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VBB on Belgian Business Law

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IFLR1000, 2019

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CAPITAL MARKETS AND FINANCIAL LAW

European Securities and Markets Authority Offers Disclosure and Investor Protection Guidance on Special Purpose Acquisition Companies

On 15 July 2021, the European Securities and Markets Authority (the ***ESMA***) addressed a Public Statement (the ***Statement***) to National Competent Authorities (***NCAs***) that contains a non-exhaustive list of expectations on how Special Purpose Acquisition Companies (***SPACs***) should satisfy prospectus disclosure requirements and meet possible investor protection issues in the European Union. The ESMA issued the Public Statement after ascertaining that, following the significant increase of SPAC activity in the European Union in the first half of 2021, differences in company law and market practices in several jurisdictions in the EU may cause SPAC prospectuses to be difficult to understand for investors.

Concept of SPACs

A SPAC, also referred to as a 'blank check company', is a company with no operating history that raises capital through an initial public offering (***IPO***). Subsequently, with the collected funds of the IPO, the SPAC acquires, and merges with, a non-listed business. This allows such business to go public while avoiding the extensive disclosure obligations which it would normally have to deal with as an operational company during the IPO process.

Key Disclosure Requirements for SPAC Prospectuses

The ESMA first expects the SPAC prospectus to contain the information listed in Regulation 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the ***Prospectus Regulation***), and as further detailed by Commission Delegated Regulation 2019/980 of 14 March 2019 supplementing Regulation 2017/1129 as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the ***Prospectus Delegated Regulation***).

In addition, the ESMA encourages NCAs to focus their scrutiny of SPAC prospectuses on the following additional disclosure requirements.

- *Risk factors*: the risks factors concerning both the issuer and its securities, including the conflicts of interest inherent to SPAC transactions, the governance of the SPAC, the decision-making process concerning the business combination and any possible dilution. As regards dilution risks, a SPAC prospectus should contain a table or diagram setting out possible dilution scenarios and their financial impact for the shareholders.

- *Strategy and objectives*: information on the issuer's investment policy, strategy and/or objectives, which should be consistent with the rest of the information in the prospectus, and the criteria for the selection of the target company which the SPAC envisages to merge with.

- *Relevant experience and principal activities*: an indication of the principal activities, relevant management expertise and experience of the members of the administrative, management and supervisory bodies of the SPAC.

- *Conflicts of interest – sponsors*: description of any conflicts of interest of the sponsors (the persons responsible for setting up the SPAC).

- *Shares, warrants and shareholder rights*: detailed information on the share and warrant structure, shareholder rights, and identity and voting rights of major shareholders. In this regard, a SPAC prospectus should set out the procedure and required majority in the shareholders' meeting for approving the business combination. Furthermore, the prospectus should describe the level of disclosure that the shareholders will receive about the target and the business combination.

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- *Major shareholders:* the prospectus should also identify the shareholders that hold a shareholding in the SPAC's capital or voting rights which is notifiable under national transparency laws. The prospectus should also specify whether these major shareholders have different voting rights than other shareholders. Additionally, the prospectus should indicate whether major shareholders or members of the issuer's management, supervisory or administrative bodies intend to subscribe to the offer, or whether any person intends to subscribe to more than five per cent of the offer.

- *Related party transactions and material interests*: the prospectus should specify information about any related party transactions and material interests, including conflicts of interest.

- *Information on proceeds of offer*: the prospectus should offer information about the financing of the acquisition of the target company (including the amount and sources of funds other than the proceeds of the offer) and the total level of costs that is expected to be incurred during the period up to and including the acquisition.

Possible Additional Disclosures to Satisfy Prospectus and Prospectus Delegated Regulations

The ESMA indicates that NCAs may require the prospectus to contain additional information in order to protect investors and the following examples:

- The future remuneration of the sponsors and their possible role after the acquisition of the target company.

- Information about the future shareholdings of the sponsors and other related parties.

- Information about possible changes to the governance after the acquisition of the target company.

- Detailed information about possible scenarios if the sponsors fail to find a suitable target to acquire, such as the winding-up of the SPAC and the de-listing of the shares.

The Belgian Financial Services and Markets Authority recently also proposed standards in relation to the structuring of, disclosing of information regarding, and trading in SPACs (*See*, VBB on Belgian Business Law, June 2021, Volume 2021, No. 6, p. 3-4).

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COMMERCIAL LAW

Law Further Strengthens Payment Periods for Commercial Transactions

On 15 July 2021, the Chamber of Representatives approved Bill 55K1036 modifying the Law of 2 August 2002 on combating late payment in commercial transactions (*Wetsontwerp tot wijziging van de Wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties / Projet de loi modifiant la Loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales* – the ***Bill***).

The statutory payment period for commercial transactions between companies is currently, as a rule, 30 calendar days. However, parties to a commercial transaction may agree on a longer payment period. This conventional payment period may even exceed 60 calendar days. Still, in the case of a transaction between a small and medium-sized enterprise (***SME***) creditor and a debtor company that does not qualify as an SME, the conventional payment period is limited to 60 calendar days, and any contractual provision to the contrary will be considered invalid. The payment period (both statutory and contractual) is counted as of (i) the receipt of an invoice by the debtor; (ii) the receipt of the goods or services if the invoice is received before the goods or services; or (iii) the acceptance or verification of conformity of the goods or services if the invoice is received before such acceptation or verification. In addition, the maximum duration for a procedure of acceptance and verification of goods or services purchased must not exceed 30 calendar days, unless expressly stipulated otherwise by contract, and as long as this is not manifestly abusive towards the creditor. No such conventional extension is possible if the creditor is an SME (*See*, this Newsletter, Volume 2019, No. 4, p. 3).

