"Van Bael & Bellis' 'responsive and knowledgeable team' gives very good advice, both at EU and domestic level."

Legal 500 2017

July 2018

VBB on Belgian Business Law

Highlights

COMMERCIAL LAW
Parliament Adopts Bill Harmonising Concepts of "Electronic Signature" and "Durable Medium" and Promoting Conclusion of Contracts by Electronic Means
Page 3

COMPETITION LAW
Merger Activities of Belgian Competition Authority in June 2018
Page 5

CONSUMER LAW
Bill Extending Scope for Class Actions in Data Protection and Organised Travel Adopted
Page 6

DATA PROTECTION
Belgian Data Protection Law Adopted
Page 7

INTELLECTUAL PROPERTY
According to Advocate General Taste of Food Product Does Not Qualify For Copyright Protection
Page 12

LABOUR LAW
Increase of Amounts of Gifts Exempt from Social Security Contributions
Page 15

LITIGATION
New Rules on Criminal Liability for Legal Entities
Page 16

Renowned competition and trade boutique which continues to gain visibility in M&A and private equity transactions, with strong cross-border capabilities, earning praise for its commitment and management of global transactions.

Chambers Europe 2017

Topics covered in this issue

COMMERCIAL LAW 3
COMPETITION LAW 5
CONSUMER LAW 6
DATA PROTECTION 7
INTELLECTUAL PROPERTY 12
LABOUR LAW 15
LITIGATION 16

Van Bael & Bellis on Belgian Business Law should not be construed as legal advice on any specific facts or circumstances. The content is intended for general informational purposes only. Readers should consult attorneys at the firm concerning any specific legal questions or the relevance of the subjects discussed herein to particular factual circumstances.

vbb@vbb.com
www.vbb.com

Table of contents

COMMERCIAL LAW 3

Default Commercial Interest Rate Remains Unchanged 3

Parliament Adopts Bill Harmonising Concepts of “Electronic Signature” and “Durable Medium” and Promoting Conclusion of Contracts by Electronic Means 3

COMPETITION LAW 5

Merger Activities of Belgian Competition Authority in June 2018 5

CONSUMER LAW 6

Bill Extending Scope for Class Actions to Data Protection and Organised Travel Adopted 6

DATA PROTECTION 7

Belgian Data Protection Law Adopted 7

European Data Protection Board Shows Increase of Complaints Received Since Entry into Force of General Data Protection Regulation 9

Belgium and Sixteen Other Member States Warned by European Commission over Lack of Compliance with Network and Information Systems Directive 9

Personal Data Transfers to Japan One Step Closer to Adequacy as European Union and Japan Conclude Negotiations 9

Law Establishing New ‘Information Security Committee’ Adopted 10

Bill Extending Scope for Class Actions in Data Protection and Organised Travel Adopted 11

INTELLECTUAL PROPERTY 12

According to Advocate General Taste of Food Product Does Not Qualify For Copyright Protection 12

KitKat Saga: Court of Justice of European Union Holds that Acquisition of Distinctiveness Through Use Should Be Evidenced in All Member States 13

Court of Justice of European Union Rules on Supplementary Protection Certificates for Medicinal Products Composed of Several Active Ingredients 13

Proposed Amendment to Code of Economic Law relating to Private Copy 14

Federal Parliament Adopts Bill Implementing Trade Secrets Directive 14

LABOUR LAW 15

Increase of Amounts of Gifts Exempt from Social Security Contributions 15

LITIGATION 16

New Rules on Criminal Liability for Legal Entities 16

Court of Justice of European Union Clarifies European Union Jurisdictional Rules in Competition Damages Claims 16

Van Bael & Bellis on Belgian Business Law should not be construed as legal advice on any specific facts or circumstances.
The content is intended for general informational purposes only. Readers should consult attorneys at the firm concerning any specific legal questions or the relevance of the subjects discussed herein to particular factual circumstances.

© 2018 Van Bael & Bellis

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

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

vbb@vbb.com
www.vbb.com

COMMERCIAL LAW

Default Commercial Interest Rate Remains Unchanged

On 25 July 2018, the default interest rate for commercial transactions applicable during the second semester of 2018 was published in the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*). It remains unchanged from the first semester of 2018, at 8%, until 31 December 2018 (*See, this Newsletter, Volume 2018, No. 1, p. 3*). Pursuant to 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 applies 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. The statutory interest rate for 2018 amounts to 2% (*See, this Newsletter, Volume 2018, No. 1, p. 3*).

Parliament Adopts Bill Harmonising Concepts of "Electronic Signature" and "Durable Medium" and Promoting Conclusion of Contracts by Electronic Means

On 12 July 2018, the Chamber of Representatives adopted a Bill to (i) harmonise the concepts of "electronic signature" and "durable medium" as used in Belgian law; and (ii) remove obstacles to the conclusion of contracts by electronic means (*Wetsontwerp tot harmonisatie van de begrippen elektronische handtekening en duurzame gegevensdrager en tot opheffing van de belemmeringen voor het sluiten van overeenkomsten langs elektronische weg/Projet de loi visant à harmoniser les concepts de signature électronique et de support durable et à lever des obstacles à la conclusion de contrats par voie électronique* – the "Law"). The Law amends the Civil Code, the Code of Economic Law and the Company Code.

