU Member State which allows the limitation period for action by the consumer to be shorter than two years from the time of delivery of the goods where the EU Member State has made use of the option given by Article 7(1) of the Directive and the consumer and seller have agreed on a period of liability of the seller of less than two years for the second-hand goods concerned.

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| CORPORATE LAW

European Union Consolidates Six Corporate Directives Into New EU Directive 2017/1132

EU Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (the "Directive") entered into force on 20 July 2017. The aim of the Directive is to consolidate and codify the six EU directives listed below:

- Sixth Council Directive 82/891/ECC of 17 December 1982 concerning the division of public limited liability companies;
- Eleventh Council Directive 89/666/ECC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State;
- Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies;
- Directive 2009/101/EC of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent;
- Directive 2011/35/EC of 5 April 2011 concerning mergers of public limited liability companies; and
- Directive 2012/30/EU of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, with respect to the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

The recitals of the Directive emphasise the need for specific harmonised safeguards to be in place, particularly with respect to public limited liability companies, notably because of the frequent cross-border character of their activities and the predominant character of such companies in the economy of the Member States.

The Directive specifically lays down measures concerning:

1. the coordination of national safeguards with respect to the formation of public limited liability companies and the maintenance and alteration of their capital, and with respect to disclosure, validity of obligations entered into by, and the nullity of, companies limited by shares or otherwise having limited liability, with a view to making such safeguards equivalent;
2. the disclosure requirements with respect to branches opened in a Member State by specific types of companies governed by the law of another State, to avoid disparities in the protection of shareholders and third parties;
3. the facilitation of mergers and cross-border mergers of limited liability companies; and
4. the division of public limited liability companies to ensure that shareholders of the companies involved remain adequately informed.

In Belgium, the Directive will apply to:

1. limited liability companies (naamloze vennootschap/société anonyme);
2. limited liability partnerships (commanditaire vennootschap op aandelen/société en commandite par actions); and
3. private limited liability companies (besloten vennootschap met beperkte aansprakelijkheid/société privée à responsabilité limitée).

The Directive can be found **here**.

| DATA PROTECTION

Belgian Privacy Commission Recommendation on Mandatory Record of Processing Activities Under General Data Protection Regulation

On 14 June 2017, the Belgian Privacy Commission (the "Privacy Commission") published a recommendation regarding the obligation for controllers and processors to maintain a record of processing activities in accordance with Article 30 of the General Data Protection Regulation ("GDPR"). The obligation to keep such an internal record will apply as of 25 May 2018, and from that date, the Privacy Commission (or its successor) will have the authority to request the record.

The recommendation explains the aim of the requirement to keep an internal record. In the first place, the internal record serves as an accountability instrument. In order to comply with the GDPR, it is necessary that data controllers and processors create an overview of all processing activities within their organisation. Furthermore, the internal record must be made available to the national data protection authorities.

In the recommendation, the Privacy Commission explains that the obligation to keep an internal record under Article 30 of the GDPR applies both to data controllers and data processors (or their representatives if the controller or processor does not have an establishment in the European Union). In principle, the GDPR exempts companies with fewer than 250 employees from the obligation to keep internal records unless (i) their data processing activities can contain risks for the rights and freedoms of individuals; (ii) the processing is not occasional; or (iii) the processing involves sensitive or judicial data. Nevertheless, the Privacy Commission recommends that all controllers and processors maintain internal records, but considers that small and medium-sized companies may choose not to include their occasional processing activities in their internal record. Indeed, it seems beneficial for companies to keep an overview of their processing activities in order to organise their data protection compliance.

The obligation under Article 30 of the GDPR replaces the current obligation to notify data processing activities to the Privacy Commission. The notification obligation will be abolished when the GDPR starts to apply. The Privacy Commission is of the opinion that the existing notifications that were published in the register which is available on the Privacy Commission's website will provide a useful source of information for companies to establish their internal records. The recommendation goes on to compare the obligation under Article 30 of the GDPR with the current notification obligation and indicates that the guidance which is available for completing the notification form can provide useful information for the drafting of the internal records, for instance with regard to the definition of the purposes of the processing activities, the categories of data and the categories of recipients.

The record will have to list all pre-existing and new processing activities and the register will have to be kept up to date. Therefore, the Privacy Commission encourages the introduction of a warning system for updating the record. It also recommends that professional associations create template records tailored to the needs of their sector.