The parliamentary works accompanying the Bill identify the flaws in the existing regime which reportedly allow debtors to prolong payment periods unreasonably and thus weaken the financial viability of SMEs. For example, debtors have been found to invoke the 30-day verification period to delay the start of the 30-day legal payment period or of the conventional payment period of up to 60 days. Because, under the current regime, the payment period starts as of the end of the acceptance and verification procedure (if applicable), SME creditors sometimes have to wait for up to 90 days (30 + 60 days) to receive payment. In addition, parties in commercial transactions occasionally agree on the date of receipt of the invoice, thereby artificially delaying the payment due date. Moreover, debtors may further delay the receipt of the invoice by failing to communicate information required by the creditor to establish its invoice (*e.g.*, order number). Finally, some debtors have been found to exert pressure so that their creditors do not exercise their right to claim late payment interests or indemnities.

In the light of these findings, the Bill effects the following changes:

- First, the Bill provides that parties to a commercial transaction – regardless of their status of SME – may contractually agree on a payment period which cannot exceed 60 calendar days, and that any provision to the contrary will be regarded to be invalid. However, the Bill allows the Government to authorise, by Royal Decree, longer contractual payment periods that are applicable to specific sectors after consultation of the Superior Council for the Self-employed and Small and Medium-sized Enterprises (*Hoge Raad voor de Zelfstandigen en de KMO / Conseil Supérieur des Indépendants et des PME*). The payment period starts to run as of the receipt of (i) an invoice by the debtor; or (ii) the goods or services if the invoice is received before the goods or services.

- Second, the Bill combines the verification period with the payment period (both statutory and contractual). As a result, the verification period must no longer be relied on to prolong the payment period artificially.

- Third, the Bill prohibits any agreement on the date of receipt of the invoice.

- Fourth, the Bill obliges the creditor to provide to the debtor any information required to establish an invoice at the latest at the moment of reception of the goods or the performance of the services.

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- Fifth, the Bill provides that, if the creditor satisfied all its contractual and legal obligations, but has not received payment on the due date, the unpaid amount will be increased automatically and without notice by interest and a lump sum indemnity of EUR 40 for the recovering costs incurred by the creditor.

The Bill will apply to contracts concluded as of the day of its entry into force, which is scheduled six months after its publication in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*).

Default Commercial Interest Rate Remains Unchanged

On 2 August 2021, the default interest rate for commercial transactions applicable during the second semester of 2021 was published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*). It will amount to 8%, remaining unchanged from the rate applied in the first semester of 2021 (*See*, this Newsletter, Volume 2021, No. 2, 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 2021, as published in the Belgian Official Journal on 12 February 2021, amounts to 1.75% (*See*, this Newsletter, Volume 2021, No. 2, p. 3).

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COMPETITION LAW

Court of Appeal of Brussels Suspends Belgian Competition Authority Decision Finding a Competition Law Infringement and Accepting Commitments

On 30 June 2021, the Markets Court (*Marktenhof / Cour des marchés*) of the Court of Appeal of Brussels (*Hof van Beroep te Brussel / Cour d'appel de Bruxelles*) suspended commitments made binding by the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - the ***BCA***) in an infringement decision.

The BCA suspected cosmetics company Caudalie of having engaged in resale price maintenance and restricted online sales. In an attempt to meet the BCA's competition concerns, Caudalie had made a conditional offer to the Chief Prosecutor in Competition Matters (the ***Chief Prosecutor***) (*Auditeur-Generaal / Auditeur général*) that it would make communications to its selective distributors that would reaffirm and clarify the application of the competition rules to their relationship. In return, Caudalie expected the case against it to be dropped. Caudalie did not hear back from the Chief Prosecutor on this subject. On 6 May 2021, the Competition College of the BCA (*Mededingingscollege/Collège de la concurrence*) accepted Caudalie's proposed commitments and made them binding. In the same decision, the BCA also imposed a fine of EUR 859,310 on Caudalie on account of resale price maintenance and the illegal restriction of online sales.

Caudalie appealed the BCA's decision to the Markets Court. It also requested that the Markets Court suspend the BCA's decision to the extent that it had made the commitments binding, pending a judgment on the merits of its appeal. Pursuant to Article 90(3) of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique* - the ***CEL***), the Markets Court can suspend a decision if (i) a company presents serious claims likely to result in an annulment of the decision; and (ii) the immediate application of the decision is likely to have severe consequences for the company concerned.

Caudalie argued that Article IV.52(1)7° CEL is the only legal basis that would allow the BCA to accept commitments. Since the BCA decided to adopt an infringement decision based on Article IV.52(1)2° CEL, and since Article IV.52(1)2° and Article IV.52(1)7° are mutually exclusive provisions, the BCA could not provide for commitments in its decision. Caudalie also contended that it had offered commitments under the condition that the BCA would terminate its investigation without finding an infringement. By including Caudalie's commitments in an infringement decision, the BCA altered Caudalie's offer. The Markets Court found both claims to be *prima facie* serious enough to justify the annulment of the BCA's decision.

The BCA's decision required that the commitments would be implemented by 6 July 2021, before the Markets Court would be able to rule on the merits of the case. Caudalie argued that implementing the commitments would jeopardise its right to an effective appeal. In particular, Caudalie was concerned that it would suffer serious and irreversible harm if the Chief Prosecutor were to require Caudalie to admit the existence of an infringement in its communications to its distributors.

The Markets Court held that implementing these commitments would have "*irreversible consequences in law*" and "*would cause any discussion on the merits to become superfluous*". The Markets Court also raised, of its own motion, Article 47 of the Charter of Fundamental Rights of the EU, which guarantees an effective judicial remedy against any regulator's decision. The Court found that suspending the commitments was necessary to prevent Caudalie from being deprived of that fundamental right.

As a result, the Markets Court suspended the application of the commitments provided for by the BCA decision, pending a ruling on the merits of Caudalie's application for annulment. A hearing on the merits of the case will take place on 3 November 2021.

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Damien Gérard Reported to Become Chief Prosecutor in Competition Matters of Belgian Competition Authority

On 21 July 2021, the Federal Council of Ministers (*Ministerraad / Conseil des Ministres*) reportedly appointed Damien Gérard as the new Chief Prosecutor in Competition Matters (the ***Chief Prosecutor***) (*Auditeur-Generaal / Auditeur général*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* - ***BCA***). Mr. Gérard is supposed to replace Véronique Thirion, the current Chief Prosecutor.