"Electronic Signature" and "Durable Medium"

First, the Law harmonises the terminology used to refer to electronic signatures and durable media. As regards the term "electronic signature", the Law aligns all references to this concept in federal laws with the terminology used in Regulation (EU) 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (the "eIDAS Regulation"). In particular, all references to electronic signatures will refer in clear terms to one of the three types of electronic signatures defined in the eIDAS Regulation, *i.e.*, the (i) electronic signature; (ii) advanced electronic signature; or (iii) qualified electronic signature.

Further, the Law introduces in Article I.1, 15° of the Code of Economic Law a definition of the term "durable medium", which is used in legislation to clarify that documents do not necessarily have to be in paper format. The term "durable medium" will be defined as "*any instrument which enables a natural or legal person to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored*". This definition will apply to all legislative texts containing a reference to the concept of a "durable medium". Moreover, if the wording of legislative texts sows doubt as to the equivalence of paper and other durable media, the Law makes the necessary changes.

Removal of Obstacles to Conclusion of Contracts by Electronic Means

Second, the Law removes obstacles to the conclusion of contracts by electronic means. Implementing Article 9 of Directive 2000/31/EC of 8 June 2000 on specific legal aspects of information society services, in particular electronic commerce, in the Internal Market (the "e-Commerce Directive"), Article XII.15 of the Code of Economic Law allows the conclusion of contracts by electronic means by providing that any formal requirements imposed by law for the conclusion of contracts by electronic means will be met when the functional qualities of these requirements are safeguarded.

© 2018 Van Bael & Bellis

As is permitted under the e-Commerce Directive, Article XII.16 of the Code of Economic Law currently provides that Article XII.15 does not apply to (i) contracts that create or transfer rights in real estate, except for rental rights; (ii) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority; (iii) contracts of suretyship granted and in relation to collateral securities furnished by persons acting for purposes outside their trade, business or profession; and (iv) contracts governed by family law or by the law of succession. The explanatory memorandum to the Law observes that, 15 years after the e-Commerce Directive was first implemented in Belgian law, the automatic exception to the rule of Article XII.15 for these four categories of contracts is no longer necessary. Therefore, the Law amends Article XII.16 by providing that, for the four types of contracts listed, a court may only decide not to apply Article XII.15, and thus refuse the validity or effectiveness of a contract concluded by electronic means, if it finds that, having regard to all factual circumstances of the case, there are practical obstacles to complying with a legal or regulatory formal requirement and concluding a contract by electronic means.

The Law will now be published in the Belgian Official Journal. It will enter into force ten days after its publication.

COMPETITION LAW

Merger Activities of Belgian Competition Authority in June 2018

Over the past month, the College of Competition Prosecutors (*Auditoraat / Auditorat*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") cleared the following concentrations under the simplified merger control procedure:

- acquisition of Bruynseels Robert NV and Ets. Bruynseels-De Smet NV by D'Ieteren NV in the automobile sector;
- acquisition of Datosco NV by Celor S.A.S. in the automobile sector;
- acquisition of Garage Vriesdonk N.V., E. (Eddy) Joosen N.V., Garage A. Swinnen B.V.B.A. and Garage Euromotors N.V. (Andries group) by Hedin Belgien Bil AB and I.A. Hedin Bil AB (Anders Hedin group) in the automobile sector; and
- acquisition of Urban Living Belgium NV by Triple Living NV and Immobel Living NV in the project development sector.

During that same period, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the BCA cleared the following concentrations under the standard merger control procedure:

- acquisition of Van Neerbos Groep Bouwmarkten by Intergamma Holding B.V. in the do-it-yourself sector. The acquisition is part of a larger international transaction of which the Dutch part had already been cleared by the Dutch Authority for Consumers and Markets (*Autoriteit Consument & Markt*);
- acquisition of residential care centers and service flats of Senior Assist NV by Senior Living Group NV in the sector of residential care centers for the elderly; and
- acquisition of a portfolio of brands of Sanoma Media Belgium NV and Sanoma Regional Belgium NV by Roularta Media Group NV in the magazine and digital publications media sector.

The full text of these decisions will be made available on the website of the BCA: www.abc-bma.be.

© 2018 Van Bael & Bellis

CONSUMER LAW

Bill Extending Scope for Class Actions to Data Protection and Organised Travel Adopted

The federal Parliament adopted on 19 July 2018 a bill containing miscellaneous provisions in relation to the economy (the "Bill") (*Wetsontwerp houdende diverse bepalingen inzake Economie/Projet de loi portant dispositions diverses en matière d'Economie*). As noted in *this Newsletter, Volume 2018, No. 6 at p. 6*, the Bill extends the scope of class actions to data protection and organised travel. The Bill has now become law and will be published in the Belgian Official Journal.