Finally, the record must be made in writing and has to be available electronically. It has to be designed in such a way that it can be made available at the supervisory authority's first request. For this reason, the record also has to be reader-friendly and the content easy to comprehend.

The recommendation is available on the website of the Privacy Commission in **Dutch** and in **French**.

Advocate General Considers that an Examination Script Consists of Personal Data

On 20 July 2017, Advocate General ("AG") Kokott delivered an Opinion on the question as to whether a handwritten examination script constitutes personal data within the meaning of Article 2(a) of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("Data Protection Directive"). Since the General Data Protection Regulation ("GDPR") will not affect the concept of "personal data", the request for a preliminary ruling is also of importance for the future application of the GDPR.

The preliminary question was referred to the Court of Justice of the European Union ("ECJ") by the Irish Supreme

Court in a dispute concerning the refusal of the former Irish Data Protection Commissioner to pursue a complaint made in response to the denial of access. After a fourth – unsuccessful - examination, Mr Nowak, a trainee accountant, submitted a data access request under Irish data protection legislation seeking all personal data held by the Institute of Chartered Accountants of Ireland ("CAI"). The CAI released certain documents containing Mr Nowak's personal data but refused to release his examination script on the basis that the CAI had been advised that the script did not constitute "personal data" within the meaning of the data protection legislation. Mr Nowak then brought an action before the Irish courts where the proceedings are now pending.

The AG first analysed the definition of the Data Protection Directive and found it to be very broad. In accordance with Article 2(a) 'personal data' means any information relating to an identified or identifiable individual. According to the AG, every examination aims to determine the strictly personal and individual performance of an examination candidate, and is, therefore, a collection of personal data. Furthermore, the AG considered that an examination candidate has a legitimate interest, based on the protection of his private life, in being able to object to the processing outside the examination procedure of the examination script ascribed to him.

Second, the AG held that pursuant to recital 41 of the Data Protection Directive any person must be able to exercise the right of access to data relating to him or her which is being processed, in order to verify in particular the accuracy of the data and the lawfulness of the processing. However, with regard to the issue of rectification, the AG pointed out that in relation to an examination script the right of access cannot be claimed in order to demand rectification of the contents of the script, i.e. the solution written down by the examination candidate.

Third, with regard to corrections made by examiners on the examination script, the AG stated that the purpose of the comments is to assess the examination performance. According to the AG, the comments therefore indirectly relate to the examination candidate. Because of the close link between the examination script and any corrections made on it, the latter is also personal data of the examination candidate.

Finally, the AG concluded that a handwritten examination script capable of being ascribed to an examination candidate, including any corrections made by examiners that it may contain, constitutes personal data within the meaning of the Data Protection Directive.

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INSOLVENCY

Reform of Belgian Insolvency Law

On 13 July 2017, the Chamber of Representatives of the federal Parliament adopted in plenary session the Bill introducing a new Book XX "Insolvency of undertakings" into the Code of Economic Law ("CEL") (*Wetsontwerp houdende invoeging van het boek XX "Insolventie van ondernemingen", in het Wetboek van Economisch Recht, en houdende invoeging van de definities eigen aan boek XX, en van de rechtshandhavingsbepalingen eigen aan boek XX, in boek I van het Wetboek van Economisch Recht/Projet de loi portant insertion du livre XX "Insolvabilité des entreprises", dans le Code de droit économique, et portant insertion des définitions propres au livre XX, et des dispositions d'application au livre XX, dans le livre I du Code de droit économique*).

The reform of Belgian insolvency law forms part of a broader move to modify and rationalise key economic legislation (including, for instance, the Belgian Companies' Code, the reform of which is ongoing). The objective of the reform is to create an easily comprehensible and coherent insolvency regime by merging the currently separated bankruptcy Law of 8 August 1997 (*Faillissementswet/Loi sur les faillites*) and the Law of 31 January 2009 on the continuity of enterprises (*Wet betreffende de continuïteit van de ondernemingen/Loi relative à la continuité des entreprises*) and incorporating them in Book XX of the CEL. In practice, Book XX of the CEL will contain general principles applicable to both procedures as well as rules specific to each such procedure.