The Chief Prosecutor heads the Investigation and Prosecution Service (*Auditoraat / Auditorat*) of the BCA and takes an active role in (i) opening, leading, and settling antitrust investigations; (ii) receiving and handling mergers notified to the BCA; and (iii) ensuring the implementation of decisions handed down by the Competition College (*Mededingingscollege/Collège de la concurrence*) of the BCA and the Court of Appeal.

Damien Gérard has held several positions within the Directorate General for Competition of the European Commission, where he currently is Deputy Head of the unit responsible for mergers in transport, postal services, and other services. He is a visiting lecturer at the Université Catholique de Louvain (UCL) and at the College of Europe. Damien Gérard also clerked for Koen Lenaerts, the current President of the Court of Justice of the European Union.

The appointment of Damien Gérard as Chief Prosecutor has not yet been confirmed by official sources and it remains unknown when he will take up his new position.

Separately, Axel Desmedt is reported to be one of the contenders to succeed Jacques Steenbergen as the President of the BCA. Mr. Desmedt is currently a member of the Council of the Belgian Institute for Postal Services and Telecommunications (***BIPT***) and in charge of the telecommunications and media department and the legal and human resources departments of BIPT. He is also a visiting lecturer teaching electronic communications regulation at the Katholieke Universiteit Leuven (KUL).

European Commission Opens Infringement Proceedings Against Belgium for Failure to Transpose EU Directive Prohibiting Unfair Trading Practices in the Agri-Food Sector

On 27 July 2021, the European Commission (the ***Commission***) opened an infringement procedure against Belgium and eleven other EU Member States for failure to implement Directive (EU) 2019/633 of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (the ***UTP Directive***).

The UTP Directive seeks to protect farmers, farmer organisations and small and medium sized suppliers of agricultural and food products against unfair trading practices implemented by stronger buyers. In addition, the UTP Directive provides for the possibility for farmers and small and medium sized suppliers to lodge complaints against buyers engaging in unfair trading practices. The UTP Directive requires each EU Member State to designate a national enforcement authority to handle such complaints. The national enforcement authority should have the powers and expertise necessary to carry out investigations and to order the termination of prohibited practices.

The deadline for implementing the UTP Directive was 1 May 2021. By 27 July 2021, only 15 EU Member States had complied with their obligation. In Belgium, the Federal Council of Ministers (*Ministerraad / Conseil des Ministres*) approved on 4 June 2021 a draft bill that will implement the UTP Directive. However, the draft bill must still go through the entire legislative process before it becomes law (*See*, this Newsletter, Volume 2021, No 6, p. 7).

Member States which do not remedy their failure to transpose the UTP Directive will receive a final written notice from the Commission (a reasoned opinion), following which the Commission may decide to refer the case to the Court of Justice of the European Union.

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CONSUMER LAW

Court of Justice of European Union Holds that Newspaper Publisher or Owner Authorising Publication of Incorrect Health Advice Is Not Liable under Product Liability Directive

On 10 June 2021, the Court of Justice of the European Union (***CJEU***) held that a copy of a printed newspaper which provides inaccurate health advice which, when followed, may injure a reader of that newspaper, does not constitute a defective product within the meaning of Article 2 of Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (the ***Product Liability Directive***) (Case C-65/20, *VI v. KRONE – Verlag Gesellschaft mbH & Co KG*).

The CJEU delivered its judgment in response to a question referred for a preliminary ruling by the Austrian Supreme Court (the ***Supreme Court***). The dispute in the main proceedings pitted KRONE – Verlag Gesellschaft mbH & Co KG (***Krone***), a company established in Austria which publishes the popular tabloid newspaper Kronen Zeitung, against an Austrian citizen (***VI***). In 2016, Krone published an article authored by an expert in the field of herbal medicine on the benefits of grated horseradish poultices to alleviate rheumatic pain. This article incorrectly recommended the application of fresh coarsely grated horseradish on the affected areas for a duration of between two and five *hours*. However, the article should have indicated that the substance be left on the affected areas for a duration of only between two and five *minutes*. Having followed the printed recommendation and left the substance on her ankle area for approximately three hours, VI started experiencing acute pain due to a toxic skin reaction.

Consequently, VI initiated proceedings against Krone for EUR 4,400 in damages. VI also wanted Krone to be declared liable for any current or future harmful consequences of the advice. In first instance, the Vienna District Court for Commercial Matters considered that, because the author of the article was a recognised and widely published expert in the field of herbal medicine, Krone could not have been expected to check the accuracy of the submitted article. The Vienna District Court for Commercial Matters further found that a tabloid newspaper could not be held to the same expectations as a scientific journal. On appeal, VI's claim was rejected on procedural grounds. Finally, the dispute was submitted on points of law to the Supreme Court, which questioned the CJEU as to whether Article 2 of the Product Liability Directive, read in combination with its Articles 1 and 6, must be interpreted as meaning that a copy of a printed newspaper that, concerning paramedical matters, gives inaccurate health advice relating to the use of a plant which proved injurious to the health of a reader of that newspaper, constitutes a "defective product" within the meaning of those provisions.

The Product Liability Directive creates a strict liability regime on the part of producers for death, personal bodily injury, and the destruction of or damage to non-commercial property caused by defective products.

First, the CJEU noted that it is clear from Article 2 of the Product Liability Directive that services fall outside the scope of that Directive. However, the CJEU examined whether health advice, which constitutes a service, can cause the newspaper to be defective in nature when the advice was incorporated in a physical item such as a copy of printed newspaper. In this respect, the CJEU indicated that the defective nature of a product must be determined on the basis of its inherent characteristics, such as its presentation, use, and the time it was put into circulation. It observed that the printed newspaper was only a medium for the inaccurate advice, and that the advice was unrelated to the presentation or use of the printed newspaper.

Second, the CJEU found that the Product Liability Directive does not provide for the possibility of liability for defective products in respect of damage caused by a service, of which the product is only a medium. For this reason, the liability of service providers and the liability of manufacturers of finished products are governed by two distinct legal regimes.