© 2018 Van Bael & Bellis

DATA PROTECTION

Belgian Data Protection Law Adopted

On 19 July 2018, the federal Parliament adopted the new Belgian Data Protection Law (*Wet betreffende de bescherming van natuurlijke personen met betrekking tot de verwerking van persoonsgegevens/Loi relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel*) ("New Belgian DPL").

The New Belgian DPL complements Regulation (EU) 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 of the free movement of such data, and repealing Directive 95/46/EC ("General Data Protection Regulation" or "GDPR"). While the GDPR intends to provide 'full harmonisation' for the protection of personal data, it leaves some margin of manoeuvre for Member States to implement additional national requirements. Moreover, the New Belgian DPL implements European Directive 2016/680 which regulates the protection of personal data by law enforcement agencies (*Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA*).

Below follow highlights of the New Belgian DPL that apply to private sector companies

1. *Territorial Scope*

The New Belgian DPL applies to any processing of personal data in the context of an establishment of the controller or processor in Belgium, irrespective of whether or not the actual processing takes place in Belgium. Similar to Article 3.2 of the GDPR, the New Belgian DPL will also apply to non-EU based controllers or processors that offer goods or services to Belgian residents or monitor their behaviour. Moreover, the New Belgian DPL will apply to controllers who are not located in Belgium but on a place where Belgian law applies according to international public law. Conversely, the New Belgian DPL will not apply if the controller is established in another EU Member State and uses a processor located in Belgium.

2. *Children's Consent in Relation to Information Society Services*

Article 8 of the GDPR establishes the conditions for children's consent in relation to information society services. If an information society service, such as an app or a social network, relies on consent to process personal data, the GDPR determines that such consent is only lawful if the child is at least 16 years old. However, Member States may provide for a lower age for those purposes provided that such lower age is not below 13 years. Parliament availed itself of this possibility and sets the bar at 13 years of age. For children under the age of 13, consent in relation to information society services must be given or confirmed by a parent or guardian.

The reason for this lower age-limit reflects the actual situation in online services. In many cases, older teenagers cannot be expected to require parental consent for the online services they use. It is also important to note that this provision does not alter the protection for minors under Belgian contract law.

3. *Special Categories of Personal Data*

Under the GDPR, Member States may maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health. The New Belgian DPL uses this possibility under the GDPR to impose a number of additional conditions for the processing of these categories of data.

In particular, the New Belgian DPL requires the controller or the processor of such data to: (i) designate who is entitled to consult these categories of data; and (ii) draft a list of these persons (and keep this list available for the supervisory authority). The new Belgian DPL requires the designated persons to observe legal or contractual confidentiality obligations. The old Royal Decree of 13 February 2001 imposed similar requirements for the processing of sensitive categories of data.

Furthermore, the New Belgian DPL clarifies some substantial public interests that justify the processing of sensitive categories of personal data under Article 9.2 (g) of the GDPR and provides for legal grounds, subject to additional conditions, for using data relating to criminal convictions and offences under Article 10 of the GDPR.

4. *Restrictions on Right of Information and Other Rights of Data Subjects*

The New Belgian DPL provides for limited exemptions for cases in which rights of data subjects can be restricted and controllers do not have to inform the data subjects of the processing of their personal data. This applies, for example, to personal data that are transferred to the intelligence agency OCAD/OCAM or are obtained by virtue of law from courts or police files.

5. *Processing and Freedom of Expression and Information*

The New Belgian DPL reconciles the right to the protection of personal data pursuant to the GDPR with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression by limiting specific data subjects rights, including the requirement to inform data subjects about the processing of their personal data.

In addition, international transfers of personal data for journalistic purposes are exempt from the normal restrictions on such transfers under Articles 44 to 50 of the GDPR.

6. *Guarantees and Derogations for Archiving in Public Interest, Scientific or Historical Research Purposes or for Statistical Purposes*

Processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, must be subject to appropriate safeguards for the rights and freedoms of the data subject under Article 89 of the GDPR. The New Belgian DPL now provides further obligations and a derogation from data subjects' rights.

The main additional obligations for processing personal data for the purpose of scientific or historical research or for statistical purposes consist of:

- the appointment of a data protection officer (DPO);
- additional information to be included in the internal records; and
- additional information to be provided to data subjects.

However, the New Belgian DPL also stipulates that these additional obligations do not apply if the organisation complies with a certified code of conduct with respect to the processing of personal data for these purposes.

The use for scientific or historical research or statistical purposes may constitute a "further processing" (*i.e.,* a processing for a purpose other than the purpose for which the data have been initially collected). If this is the case and the data have been obtained from the initial controller for this purpose, then both controllers must conclude an agreement that must be added to the internal processing record.