The main features of the reform can be summarised as follows:

1. The scope of application of the new insolvency rules will be significantly expanded. The narrow definition of "tradesman" will be replaced by the definition of "undertaking", which will for example allow private individuals active on a self-employed basis to benefit from the protections offered by the insolvency law regime in case of financial difficulties.

2. All insolvency procedures will be fully digitised. To that end, a Central Insolvability Database (Regsol) has already been established and was officially launched on 1 April 2017. Since that date, all notifications, depositions or communications to or by insolvency officials or delegated judges must be carried out through Regsol.

3. The Bill contains various measures to encourage second chance entrepreneurship. For instance, natural persons who have been subject to a bankruptcy procedure will be entitled to obtain liberation of residual debts, subject to the approval of the competent judge.

4. Amicable settlements between debtors and creditors are encouraged in order to increase the possibility of a swift re-launch of distressed companies at a moderate cost. It will also be possible for amicable settlements to be granted an executory nature, which will in turn allow creditors to enforce them in Court in the event the debtor would not comply with the terms of the settlement. Furthermore, the debtor will be entitled to request that the Court appoint a company mediator in order to prepare and support the amicable settlement, collective agreement or transfer under judicial supervision procedure.

5. In order to avoid situations in which debtors abuse insolvency procedures in order to prevent creditors from enforcing a legal or contractual security, an exception to the principle that a request for judicial reorganisation suspends the sale following an attachment, is introduced subject to specific conditions.

6. The provisions on director's liability for gross negligence that contributed to the bankruptcy of the company are relocated from the Belgian Companies' Code to Book XX of the CEL. Also, the provisions on the directors' personal liability for overdue social security contributions are relocated from the social security legislation to Book XX of the CEL. A specific liability for wrongful trading is also introduced.

7. The provisions implementing Regulation 2015/848 of 20 May 2015 on insolvency proceedings (the "Insolvency Regulation") are inserted in a separate title of Book XX of the CEL. Furthermore, a framework similar to that of the Insolvency Regulation will apply to cross-border insolvency procedures which do not fall under the scope of the Insolvency Regulation.

The Bill will be published shortly and its entry into force is on 1 May 2018.

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

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| INTELLECTUAL PROPERTY

European Commission Presents Report on EU Customs Enforcement of IPR

On 20 July 2017, the European Commission (the "Commission") presented its "Report on EU customs enforcement of intellectual property rights – Results at the EU border 2016" (the "Report"). The Commission has published such reports since 2000. The Report is based on data provided by the Member States' customs administrations and contains statistical information regarding the detentions made under customs procedures. It includes data on the description, quantities and value of the goods, their provenance, the means of transport and the type of intellectual property right that may have been infringed.

In 2016, customs authorities in the EU made over 63,000 detentions which covered a total of 41.3 million articles with a domestic retail value of more than EUR 672 million. However, the total number of interceptions by customs decreased by 22% compared to 2015. In terms of numbers of detained articles, the top 3 categories are cigarettes, toys and foodstuff while the top 3 categories for number of procedures are, just as in 2015, sport shoes, clothing and non-sport shoes. These are goods that are typically ordered online and shipped via post or courier.

China is the main originating country (80%) for goods suspected of infringing IPR. As in former years, Hong Kong, India, Turkey and Vietnam can also be found in the top 7 while Cambodia and Pakistan appear this year in the top 5 due to large detentions of cigarettes.

Postal, air and express transport remain the most important means of transport, while sea transport by container is the main form of transport by volume of seized articles.

Lastly, the majority of articles (*i.e.*, 92% by number and 88% by value) detained by customs in 2016 were suspected of infringing a trade mark. Moreover, there has been an increase in articles suspected of infringing design and model rights compared to 2015, with a wide variety of products concerned and with an emphasis on office stationery, toys, mobile phone accessories and lighters. With regard to copyright infringements, the product categories most concerned were toys, bags, wallets, purses, mobile phones and office stationery. The main categories of products suspected of infringing patents were mobile phones, medicines, LED lights and laminate flooring.