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On this basis, the CJEU determined that inaccurate health advice published in a printed newspaper concerning the use of another physical item falls outside the scope of the Product Liability Directive. Accordingly, the inaccurate health advice does not make the newspaper defective or the publisher or owner of this newspaper, or even the author of the article, liable under the Product Liability Directive.

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CORPORATE LAW

Central Commercial Register Featuring Economic Indicators to Facilitate Tracing Companies in Financial Difficulties Enters Into Force

On 5 July 2021, the Royal Decree of 13 June 2021 on the central register of economic indicators in view of tracing companies in financial difficulties entered into force (*Koninklijk Besluit inzake het centraal register van economische knipperlichten met het oog op de opsporing van ondernemingen in financiële moeilijkheden / Arrêté royal relatif au registre central des clignotants économiques permettant la détection des entreprises en difficultés financières* – the ***Royal Decree***). The Royal Decree establishes the central register of economic indicators that will centralise useful indicators to assist the Chambers for Companies in Financial Difficulties of the Enterprise Courts (the ***Chambers***) in tracing companies in financial difficulties (the ***Central Register***).

The Chambers are responsible for monitoring companies in financial difficulties in order to:

- determine that the financial situation cannot be remedied, in which case the company's file will be submitted to the Public Prosecutor who can sue the company for bankruptcy; or
- encourage the company in financial difficulties to adopt the necessary measures to ensure the continuity of its business and to protect the interests of the company's creditors.

The Central Register will collect several relevant economic indicators which facilitate the Chambers' task of tracing of companies in financial difficulties, such as:

- information on outstanding debts from institutional creditors;
- the financial health indicator, as calculated by the National Bank of Belgium;
- the number of employees in the company (to allow the Chambers to assess the social consequences of the financial difficulties); and
- possible transfers of the registered office of the company (particularly in case of multiple transfers within a short timeframe).

The Central Register is accessible to the members of the competent clerk's office of the Enterprise Court, judges of the Chambers, reporting judges and public prosecutors.

The Royal Decree can be consulted in Dutch (here) and in French (here).

Start of Electronic Incorporation of Legal Entities and Registration of Representation Powers in Central Register

On 1 August 2021, the Law amending the Belgian Companies and Associations' Code and the Law of 16 March 1803 regarding the organisation of the function of public notaries and containing several provisions implementing Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law entered into force (*Wet tot wijziging van het Wetboek van vennootschappen en verenigingen en van de wet van 16 maart 1803 op het notarisambt en houdende diverse bepalingen ingevolge de omzetting van Richtlijn (EU) 2019/1151 van het Europees Parlement en de Raad van 20 juni 2019 tot wijziging van Richtlijn (EU) 2017/1132 met betrekking tot het gebruik van digitale instrumenten en processen in het kader van het vennootschapsrecht / Loi modifiant le Code des sociétés et des associations et la loi du 16 mars 1803 contenant organisation du notariat et portant des dispositions diverses à la suite de la transposition de la directive (UE) 2019/1151 du Parlement européen et du Conseil du 20 juin 2019 modifiant la directive (UE) 2017/1132 en ce qui concerne l'utilisation d'outils et de processus numériques en droit des sociétés* - the ***Law***).

The Law introduces the possibility to incorporate legal entities electronically, without the need for the physical appearance of the incorporators at the notary's office or a wet ink signature. The notary may nevertheless still

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require the incorporators to be physically present if he or she presumes identity fraud or if this is necessary to verify the legal capacity or representation powers of private individuals.

In addition, the Law introduces the obligation to register a legal entity's representation powers (as set out in the articles of association) in the Belgian Central Register of Coordinated Articles of Association (the ***Central Register***) that has recently been established. This should allow third parties to verify the representation powers of their counterpart without having to consult in detail the articles of association of a given company. The representation powers will have to be filed together with the coordinated articles of association. The obligation to file this information in the Central Register applied as of 1 August 2021 for the articles of association that were adopted or amended in a Belgian notarial deed. For existing legal entities, the representation powers should be registered in the Central Register on the occasion of the next amendment of the articles of association.

The Law can be consulted in Dutch (here) and in French (here).

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DATA PROTECTION

European Data Protection Board Publishes Draft Guidelines on Codes of Conduct for International Data Transfers

On 7 July 2021, the European Data Protection Board (***EDPB***) published draft Guidelines 04/2021 on codes of conduct as a tool to facilitate data transfers (available here - the ***Guidelines***). The guidelines aim to clarify the application of Articles 40(3) and 46(2)(e) of the General Data Protection Regulation 2016/679 (***GDPR***). These provisions allow codes of conduct to serve as "appropriate safeguards" allowing personal data to be transferred outside of the EEA. The Guidelines complement EDPB Guidelines 1/2019 on codes of conduct which discuss the general framework for adopting codes of conduct (*See*, this Newsletter, Volume 2019, No. 2, p. 9).

The GDPR requires that controllers and processors implement appropriate safeguards for transferring personal data from or to third countries or international organisations. Codes of conduct were introduced as a new transfer mechanism under the GDPR (compared to the previous Data Protection Directive) but have remained a little used tool so far. The EDPB Guidelines seek to promote the use of approved codes of conduct as a transfer mechanism.

As noted in Article 40(2) of the GDPR, associations or other bodies representing controllers or processors can adopt codes of conduct. The Guidelines note that codes intended for transfers could, for instance, be elaborated by bodies representing a sector or different industries with a common processing activity sharing the same processing characteristics and needs. For the codes of conduct to serve as an "appropriate safeguard" pursuant to Article 46 of the GDPR, they need to be approved by a competent supervisory authority in the EEA and then recognised by the European Commission as having general validity within the Union by way of an implementing act. The Guidelines include a flow chart which details the procedural steps for adopting a code of conduct intended for data transfers.

The Guidelines also provide a checklist of elements to be included in a code of conduct intended for data transfers. This checklist reflects the precepts which the Court of Justice of the European Union gave in *Data Protection Commissioner v. Facebook Ireland Limited, Maximillian Schrems (C-311/18) (Schrems II)* (*See*, this Newsletter, Volume 2020, No. 7, p. 8). The Guidelines note that the EDPB will issue additional guidance regarding the elements that form part of the checklist.