Moreover, the New Belgian DPL states that, where possible, the controller should only use anonymised data for the above purposes. The data must be anonymised after collection. If this is not possible in view of the purposes pursued, the controller can be allowed to use pseudonymised data. In that case, the pseudonymisation can only be undone if this is strictly necessary and after the advice of the DPO.

7. *Cease and Desist Procedure*

The New Belgian DPL introduces a cease and desist procedure which allows for bringing a claim for infringement of data protection obligations before the President of the Court of First Instance. The President of the Court of First Instance was also competent to hear actions brought under the current Data Protection Law of 8 December 1992 (which will be abolished when the New Belgian DPL enters into force). If the Court finds an infringement, it can order the infringing party to cease the infringement and impose a penalty if the party does not comply with the order.

If a data subject also wishes to claim compensation for damages suffered, the data subject will have to start distinct proceedings, since an action for damages cannot be brought in a cease and desist procedure.

© 2018 Van Bael & Bellis

8. *Sanctions and Penalties*

The sanctions, including the administrative fines of the GDPR, also apply to infringements of the obligations of the New Belgian DPL. In addition to the administrative fines, the New Belgian DPL also imposes criminal sanctions, making the infringement of data protection law a criminal offence.

The New Belgian DPL will enter into force upon its publication in the Belgian Official Journal.

European Data Protection Board Shows Increase of Complaints Received Since Entry into Force of General Data Protection Regulation

During the second plenary meeting of the European Data Protection Board ("EDPB") held on 4 and 5 July 2018, the EU Member State data protection authorities ("DPA") discussed the sharp increase in the number of complaints since the entry into force of the General Data Protection Regulation ("GDPR") on 25 May 2018.

The EDPB is an independent EU body in charge of the application of the GDPR which contributes to the consistent application of data protection rules throughout the European Union. The EDPB consists of the head of each EU Member State DPA and of the European Data Protection Supervisor or their representatives.

Various national DPAs had already revealed a significant increase of complaints after 25 May 2018. For instance, the Dutch DPA, the *Autoriteit Gegevensbescherming*, reported that it had received 600 complaints by the end of June 2018, while the Irish Data Protection Commissioner had already received 1,300 "concerns and complaints" by the beginning of June 2018. Many of these complaints are reported to relate to requests to access or erase personal data and are directed against private (*i.e.*, non-public sector) companies.

During discussions with regard to cooperation and consistency procedures, the EDPB shared experiences on the one-stop shop mechanism and the other challenges which the DPAs are facing. In particular, the EDPB reported that approximately 100 cross-border complaints have been filed since 25 May 2018 and are currently still under investigation. The advent of these complaints will provide a test for the one-stop-shop approach ensured by the lead authority and the consistency mechanism that must ensure a harmonised application of the GDPR.

In addition, the EDPB offered guidance on GDPR compliance in the framework of Internet Corporation for Assigned Names and Numbers ("ICANN") and the Payments Services Directive ("PSD2 Directive"). It also raised concerns in relation to the Privacy Shield. A full report on the EDPB meeting with further information on these topics can be found here.

Belgium and Sixteen Other Member States Warned by European Commission over Lack of Compliance with Network and Information Systems Directive

On 19 July 2018, the European Commission sent warning letters to 17 Member States, including Belgium, for their failure to transpose into their national laws, Directive 2016/1148/EU of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (the "NIS Directive").

The objective of the NIS Directive is to achieve a high level of security of network and information systems across the European Union through the development of national cybersecurity capabilities and increasing EU-level cooperation. The NIS Directive imposes, *inter alia*, incident reporting obligations on essential service and digital service providers in the energy, healthcare, utilities, banking and transportation sectors.

The Member States concerned failed to implement the NIS Directive in their national law by the due date of 9 May 2018. These countries now have two months to respond to the letter of formal notice sent by the European Commission, failing which the latter may decide to send a reasoned opinion and, ultimately, bring infringement proceedings before the Court of Justice of the European Union.

Personal Data Transfers to Japan One Step Closer to Adequacy as European Union and Japan Conclude Negotiations

On 17 July 2018, the European Union and Japan successfully concluded their negotiations on reciprocal adequacy. These negotiations recognise Japan and the European Union as providing a comparable level of protection of

© 2018 Van Bael & Bellis

personal data, and clear the way for a seamless transfer of personal data between Japan and the European Union.

Japan has committed to implementing additional safeguards to protect European citizens' personal data (*e.g.* the definition of sensitive data will be expanded, the exercise of individual rights to access and rectification will be facilitated and the further transfer of Europeans' data from Japan to another third country will be subject to a higher level of protection). These new rules will be binding on Japanese companies importing data from the European Union and enforceable by the Japanese independent data protection authority ("PPC") and courts. Japan has also committed to establish a complaint-handling mechanism to investigate and resolve complaints from Europeans regarding access to their data by Japanese public authorities. This new mechanism will be administered and supervised by the PPC.