Court Tackles Counterfeit Ice Watches Packaged in Lego-shaped Containers

On 7 June 2017, the criminal section of the Court of First Instance of Bruges (*Rechtbank van Eerste Aanleg/Tribunal de Première Instance*) (the "Court") ruled on a counterfeiting claim brought by Ice and Lego Juris ("Lego") against two individuals pursuant to Article XI.293 of the Code of Economic Law (*Wetboek Economisch Recht/Code de Droit Economique*). The dispute was prompted by the discovery at the port of Antwerp of 6,600 "Ice Forever" watches, packaged in Lego-shaped containers which Ice no longer markets.

The Court first dismissed Ice's counterfeiting claim. It found that the trade mark "Ice Forever" had never been registered and that the watches at stake could not benefit from copyright protection.

The Court addressed Lego's claims and confirmed the 2012 judgment of the Brussels Court of Appeal in which it had affirmed the validity of Lego's shape marks (*See, this Newsletter, Volume 2013, No. 1, pp. 8 and 9*). The Court rejected the defendants' reference to the decision of the Court of Justice of the European Union ("ECJ") in case C-48/09, *Lego Juris A/S v OHIM and Mega Brands, Inc.*, in which the ECJ had upheld the refusal of the OHIM to register, as construction toys (class 28), Lego's red three-dimensional brick. Because in the matter at hand the Lego-shaped brick was incorporated in the design of the watches' plastic packaging, the Court distinguished the ECJ judgment. Assessing the shape mark under classes 16 and 20, the Court held that the shape of the container did not achieve any technical result but was purely decorative. Hence, it held that the shape mark registered by Lego was valid for these two classes.

As a consequence, the Court held that Lego's trade mark had been infringed due to the strong visual similarity and

likelihood of confusion with the counterfeit products. The Court sentenced one of the defendants to a ten-month prison term and a fine of EUR 24,000. The second defendant was cleared of all charges.

The Court also awarded private damages to Lego in the amount of EUR 33,000. The Court found that Lego had suffered material and moral economic damages due to the emergence of cheap, qualitatively inferior, counterfeit products that trivialised its goods and affected the image of the brand.

Opposition Dismissed as Distinctive Character of Earlier Trade Mark was Altered by Additional Elements

On 28 June 2017, the General Court of the European Union (the "Court") issued a judgment in case T-333/15 with regard to the requirement to prove genuine use of an earlier trade mark in opposition proceedings.

On 30 August 2011, Josel, SL ("Josel") filed an opposition against the word mark "NN" registered on 13 January 2011 in the European Union by Nationale-Nederlanden Nederland BV ("Nationale-Nederlanden") for services of insurance, financial, monetary and real estate affairs on the basis of its earlier word mark.

The Opposition Division of the EUIPO dismissed Josel's opposition on 28 May 2014 on the ground that Joel had failed to demonstrate genuine use of the earlier word mark, as is required by Article 42(2) of Regulation No 207/2009 on the Community trade mark (the "Regulation"). In particular, the Opposition Division held that, because the evidence put forward by Josel showed that the word mark NN was complemented by the words "*núñez i navarro*", a circle and the word "HOTELS", the distinctive character of the trade mark in the form in which it had been registered (i.e., word mark) had been altered.

The EUIPO concluded that the earlier word mark had not been "used" within the meaning of Article 15(1) of the Regulation. Pursuant to this provision, the use of a trade mark in a form differing in elements will not be genuine if these elements alter the distinctive character of the mark in the form in which it was registered.

Having lost its appeal in front of the Fourth Board of Appeal of EUIPO, Josel turned to the Court.

In its judgment, the Court referred to Articles 15(1) and 42(2) and (3) of the Regulation. After noting that Josel's trade mark contained multiple elements in addition to the "NN" word mark, the Court assessed whether the differences between the form of the sign used in trade and the form in which it was registered were only negligible so that the signs could be regarded as equivalent, or if the additional elements had a distinctive and dominant character.

Similarly to EUIPO, the Court found that the variations in the earlier trade mark (as registered) were of a nature that affected its distinctive character. In particular, it dismissed Josel's argument that the letters NN were still used in the same font, recalling that word marks are not distinguished by a particular font. The Court also clarified that even though the terms "*núñez i navarro*" referred to the name of the parent or holding company, it had no bearing on the possible alteration of the distinctive character of the trade mark. The Court then went on to state that these terms were often placed prominently, occupying a central position and a much more significant place than the trade mark NN. Finally, the Court added that the letters NN could very likely be perceived as constituting the initials of "*núñez i navarro*" which, as surnames, have a normal distinctive character of their own.