The Guidelines are open for public consultation until 1 October 2021.

Belgian Data Protection Authority Starts Public Consultation on Processing of Biometric Data

On 15 July 2021, the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* - ***DPA***) published its draft recommendation on the processing of biometric data (the ***Recommendation***) and invited stakeholders to submit their comments.

The General Data Protection Regulation 2016/679 (***GDPR***) defines biometric data as personal data that are derived from physical, physiological, or behavioural characteristics of a natural person. This includes data such as digital fingerprints or iris scans. Biometric data are increasingly being used by governments, but also private companies, to identify or authenticate data subjects.

By their very nature, these data are particularly sensitive. As a rule, their processing is prohibited under the GDPR, unless the processing can be justified based on one of the exceptions contained in Article 9(2) GDPR.

The Recommendation offers guidance on the available legal bases for the processing of biometric data and on ways to apply the general principles of proportionality, security, data storage and transparency in relation to biometric data.

The DPA also indicates that a data protection impact assessment (***DPIA***) will be required for the processing of personal data for the unique identification of data subjects located in public spaces or in private spaces that are publicly accessible. In addition, a DPIA will also be required if biometric data are used with "new technologies" prone to

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creating a high risk to the rights and freedoms of natural persons as mentioned in Article 35 of the GDPR.

In addition, the Recommendation identifies a gap in Belgian law with regard to the use of biometric data: the DPA considers that any processing of biometric data for the purposes of authentication of persons, insofar as explicit consent can be invoked and with the exception of the processing of biometric data in the framework of the eID (electronic identity card) (and the passport), currently does not have a statutory basis. The DPA therefore calls on the legislator to create such a statutory basis for the processing of biometric data and adds that it will not act against such processing during a one-year transitional period that should be used to fill the legislative gap.

Interested parties are invited to submit their views on the Recommendation by 1 September 2021. The Recommendation is available in Dutch and French.

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INSOLVENCY

Supreme Court Rules on Enforceability of General Discharge of Directors against Bankruptcy Trustee

On 18 June 2021, the Supreme Court (*Hof van Cassatie / Cour de Cassation*) considered whether the general discharge granted to directors of a company prior to the company being declared bankrupt is enforceable against that company's bankruptcy trustee (*curator / curateur*). The Supreme Court held that this is not the case when the bankruptcy trustee brings an action on behalf of all creditors of the company.

Background

The underlying dispute concerned the sale of a business by a legal publisher that later filed for bankruptcy (the ***Company***) to a company whose directors and shareholders were the same as those of the Company. A few months after that sale, the shareholders' meeting of the Company granted general discharge to its directors for the financial year in which the sale took place. Later that year, the Company was declared bankrupt.

The bankruptcy trustee claimed that the sale of the Company's business was not in the interest of the Company and brought an action to establish the directors' liability on behalf of the Company's creditors.

On 3 December 2018, the Ghent Court of Appeal held that the bankruptcy trustee could not bring such an action as the bankruptcy trustee acts on behalf of the Company and is therefore bound by the general discharge granted by the Company. The bankruptcy trustee did not agree and appealed to the Supreme Court.

Supreme Court Judgment

The Supreme Court confirmed that the general discharge is only enforceable against the Company and not against third parties. However, the Supreme Court added that the general discharge is not enforceable against the bankruptcy trustee when he or she brings an action on behalf of all creditors of the Company, as these creditors are third parties. The Supreme Court therefore annulled the judgment of the Ghent Court of Appeal and referred the case to the Brussels Court of Appeal.

In the case at hand, the bankruptcy trustee had sought to establish the directors' liability on the basis of Article 528, §1 of the old Belgian Companies' Code (the ***BCC***) and the shareholders' meeting had granted discharge pursuant to Article 554, §2 of the BCC. The judgment of the Supreme Court will nevertheless continue to be relevant under the new Belgian Companies and Associations' Code (the ***BCAC***), as these provisions were maintained in Article 2:56, §3 and Article 7:149, §2, BCAC.

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INTELLECTUAL PROPERTY

AG Saugmandsgaard Supports Protection of Partial Design and Sides with Ferrari

On 15 July 2021, Advocate General (***AG***) Saugmandsgaard delivered his opinion in case C-123/20 *Ferrari SpA v. Mansory Design & Holding GmbH, WH*. The AG suggested that Article 11(2) of Regulation 6/2002/EC (***Design Regulation***) be interpreted as meaning that individual parts of a product may be protected as unregistered community designs even when only the full product was made available to the public.

Factual Background and Procedure

Ferrari SpA (***Ferrari***) is a car manufacturer established in Italy. On 2 December 2014, Ferrari presented the new Ferrari FXX K to the public in a press release including two photographs showing the vehicle. Mansory Design & Holding GmbH (***Mansory Design***) manufactures and sells 'tuning kits' to transform the appearance of a Ferrari 488 GTB to make it resemble the Ferrari FXX K. Ferrari claimed that Mansory Design had infringed its unregistered Community design rights (***UCDR***) by selling the 'tuning kits'. Both the Regional Court of Düsseldorf and the Highest Regional Court of Düsseldorf rejected Ferrari's claims. Both German Courts considered that Ferrari did not demonstrate the minimum requirements of autonomy and consistency of form. Ferrari appealed to the German Federal Court which referred a request for a preliminary ruling to the Court of Justice of the European Union (***CJEU***).

Advocate General's Opinion

First, the AG explained that Article 11(2) of the Design Regulation must be interpreted as meaning that the making available to the public of the overall design of a product entails the making available to the public of the design of a part of that product. Individual parts of a product can thus benefit from design protection as soon as the full product is made available to the public and provided that it is clearly identifiable. The contrary situation would discourage innovation and would hinder the objectives of simplicity and rapidity. It would also amount to introducing formalities that did not exist before. Nevertheless, the AG explained that two criteria must be fulfilled for a partial design to be protected as an unregistered design:(i) the making available of a part of the product's design should be clearly identifiable; and (ii) if the design is made available through the publication of a photograph of the product, the characteristics of the design of the part relied on must be clearly visible on that photograph.