Once adopted, these measures will cover personal data exchanged between senders and recipients in the EU and Japan for commercial purposes. Both the European Union and Japan will now launch the necessary procedures for the adoption of the formal adequacy decisions. Following the adoption of these formal decisions, personal data will flow from the Member States to Japan without being subject to any further safeguards or authorisations such as binding corporate rules and contractual clauses. For Europe, the adequacy decision must be adopted by the European Commission.

Law Establishing New 'Information Security Committee' Adopted

On 19 July 2018, the Law regarding the establishment of the information security committee was adopted by the federal Parliament (*Wet tot oprichting van het informatieveiligheidscomité en tot wijziging van diverse wetten betreffende de uitvoering van verordening (EU) 2016/679 van 27 april 2016 van het Europees Parlement en de Raad betreffende de bescherming van natuurlijke personen in verband met de verwerking van persoonsgegevens en betreffende het vrije verkeer van die gegevens en tot intrekking van richtlijn 95/46/EG/Loi instituant le comité de sécurité de l'information et modifiant diverses lois concernant la mise en oeuvre du règlement (UE) 2016/679 du Parlement européen et du Conseil du 27 avril 2016 relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, et abrogeant la directive 95/46/CE*) ("Law of 19 July 2018").

The GDPR obliges Member States to adapt their institutional framework of advisory, authorisation and control bodies in the field of data protection and data sharing. With the abolishment of the sectoral committees that issued authorisations under the old Data Protection Authority, Parliament was of the opinion that it needed to set up a new authority to guarantee the flexible, safe and legally secure extension of data sharing in a number of sectors. For this reason, the Law of 19 July 2018 creates the Information Security Committee ("ISC"). The ISC consists of two chambers, one for social security and health and one chamber for the Federal Government.

The main tasks of the ISC are:

- to deliver compulsory deliberations in respect of specific transfers of personal data between public authorities and in the social and health sector. These deliberations will assess whether the transfers comply with the basic principles of data protection; and
- to promote data protection and information security, for instance by approving information security policies or monitoring the training and functioning of data protection officers ("DPO's") of the social security institutions and of the other institutions of the federal government.

Contrary to the old sectoral committees, the new ISC is not part of the Data Protection Authority but is an independent body. The preliminary assessment by the ISC does not affect the possibility for the Data Protection Authority (*Gegevensverwerkingsautoriteit/Autorité de protection des données*) to carry out an ex post assessment of such processing activities.

Moreover, the Law of 19 July 2018 provides for a general statutory basis for setting up a data warehouse for data matching and data mining at the National Social Security Office in order to combat fraud more efficiently.

The Law of 19 July 2018 will enter into force upon its publication in the Belgian Official Journal.

© 2018 Van Bael & Bellis

Bill Extending Scope for Class Actions in Data Protection and Organised Travel Adopted

See, this Newsletter, Consumer Law.

INTELLECTUAL PROPERTY

According to Advocate General Taste of Food Product Does Not Qualify For Copyright Protection

On 25 July 2018, Advocate General ("AG") Wathelet delivered an opinion (the "Opinion") on the issue of whether the taste of a food product can be protected by copyright under Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society (the "Directive").

The case originates from a dispute between two cheese producers and manufacturers, Levola Hengelo BV ("Levola") and Smilde Food BV ("Smilde"). Levola had purchased all rights to its cheese spread named "Heksenkaas". However, in January 2014, Smilde started producing a similar product named "*Witte Wievenkaas*". Consequently, Levola brought an action against Smilde for copyright infringement. However, for such an infringement claim to be valid, the work must be protected by copyright, which leads to the question as to whether taste in and of itself can be the subject of copyright protection.

The Court of Appeal of Arnhem-Leeuwarden decided to stay the proceedings and referred questions for a preliminary ruling to the Court of Justice of the European Union ("ECJ") asking (i) whether EU law precludes the taste of a product from qualifying for copyright protection and, if the ECJ were to answer the first question negatively; (ii) which conditions must be met for a taste to be protected; and (iii) whether the protection concerns only the taste or also the recipe. The Court of Appeal also sought guidance as to how a court should assess the taste of a product in practice, and which elements an applicant should put forward when seeking protection.

At the outset, the AG made two general comments. First, the AG determined that as the notion of a "work" is not defined by the Directive, an autonomous and uniform interpretation must be sought taking into account the context of the provision and the objective pursued by the legislation. Second, the AG recalled that in Case C-5/08 *Infopaq International*, the ECJ held that copyright, within the meaning of the Directive, could only apply to work which is original, in the sense that it is an intellectual creation peculiar to its author.

Against this background, the AG proceeded to examine the specific issue as to whether a taste can constitute a "work". The AG looked at Article 2(1) of the Berne Convention which determines the scope of "literary and artistic" works that qualify for protection under copyright law. While Article 2(1) provides for a non-exhaustive list, the AG noted that the list makes no reference to taste nor to any type of work similar to taste such as odours or perfumes. Moreover, the taste of a food product cannot be equated with any of the "work" protected by the WIPO Copyright Treaty or by any other provision of international law.