As a consequence, the Court upheld the EUIPO's conclusion that the addition of the word element "*núñez i navarro*" to the earlier word mark had altered its distinctive character. The Court therefore dismissed the action in its entirety.

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Trade Mark "la Milla de Oro" Is Not an Indication of Geographical Origin

On 6 July 2017, the Court of Justice of the European Union (the "ECJ") ruled on two preliminary questions pertaining to the alleged invalidity of the trade mark "*la Milla de Oro*" consisting of a geographical origin.

The dispute involved, on one hand, Benavente Cárdaba and Moreno Benavente (the "Benaventes"), proprietors of the Spanish trade mark "*la Milla de Oro*" and winemakers, and on the other hand, Abadía Retuerta SA, a company using the sign "*El Pago de la Milla de Oro*" for commercial, promotional and advertising purposes with regard to wines. The Benaventes brought an action for infringement against Abadía Retuerta in Spain, alleging that the use of "*la Milla de Oro*" by Abadía Retuerta was likely to give rise to a likelihood of confusion on the part of the consumers between the goods sold by the Benaventes and Abadía Retuerta. Abadía Retuerta contested this claim and brought a counterclaim seeking the invalidity of the trade mark "*la Milla de Oro*", on the grounds that it constitutes an indication of geographical origin within the meaning of Article 3(1)(c) of Directive 2008/95/CE to approximate laws of the Member States relating to trade marks (the "Directive").

The Commercial Court of Burgos (Spain) sided with Abadía Retuerta.

The Benaventes appealed this judgment to the Provincial Court of Burgos (Spain), claiming that the sign "la Milla de Oro" was not an indication of geographical origin but merely a fanciful name designating goods belonging to the luxury brand sector. In this context, the Provincial Court referred the two following questions to the ECJ for a preliminary ruling: (i) can a sign referring to the characteristic of a product or service which is found in abundance in a single place with a high degree of value and quality be regarded as an indication of geographical origin; and (ii) can the use of this sign constitute another ground for invalidity within the meaning of Article 3 of the Directive?

The ECJ first held that the sign "*la Milla de Oro*" did not constitute an indication of geographical origin since it had to be accompanied by additional geographical indications in order to identify the geographical origin of the goods or services concerned. By way of illustration, the ECD explained that both the sign "*la Milla de Oro*" de la Ribera del Duero (Spain) and the sign "*la Milla de Oro*" de la Rioja (Spain) coexisted in the wine-growing sector. Similarly, this sign is used in the luxury goods sector to designate a district in Madrid housing businesses, well-known brand names and museums.

With regard to the second question, the ECJ left it for the referring court to determine whether "*la Milla de Oro*" could be perceived as descriptive with regard to a wine which can be found in abundance in a single place with a high degree of value and quality. The ECJ added that the referring court would have to determine whether the sign had a distinctive character. In this respect, the ECJ recalled that a trade mark has a distinctive character if it allows the identification of the product as originating from a particular undertaking, and thus enables the consumer to distinguish between that product and products of other undertakings. The ECJ then noted that the laudatory connotation of a trademark such as the one at issue did not mean that it could not be appropriate for the purposes of guaranteeing to consumers the origin of the products which it covered.

Preliminary Draft Law on Implementation of Unitary Patent and Unified Patent Law Approved by Council of Ministers

On 7 July 2017, the Council of Ministers (*ministerraad/conseil des ministres*) approved a draft bill on the implementation of the unitary patent and the unified patent law in Belgian law following the reform of the European patent system.

The draft bill has been referred for advice to the Council of State (*Raad van State/conseil d'état*).

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| LITIGATION

Court of Justice of European Union Rules On Jurisdiction Clauses in Pan- European Contracts

The Court of Justice of the European Union (the "ECJ") recently handed down two interesting judgments regarding the use of jurisdiction clauses in contracts involving parties established in different EU Member States.

ECJ Rules on Extending Benefit of Forum Clause to Representatives of Signatories

On 28 June 2017, the ECJ held that the representatives of a company could not rely on a jurisdiction clause in a contract between their company and another company in order to dispute the jurisdiction of a court over an action for damages which seek to establish their personal liability for torts carried out in the performance of their duties.