Second, the AG clarified that criteria such as 'autonomy' and 'consistency' were not required when examining the individual character of a partial design. Maintaining the opposite view would amount to introducing new criteria that were not written into the Design Regulation. Based on Article 3(a) of the Design Regulation, a design is defined by particular lines, colours, shapes, or texture that make it identifiable as such. The AG concluded that a design not meeting that definition should be declared non-existent.

The AG's opinion can be found here.

General Court Denied Access to Harmonised Standards for Copyright Reasons

On 14 July 2021, the General Court of the European Union (***GC***) held in case T-185/19, *Public.Resource.Org, Inc. and Right to Know CLG v European Commission*, that the European Commission (the ***Commission***) rightfully denied access to harmonised standards adopted by the European Committee for Standardisation (the ***CEN***) under freedom of information principles.

Factual Background and Procedure

The Commission refused to grant access to four harmonised standards adopted by the CEN because they were protected by copyright. The Commission's decision was based on the exception provided for in Article 4(2), of Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament Council and Commission documents (the ***Regulation***). Article 4(2) of the Regulation provides that "*the institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property*".

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Public.Resource.Org.Inc and Right to Know CLG (the ***Applicants***) had brought an action for annulment against the Commission's decision arguing that the Commission misapplied Article 4(2) of the Regulation, since this provision does not protect the requested harmonised standards. The Applicants argued that (i) no copyright protection of the harmonised standards is possible because they are part of EU Law; (ii) the harmonised standards lack originality and therefore do not benefit from copyright protection; and (iii) the Commission did not demonstrate the alleged undermining of the commercial interest of the standardisation organisation.

GC's decision

The GC explained that copyright remains largely governed by national law. Nonetheless, harmonised standards bear sufficient creativity to deserve copyright protection. This protection would be undermined if the content of harmonised standards was to be disclosed to the Applicants. The GC also recognised that the sale of harmonised standards is a vital part of the commercial interests of the CEN and added that freely available access to harmonised standards could hinder the creation of further standards. Finally, the GC stated that the fact that harmonised standards contain environmental information is not sufficient to demonstrate an overriding public interest justifying their disclosure.

The GC's ruling can be found here.

European Patent Office Board of Appeal Holds that Pre-clinical Data May Show Therapeutic Effect in Patent Filing

On 10 November 2020, the European Patent Office (***EPO***) Board of Appeal (***BoA***) decided in case T 0966/18 that pre-clinical data, together with common general knowledge, is deemed sufficient to demonstrate a claimed therapeutic effect.

Factual Background and Procedure

The dispute involved Patent No. 1 578 253 entitled "Prevention and treatment of synucleinopathic disease" (the ***Patent***). The invention provides improved methods and agents for treatment of diseases associated with synucleinopathic diseases (neurodegenerative diseases such as Parkinson's and dementia with Lewy body).

The Patent was revoked for insufficient disclosure by a decision of the EPO's Opposition Division pursuant Article 101 (3) (b) of the European Patent Convention (***EPC***). According to the Opposition Division, the disclosure of the invention was not sufficiently clear and complete for it to be carried out by a person skilled in the art as required by Article 83 of the EPC.

The Patent owners appealed this decision. The question before the BoA was whether the data provided in the application and the common general knowledge at the time of its filing plausibly demonstrated a therapeutic effect for synucleinopathic diseases.

BoA's Decision

The BoA considered that there was sufficient data to demonstrate that the use of -synuclein (**-SN**) antibodies could treat synucleinopathic diseases. The Patent disclosure indicated that the injected mice were divided in three groups of four depending on their antibody titer (high, low or none). Mice that received anti--SN antibodies presented a reduction in -SN aggregates. For the BoA, the reduction of the -SN aggregation is an accepted measure of therapeutic effect.

The Patent owners also submitted evidence from post-filing clinical trials, but the BoA concluded that the data provided in the application in combination with the scientific literature, was sufficient to plausibly demonstrate a therapeutic effect.

The BoA's decision can be found here.

European Commission Calls on Member States to Comply with Copyright Directive

On 26 July 2021, the European Commission (the ***Commission***) requested 21 EU Member States, including Belgium, to provide information on their implementation of Directive 2019/789 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes and Directive 2019/790 on copyright and related rights in the Digital Single Market (together 'the ***Copyright Directives***').

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The targeted Member States failed to demonstrate that they completely transposed both Copyright Directives in their national legislation. The deadline for doing so was 7 June 2021. Consequently, the Commission decided to open infringement procedures by sending letters of formal notice to these Member States pursuant to Article 258 of the Treaty on the Functioning of the European Union (***TFEU***). The targeted Member States have two months to respond. If the Member States do not provide the relevant adequate information to the Commission, it may decide to issue reasoned opinions.

The Commission's press release can be found here.

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LABOUR LAW

Court of Justice of European Union Holds that EU Employers Can Ban Headscarves at Work as Part of a Neutrality Policy

In its preliminary ruling of 15 July 2021, the Court of Justice of the European Union (the ***CJEU***) held that employers can ban employees from wearing a headscarf or any other visible form of expression of political, philosophical, or religious beliefs at work, if the employers have to project an image of neutrality to customers or seek to prevent social disputes (joined cases C-804/18 and C-341/19, *WABE* and *MH Müller Handel*). The CJEU added that such a neutrality policy must reflect a genuine need on the part of the employer and must be applied to all workers in a general and undifferentiated way.

Background

Two women employed in Germany as respectively a special needs childcare worker and a sales assistant were banned by their employers for wearing a headscarf. The employer of the first employee requested her to remove the headscarf based on its neutrality policy and, following her refusal, suspended her from work on two occasions and gave her a warning.

The second employee's employer also requested her to remove her headscarf at work considering her sales position. Following her refusal, she was first transferred to another temporary post in which she could wear the headscarf. Subsequently, she was instructed to attend work without conspicuous, large-sized signs of any political, philosophical, or religious beliefs.