The AG emphasised that copyright protection extends to original expressions and not to ideas, procedures, methods of operation or mathematical concepts. In this regard, he referenced the "idea/expression dichotomy" stating that the form in which a recipe is expressed could be protected by copyright if the expression is original but copyright does not protect the recipe (the idea) as such.

In order to qualify for protection, original expressions should be identifiable with "sufficient precision and objectivity". However, the AG found that taste is "essentially a qualitative element" which is subjective. The possibility of identifying a work with sufficient precision and objectivity and consequently, the extent of its protection by copyright, is imperative in order to respect the principle of legal certainty in the interest of both the copyright owner and third parties who may be exposed to legal proceedings for the infringement of copyright. While the AG did not rule out that in the future, techniques may evolve for the precise and objective identification of a taste or smell, in the current state of affairs this is not possible.

In conclusion, the AG advised the ECJ to find that the Directive precludes copyright protection for the taste of a food product. The AG did not address the further questions as they had only been raised if it was found that the Directive does not stand in the way of copyright protection for taste.

KitKat Saga: Court of Justice of European Union Holds that Acquisition of Distinctiveness Through Use Should Be Evidenced in All Member States

On 25 July 2018, the Court of Justice of the European Union (the "ECJ") confirmed, on appeal, the judgment handed down by the General Court of the European Union (the "Court") on 15 December 2016 in Case T-112/13, *Mondelez UK Holdings & Services v. EUIPO* (*See, this Newsletter, Volume 2016, No. 12, p. 15*).

The dispute arose after Mondelez UK Holdings & Services Ltd, formerly Cadbury Schweppes plc ("Mondelez"), had filed for a declaration of invalidity of a three-dimensional sign registered by Société de produits Nestlé SA ("Nestlé") before the European Intellectual Property Office (the "EUIPO"). Mondelez claimed that the trade mark, which consists of the shape of the Kit Kat chocolate bar, should be declared invalid on the grounds that the mark lacked distinctive character.

While the Cancellation Division declared the trade mark invalid, the EUIPO held on appeal that Nestlé had sufficiently showed that the trade mark had acquired distinctive character through use.

Mondelez then successfully appealed to the Court which annulled the decision of the EUIPO. The Court found that the EUIPO had erred in considering that the trade mark had acquired distinctiveness since a substantial proportion of the relevant public in the European Union as a whole (as opposed to specific Member States) could identify the goods as being Kit Kat chocolate bars. In particular, the Court held that the EUIPO had not decided on the perception of the trade mark by the relevant public in, *inter alia,* Belgium, Greece, Ireland and Portugal and had failed to analyse the evidence put forward by Nestlé with regard to these Member States.

Nestlé, Mondelez and the EUIPO all appealed the decision to the ECJ.

The ECJ declared the appeal lodged by Mondelez to be inadmissible. Since Mondelez only sought to amend certain grounds of the judgment and did not request that the operative part of the judgment be set aside, it breached Article 56 of the Statute of the Court of Justice of the European Union.

For this part, both Nestlé and the EUIPO alleged an infringement of Articles 52(2) and 7(3) of Regulation No 207/2009 of 26 February 2009 on the EU trade mark (the "Regulation") which, in substance, provide that a trade mark may acquire distinctiveness as a result of the use which the trade mark owner has made of it. In essence, Nestlé and the EUIPO claimed that the Court had infringed these provisions in requiring that evidence as to the perception of the trade mark at issue by the relevant public in Belgium, Greece, Ireland and Portugal be analysed before reaching a conclusion on whether that trade mark had acquired distinctiveness through use. Nestlé contended that, by focusing on individual markets, the Court's decision infringed the unitary character of the EU trade mark as well as the very existence of a single market. The unitary character of the EU trade mark implies that territorial borders should be disregarded for the purpose of assessing the acquisition of distinctiveness through use.

The ECJ did not follow Nestlé's argument and held that evidence submitted to prove the acquisition of distinctiveness through use must be capable of establishing such acquisition throughout the European Union in all Member States, and not only in a substantial part or the majority of that territory. As a consequence, it is insufficient, the ECJ held, to produce evidence that covers only part of the European Union, even if that part consists of all but one Member State. In view of these findings, the ECJ dismissed the appeals.

Court of Justice of European Union Rules on Supplementary Protection Certificates for Medicinal Products Composed of Several Active Ingredients

On 25 July 2018, the Court of Justice of the European Union (the "ECJ") delivered its judgment in Case C-121/17, *Teva UK and Others*. The ECJ held that a Supplementary Protection Certificate ("SPC") can be granted for a product composed of several active ingredients with a combined effect where, even if the combination of active ingredients that make up the product is not expressly mentioned in the claims of the basic patent, those claims "*relate necessarily and specifically to that combination*".