In the case at hand, Mr Leventis and Mr Vafeias were two representatives of a Greek company (Brave Bulk Transport – "BBT"). BBT had entered into a charter agreement with another Greek company called Malcon Navigation ("Malcon") pursuant to which Malcon chartered a ship to BBT (the boat was later sub-chartered by BBT to the Iraqi government). Since the boat was returned five months later than the agreed upon date in the contract, Malcon initiated arbitration proceedings against BBT in February 2007.

BBT and Malcon later entered into a new agreement (the "Agreement") in order to stay the arbitration proceedings until the resolution of an action for damages brought by BBT against the Iraqi government. That Agreement provided that if a settlement with the Iraqi State was reached, Malcon would receive at least 20% of the amount paid by Iraq to BBT. In addition, the Agreement also provided for a jurisdiction clause conferring jurisdiction on the English courts to resolve any dispute arising out of this Agreement.

A few months later, Malcon learnt that an amicable settlement had been reached by Iraq and BBT. However, Malcon never received the amount it was entitled to under the Agreement. It therefore continued the arbitration proceedings but also initiated legal proceedings before Greek courts against BBT and its two representatives – Mr Leventis and Mr Vafeias – with the aim of rendering them jointly and severally liable for having committed torts.

Because of the jurisdiction clause in the Agreement, the Greek courts dismissed the action brought by Malcon in so far as it concerned BBT. By contrast, with respect to BBT's representatives (who were not parties to the Agreement), the courts upheld jurisdiction. Mr Leventis and Mr Vafeias then appealed this ruling to the Greek Supreme Court alleging that it was exceptionally possible to rely on a jurisdiction clause against a party to a dispute who was a third party at the time of its signing. Uncertain of the answer to this issue in the light of Article 23 of Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels Regulation"), the Greek Supreme Court stayed the proceedings and referred the issue to the ECJ for a preliminary ruling.

Referring to its well-established case-law (including *Refcomp, CDC Hydrogen Peroxide and El Majdoub*), the ECJ recalled that "*a jurisdiction clause in a contract may, in principle, produce effects only in the relations between the parties who have given their agreement to the conclusion of that contract*". The ECJ then found that, in the case at hand, "*the jurisdiction clause at issue was not being put forward by one of the parties to the contract in which it appears*". In addition, neither BBT nor its representatives were able to provide evidence justifying the view that the representatives of BBT and Malcon had entered into the Agreement. The ECJ therefore concluded that, since they were not parties to the Agreement, Mr Leventis and Mr Vafeias were not entitled to rely on the jurisdiction clause provided for in the Agreement in order to dispute the jurisdiction of the Greek courts.

ECJ Allows Third Party Victims to Depart from Jurisdiction Clause in Insurance Contract

On 13 July 2017, the ECJ ruled that when a third party victim is entitled to seek reparation for a loss or an injury directly against the insurer of the person who caused the injury, this third party victim is not bound by a jurisdiction clause contained in the insurance contract between the party who caused the harm and the insurer.

The case at hand involved a Swedish company (*Skåne Entreprenad Service AB* – "Skane") which was responsible for the delivery by boat of specific goods to a Danish port. In order to cover its risks, Skane had entered into a liability agreement with Navigators Management Limited ("Navigators"), an English insurance company. The contract between the two parties contained a jurisdiction clause under which the parties agreed that any dispute arising under or in connection with the contract would be submitted to the High Court in London. Unfortunately, a dispute arose when the boat caused injury to the quay installations of the destination port ("Assens Havn") in Denmark.

Shortly thereafter, Skane entered into liquidation and Assens Havn brought an action directly against Navigators (Skane's insurer). To this end, Assens Havn took advantage of a remedy provided for under Danish law which allowed a third party victim to seek reparation by bringing proceedings before the Danish courts directly against the insurer.

However, the Danish court of first instance declined jurisdiction asserting that the insurance contract agreed between Skane and Navigators provided that any dispute arising out of or in connection with the contract had to be resolved by the English courts. In reaching its decision, the Danish court found that Article 11 of the Brussels Regulation did not allow a third party victim to disregard the jurisdiction clause agreed on by the parties to the insurance contract.

Uncertain as to the compatibility of this ruling with the Brussels Regulation (in particular Articles 8 to 14 which contain specific provisions on insurance contracts), the Danish Supreme court stayed the proceedings and referred the issue to the ECJ for a preliminary ruling.