The first employee brought an action seeking an order that her employer should remove the warnings in relation to the headscarf from her personnel file. The second employee brought an action seeking a declaration from her employer that the instruction not to wear a headscarf at work was invalid

Questions for Preliminary Ruling

The two courts decided to refer the following questions to the CJEU concerning the interpretation of Council Directive 2000/78/EC of 28 November 2000 establishing a general framework for equal treatment in employment and occupation:

1. Does an internal rule of an employer, prohibiting workers from wearing any visible sign of political, philosophical, or religious beliefs in the workplace, constitute, with regard to workers who observe specific clothing rules based on religious precepts, direct or indirect discrimination on the grounds of religion or belief?

2. May a difference of treatment indirectly based on religion and/or gender, arising from an internal rule of an employer prohibiting workers from wearing any visible sign of political, philosophical, or religious beliefs in the workplace, be justified by the employer's desire to pursue a policy of political, philosophical, and religious neutrality with regard to its customers or users, in order to take account of their legitimate wishes?

Assessment of CJEU

At the outset, the CJEU noted that the wearing of signs or clothing to manifest religion or belief is protected by the freedom of thought, conscience, and religion.

Furthermore, the CJEU referred to established case law which holds that an internal neutrality rule does not constitute direct discrimination provided that it covers any manifestation of such beliefs without distinction and treats all workers of the employer in the same way by requiring them, in a general and undifferentiated way, to dress neutrally and thus precludes the wearing of any signs reflecting political, philosophical, or religious beliefs. It added that this approach should not change in the light of the fact that some workers observe religious precepts requiring specific clothing to be worn. In the case at hand, the rule at issue appeared to have been applied in a general and undifferentiated way, since the employer also required an employee wearing a religious cross to remove that sign.

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The CJEU concluded that, for the first employee's case, the employer's internal neutrality rule did not constitute a form of direct discrimination on the grounds of religion or belief.

The CJEU then examined whether a difference of treatment indirectly based on religion or belief, arising from a neutrality rule, may be justified by the employer's desire to pursue a policy of political, philosophical, and religious neutrality towards its customers or users, in order to take account of their legitimate wishes. It answered that question in the affirmative based on the following considerations:

- An employer's desire to display, in relations with customers, a policy of political, philosophical, or religious neutrality may be regarded as a legitimate aim. However, the CJEU added that a mere desire is not sufficient to justify objectively a difference in treatment indirectly based on religion or belief. Such a justification will only be objective if there is a genuine need on the part of that employer to maintain a policy of neutrality. The relevant elements for identifying such a need include the rights and legitimate wishes of customers and users.

- The difference in treatment must be appropriate for the purpose of ensuring that the policy of neutrality is properly applied, which implies that such a policy should be pursued in a consistent and systematic manner.

- Lastly, the prohibition on wearing any visible sign of political, philosophical, or religious beliefs in the workplace must be limited to what is strictly necessary, having regard to the actual scale and severity of the adverse consequences which the employer is trying to avoid in adopting the prohibition.

In connection with the second employee's case, the CJEU inquired whether indirect discrimination on the grounds of religion or belief resulting from an internal rule of an employer prohibiting the wearing of visible signs of political, philosophical, or religious beliefs in the workplace, can be justified if that prohibition is limited to conspicuous, large-sized signs only. It pointed out that such a limited prohibition is liable to have a greater effect on people with religious, philosophical, or non-denominational beliefs which require the wearing of a large-sized sign, such as a head covering. Thus, if the criterion of wearing conspicuous, large-sized signs of particular beliefs is inextricably linked to one or more specific worldviews, the prohibition on wearing those signs based on that criterion will mean that some workers will be treated less favourably than others on the basis of their religion or belief, which would amount to direct discrimination. The CJEU maintained that such a distinction cannot be justified. It added that, should direct discrimination not be found to exist, a difference in treatment of that nature would constitute indirect discrimination, if it results in a particular disadvantage for individuals adhering to a particular religion or belief. It concluded that a policy of neutrality of an employer must meet a genuine need on the part of the employer, such as the prevention of social conflicts or the presentation of a neutral image of the employer towards customers, in order to justify objectively a difference in treatment indirectly based on religion or belief.

Lastly, the CJEU held that, in examining the appropriateness of a difference of treatment indirectly based on religion or belief, national, more favourable provisions protecting the freedom of religion may be considered as well.

Employers who Performed Well Allowed to Grant Corona Premium from 1 August 2021

Based on a Royal Decree of 21 July 2021 (*Koninklijk Besluit van 21 juli 2021 tot wijziging van artikel 19 quinquies 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 21 juillet 2021 modifiant l'article 19quinquies 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*) that was published in the Belgian Official Journal on 29 July 2021, employers that achieved "good financial results'" during the Covid-19 crisis are allowed to grant a so-called Corona premium to their employees between 1 August 2021 and 31 December 2021.

The Royal Decree does not define the concept of good financial results. Consequently, its interpretation will be left to the social stakeholders at industry and company levels.

The Corona premium is limited to a maximum of EUR 500 per employee and should be granted on the basis of an industry or company collective labour agreement, or an

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individual agreement for employers that do not have a trade union delegation.

In addition, the premium should be granted in the form of consumption vouchers for use in a number of defined businesses (such as the hospitality and cultural sectors) which require specific support for their economic recovery.

The premium will be exempt from personal income tax and from the employees' social security contributions. From the employer's perspective, a reduced employer's social security contribution of 16.5% will be due.

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LITIGATION

Brussels Court of Appeal Upholds Attachment Order against Kazakhstan

On 29 June 2021, the Brussels Court of Appeal (the ***Court of Appeal***) handed down a judgment in which it upheld a protective attachment order over more than USD 500 million worth of assets, owned by Kazakhstan, and held with the Brussels subsidiary of the Bank of New York Mellon (the ***BNYM***).

The case confirms the willingness of the Belgian courts to allow recourse, in the form of an attachment, against assets managed by a State's central bank and held by an independent third-party financial institution.