The case concerned the validity of the SPC protection for Truvada®, a medicinal product for the treatment and prevention of HIV marketed by Gilead. Truvada® contains two active ingredients, tenofovir disoproxil and emtricit-

© 2018 Van Bael & Bellis

abine, which have a combined effect. However, only tenofovir disoproxil is expressly mentioned in the claims of the basic patent obtained by Gilead. Concerning emtricitabine, the claims of the basic patent merely stipulate that the compounds mentioned may, if necessary, be associated with "*other therapeutic ingredients*". What is to be understood by "*other therapeutic ingredients*" is neither defined nor explained. Nevertheless, in 2008 Gilead obtained an SPC relating to a composition containing both tenofovir disoproxil and emtricitabine. In this light, the applicants, a number of pharmaceutical companies which intend to market generic versions of Truvada®, brought an action challenging the validity of the SPC before the UK courts. In the course of those proceedings, the High Court of Justice (England and Wales) referred a request for a preliminary ruling to the ECJ regarding the interpretation of Article 3(a) of Regulation (EC) No 469/2009 concerning the Supplementary Protection Certificate for medicinal products (Regulation 469/2009).

Article 3(a) of Regulation 469/2009 stipulates that, in order for an SPC to be granted, the concerned product has to be "*protected by a basic patent in force*" in the Member State in which the application is submitted and at the date of application. In interpreting this provision, the ECJ emphasised the key role played by the claims of the basic patent in determining whether a product is protected. The ECJ then observed that those claims must "*ensure both a fair protection for the patent proprietor and a reasonable degree of legal certainty for third parties*". The ECJ also found that it is not the purpose of the SPC to extend the protection conferred by a patent beyond the invention which the patent covers. Therefore, the ECJ concluded that a product is "*protected by a basic patent in force*" within the meaning of Article 3(a) in so far as, if that product is not explicitly mentioned in the claims of the basic patent, one of those claims necessarily and specifically relates to it. In siding with the Advocate General, the ECJ added that, for that purpose, the combination of the ingredients must necessarily fall under the invention covered by the patent, and, each of those active ingredients must be specifically identifiable, and this from the point of view of a person skilled in the art and on the basis of the prior art at the filing date of the basic patent.

It is now up to the High Court of Justice (England and Wales) to decide on the question as to whether the general expression "*other therapeutic ingredients*" in the basic patent satisfies the requirements laid down by the ECJ. Although the ECJ did not pronounce itself on this question, it has suggested that this might not be the case. Its position would be in keeping with a recent judgment of the German "Bundespatentgericht", which on 15 May 2018 annulled the German SPC for the combination of tenofovir disoproxil and emtricitabine.

Proposed Amendment to Code of Economic Law relating to Private Copy

On 20 July 2018, the Belgian Council of Ministers approved a draft bill implementing two changes to the provisions of the Code of Economic Law on the reproduction of works and performances for private use.

First, the draft bill provides for a purely technical adjustment, aligning the text of the exception for private use with the text of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

Second, the draft bill adapts the existing exception for private use to the digital evolution by subjecting online reproduction services clearly used to make private copies to the remuneration for private copying.

The draft bill will be submitted to the Council of State for advice.

Federal Parliament Adopts Bill Implementing Trade Secrets Directive

The federal Parliament adopted on 19 July 2018 the bill regarding the protection of trade secrets (*Wetsontwerp betreffende de bescherming van bedrijfsgeheimen/Projet de loi relative à la protection des secrets d'affaires*) (*See, this Newsletter, Volume 2018, No. 6, p. 14*). The bill has now become law and will be published in the Belgian Official Journal.

LABOUR LAW

Increase of Amounts of Gifts Exempt from Social Security Contributions

Employers in Belgium have the possibility to give their employees gifts with an advantageous social security and tax treatment on the occasion of specific events in their professional careers or their personal lives. Employers may thus make gifts on the occasion of Saint Nicholas, Christmas or New Year, a marriage or a declaration of legal cohabitation, an honourable award or an honourable distinction or at retirement. These gifts can be given in kind, in cash or in cheques.

Provided that these gifts do not exceed a specific amount or a specific value, the National Social Security Office accepts that such gifts should not be qualified as remuneration and are therefore exempt from social security contributions.

A Royal Decree regarding the exemption from social security contributions for these gifts was published in the Belgian Official Journal of 6 July 2018 (*Koninklijk Besluit van 3 juli 2018 tot wijziging van artikel 19, § 2, 14°, van het Koninklijk Besluit van 28 november 1969 tot uitvoering van de wet van 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders/Arrêté royal du 3 juillet 2018 modifiant l'article 19, § 2, 14°, de l'arrêté royal du 28 novembre 1969 pris en exécution de la loi du 27 juin 1969 révisant l'arrêté-loi du 28 décembre 1944 concernant la sécurité sociale des travailleurs*).

The following amounts are, retroactively from 1 January 2017, exempt from social security contributions if they are offered at the occasion of:

- Saint Nicholas, Christmas or New Year celebrations: EUR 40 per employee and EUR 40 per dependent child (instead of EUR 35);

- An honourable award: EUR 120 (instead of EUR 105);

- A marriage or the declaration of legal cohabitation: EUR 245 (instead of EUR 200); and

- A retirement: per full year of service: EUR 40 (instead of EUR 35); with a minimum of EUR 120 (instead of EUR 105); and a maximum of EUR 1,000 (instead of EUR 875).