In answering the question of the Danish Supreme Court, the ECJ held that Article 13 of the Brussels Regulation, read in conjunction with Article 14 of the same Regulation, allowed for derogations to the general principles provided for in Articles 8 to 12 of the Brussels Regulation. The ECJ therefore found that "*an agreement on jurisdiction made between an insurer and an insured party cannot be invoked against a victim of insured damage who wishes to bring an action directly against the insurer before the courts for the place where the harmful event occurred,* […], *or before the courts for the place where the victim is domiciled.*"

The ECJ therefore concluded that "*a victim entitled to bring a direct action against the insurer of the party which caused the harm which he has suffered is not bound by an agreement on jurisdiction concluded between the insurer and that party.*"

Although those judgments are not revolutionary, they offer a clear illustration of the ECJ's application of a jurisdictional clause under the Brussels Regulation. Additionally, even though the Brussels Regulation has been replaced by Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels Ibis Regulation"), the findings of the ECJ in these cases continue to be relevant under the Brussels Ibis Regulation.

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| REAL ESTATE

Mandatory Insurance For Ten-Year Civil Liability of Construction Professionals

On 9 June 2017, the Law of 31 May 2017 on the mandatory insurance for the ten-year civil liability of contractors, architects and other service providers in the construction sector and amending the Law of 20 February 1939 on the protection of the title and the profession of architect was published in the Belgian Official Journal (*Wet van 31 mei 2017 betreffende de verplichte verzekering van de tienjarige burgerlijke aansprakelijkheid van aannemers, architecten en andere dienstverleners in de bouwsector van werken in onroerende staat en tot wijziging van de wet van 20 februari 1939 op de bescherming van de titel en van het beroep van architect/Loi relative à l'assurance obligatoire de la responsabilité civile décennale des entrepreneurs, architectes et autres prestataires du secteur de la construction de travaux immobiliers et portant modification de la loi du 20 février 1939 sur la protection du titre et de la profession d'architecte*, the "Law").

The Law aims to eliminate the discrimination which exists against architects vis-à-vis other construction professionals in relation to their ten-year liability insurance. The Constitutional Court (*Grondwettelijk Hof/Cour Constitutionnelle*) held in 2007 that the absence of the obligation for other construction professionals to insure their ten-year liability under Articles 1792 and 2270 of the Civil Code, constituted a form of discrimination against architects. Furthermore, the Law also tries to improve the regulation of the construction market and to enhance consumer protection.

The Law applies to contractors, their subcontractors, architects and other providers of intangible services relating to a construction project (*e.g.* specialised consulting offices), with the exception of real estate developers, and requires them to take out a ten-year liability insurance covering their liability under Articles 1792 and 2270 of the Civil Code. For architects, this means that their current obligation to take out such insurance under Article 9 of the Law of 20 February 1939 on the protection of the title and the profession of architect, will be replaced by this new obligation.

The scope of this mandatory insurance is limited to the ten-year liability insurance of construction professionals for works relating to residential buildings located in Belgium (*e.g.* houses, apartments) that require the intervention of an architect. The insurance coverage itself is only mandatory for damage threatening the solidity, stability and water tightness of the building's structure. Furthermore, specific types of damage are explicitly excluded (such as aesthetic damage; purely intangible damage; damage following radioactivity; damage following non-accidental pollution; and tangible and intangible damage not exceeding EUR 2,500).

The Law also imposes minimum coverage thresholds per claim for all tangible and intangible damage. If the rebuilding value exceeds EUR 500,000, the minimum coverage must be EUR 500,000 per claim. If the rebuilding value is lower than EUR 500,000, the minimum coverage must be equal to the rebuilding value of the building. This amount refers to the reconstruction of the entire residential building (*i.e.*, the apartment building and not the individual apartments).

In principle, each construction professional must have his or her own insurance (either in the form of an annual insurance policy or in the form of a project-specific insurance policy). However, the Law provides for the possibility of using a global insurance policy covering the liability of all construction professionals involved in the construction process.

All contractors and other construction professionals required to insure their ten-year liability, must submit an insurance certificate to the principal and to the architect prior to the commencement of the works.

The Law will enter into force on 1 July 2018 and will apply to all building projects for which a final building permit is issued after its entry into force.

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