From a fiscal point of view, the increased amounts still have to be accepted by the tax authorities.

LITIGATION

New Rules on Criminal Liability for Legal Entities

On 5 July 2018, the federal Parliament adopted a new law amending Articles 5 and 7*bis* of the Belgian Criminal Law Code on criminal liability for legal entities (*Wet tot wijziging van het Strafwetboek wat de strafrechtelijke verantwoordelijkheid van rechtspersonen betreft/Loi modifiant le Code pénal en ce qui concerne la responsabilité pénale des personnes morales*, the "Law").

In its initial version, Article 5 of the Belgian Criminal Law Code provided that any legal entity could be liable for any criminal offense committed in relation to its corporate purpose. However, Article 5 also stated that the Belgian federal State, the Belgian sub-regions and other local entities and municipalities fell outside the scope of this provision. The rules on criminal liability therefore did not apply to those public law entities.

The Law has now removed this exception from Article 5 of the Belgian Criminal Law Code. However, the Law also amended Article 7*bis* of the same Code which now provides that only a guilty verdict (*eenvoudige schuldverklaring/la simple déclaration de culpabilité*), with the exclusion of any other sanction, can be adopted against those public law entities.

Court of Justice of European Union Clarifies European Union Jurisdictional Rules in Competition Damages Claims

On 5 July 2018, the Court of Justice of the European Union (the "ECJ") handed down an interesting judgment in which it clarified the jurisdictional rules in damages claims resulting from anticompetitive conduct.

In the case at hand, FlyLaL – a Lithuanian airline – had brought an action before the Lithuanian courts against Air Baltic and Riga airport (two Latvian companies) seeking compensation for alleged anticompetitive conduct. FlyLaL argued that Air Baltic had abused its dominant position by engaging in predatory pricing on specific routes departing from and arriving at Vilnius airport. FlyLaL also contended that those predatory practices were the result of an anticompetitive agreement entered into between Air Baltic and Riga airport whereby Air Baltic benefited from discounts of 80% on fees for aircraft take-off, landing and security services offered by Riga airport. The savings made on those services allowed Air Baltic to fund its predatory prices which affected FlyLaL.

Relying on Article 2 of the now repealed Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation") which provides that "*persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*", both Air Baltic and Riga airport raised objections claiming that the Lithuanian courts lacked international jurisdiction and that the claim should have been brought before the Latvian courts instead.

However, at first instance, the Lithuanian court found that Article 5 of the Brussels I Regulation (which provides that "[a] *person domiciled in a Member State may, in another Member State, be sued* [...] *3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur* [...]") applied to the case at hand and that the Lithuanian courts therefore had jurisdiction to hear the case.

Both Air Baltic and Riga airport challenged that judgment.

On appeal, the Lithuanian Court of Appeal was uncertain as to (i) whether the alleged loss of income suffered by FlyLaL as a result of the anticompetitive conduct of Air Baltic and Riga airport could be regarded as damage capable of providing a basis for its jurisdiction pursuant to Article 5(3) of the Brussels I Regulation; and (ii) how to interpret the notion of "*place where the harmful event occurred*" in Article 5(3) of the Brussels I Regulation in the case of damages resulting from a violation of competition law. The Lithuanian Court of Appeal therefore stayed the proceedings and referred the matter to the ECJ for a preliminary ruling.

In its judgment, the ECJ confirmed that "l*oss of income consisting, inter alia, in loss of sales incurred as a result of anticompetitive conduct [...], may be regarded as 'damage' for the purposes of applying Article 5(3) of* [the Brussels I Regulation]" (para. 36).

In addition, the ECJ also found that, in the context of an action seeking compensation for loss of sales caused by anticompetitive conduct, the notion of "*place of harmful event*" under Article 5(3) of the Brussels I Regulation consisted of either

- the place of the market which is affected by that conduct and on which the victim claims to have suffered those losses (*i.e.* Lithuania in the case at hand); or
- the place of conclusion of this agreement (*i.e.* Latvia in the case at hand), in the case of an anticompetitive agreement between companies; or
- the place where the predatory prices were offered and applied.

By means of derogation to this last possibility, the ECJ also noted (para. 50) that if the predatory pricing policy consisted solely of the implementation of a prior anticompetitive agreement, then the "*place of harmful event*" under Article 5(3) of the Brussels I Regulation would be the place of conclusion of the anticompetitive agreement.

It must be noted that Articles 4 and 7 of the currently applicable Regulation (EU) 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") contain similar terms to Articles 2 and 5 of the Brussels I Regulation. Consequently, the verdict of the ECJ in this case continues to be relevant under the Brussels Ibis Regulation.

© 2018 Van Bael & Bellis

In the centre of Europe with a global reach

VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

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

vbb@vbb.com
www.vbb.com