Background

The proceedings before the Belgian courts result from the efforts of two Moldovan investors (Anatolie and Gabriel Stati (the ***Investors***)) who seek to enforce an arbitral award handed down in their favour in 2013. The arbitral tribunal (chaired by Karl-Heinz Böckstiegel) had found Kazakhstan liable for a harassment campaign against the Investors which ultimately resulted in a violation of the Energy Charter Treaty provisions on Fair and Equitable Treatment. As a result, the arbitral tribunal had ordered Kazakhstan to pay USD 508 million to the Investors as compensation for the damage suffered.

In the absence of voluntary payment from Kazakhstan, the Investors sought a protective attachment order from the Brussels Court of First Instance in 2017 enabling them to freeze assets owned by Kazakhstan held with BNYM pending the outcome of the proceeding leading to the recognition and enforcement of their arbitral award in Belgium. The protective attachment order was obtained in *ex parte* proceedings (*i.e.*, without notice to Kazakhstan). However, upon notice of the attachment order, Kazakhstan lodged a third-party opposition *(tierce opposition / derdenverzet)* challenging the validity of the protective order. After the Brussels Court of First Instance dismissed the third-party opposition, Kazakhstan appealed that decision to the Court of Appeal.

Court of Appeal Judgment

In its judgment of 29 June 2021, the Court of Appeal dismissed Kazakhstan's appeal, considering that the protective attachment order issued in 2017 was *prima facie* meritorious. In particular, the Court of Appeal found (i) that the Investors' claim against Kazakhstan was sufficiently certain and based on the arbitral award handed down in 2013; (ii) that the protective attachment order had been issued following Kazakhstan's refusal to comply with the arbitral award for several years and that the full recovery of the damages suffered by the Investors was thus at risk; (iii) that Kazakhstan only owned limited assets in Belgium; and (iv) that courts in Luxemburg, the Netherlands and Sweden had already ordered the freezing of Kazakhstan's assets in their territories.

In addition, the Court of Appeal found that the factual circumstances of the case showed that Kazakhstan had attempted to put its assets beyond the reach of the Investors. It noted that Kazakhstan had attempted to conceal that it was the real owner of the assets held with BNYM by alleging that it was instead a separate entity (Kazakhstan's national bank) which was the owner of those assets. The Court of Appeal dismissed this argument and considered that such an allegation amounted to "simulation" and that Kazakhstan had to be regarded as the real and ultimate owner of the assets held at BNYM. The 2001 trust management agreement under which assets were held by the National Bank was "*a mere pretence to the outside world and third parties*".

Finally, the Court of Appeal rejected Kazakhstan's argument that the attached assets were subject to State immunity. In that regard, it found that the assets were invested with the aim of maximising long-term returns and were therefore intended to be used for commercial purposes. As a result, the assets did not fall within the scope of the protection of State immunity.

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Comment

The present judgment of the Court of Appeal only addresses the issue of the protective attachment order aimed at freezing Kazakhstan's assets in Belgium.

The fact that the Court of Appeal has confirmed the validity of this freezing is without prejudice to the outcome of the pending proceedings related to the recognition and enforcement of the arbitral award issued in the Investors' favour. Although the award had been recognised in Belgium, Kazakhstan is appealing the earlier recognition order and a further hearing is scheduled for October 2021.

It is only upon completion of those recognition and enforcement proceedings that the effective release of the assets (to the benefit of the Investors) will take place. There are further proceedings pending before the Brussels Court of First Instance in which Kazakhstan seeks the release of the funds held by BNYM.

European Commission Publishes Proposal for the European Union to Join the 2019 Hague Judgments Convention

On 16 July 2021, the European Commission (the ***Commission***) issued a Proposal for the European Union (the ***EU***) to accede to the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the ***Judgments Convention***). The Judgments Convention seeks to facilitate the cross-border recognition and enforcement of foreign judgments in civil and commercial matters. The Commission participated in the negotiation process of the Judgments Convention, which was adopted on 2 July 2019 at the Hague Conference on Private International Law. The Judgments Convention has been signed by Israel, Ukraine, and Uruguay, but has not yet been ratified.

In line with Article 81(2) and Article 218 of the Treaty on the Functioning of the European Union (the ***TFEU***), the EU is competent to regulate matters relating to the recognition and enforcement of foreign judgments in civil and commercial matters. In addition, pursuant to Article 3(2), TFUE, the EU has an exclusive competence to conclude international agreements if such agreements may affect common EU rules or alter their scope.

Since the Judgments Convention allows regional economic organisations to become contracting parties, the Commission made it clear that the EU, on the basis of its exclusive external competence to regulate international jurisdiction and recognition and enforcement of judgments in civil and commercial matters, will be competent for all matters covered in the Judgments Convention. As a result, the Member States will be bound by the Judgments Convention by virtue of the EU adhesion and will not be able to become contracting parties individually.

Once ratified, the Judgments Convention will facilitate the recognition and enforcement, in non-EU countries, of judgments handed down by courts in the EU Member States. Reciprocally, it will also facilitate the recognition and enforcement, in EU Member States, of judgments issued in non-EU countries. Following the EU's opposition to the United Kingdom acceding the Lugano Convention (*See*, this Newsletter, Volume 2021, No. 5, p. 12), the Judgments Convention could serve as a suitable alternative for the mutual recognition and enforcement of judgments between the EU Member States and the United Kingdom. Importantly, the recognition and enforcement in EU Member States of judgments handed down in civil and commercial matters in other EU Member States will remain governed by Regulation 1215/2012 on jurisdiction and the recognition and enforcement in civil and commercial matters (the ***Brussels Regulation (recast)***).

In its proposal, the Commission indicated that the Judgments Convention could therefore encourage EU businesses and citizens to engage in international trade and investment activities. The Commission also noted that the Judgments Convention will guarantee the preservation of EU fundamental rights and fair proceedings as it provides for a specific ground to refuse the recognition or enforcement of judgments that are incompatible with the fundamental principles of EU law.

The accession of the EU to the Judgments Convention has now to be formally decided by the Council, subject to the European Parliament's prior consent as provided for under Article 218(6) of the TFEU.

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Court of Justice of European Union Establishes Rules on Local Territorial Jurisdiction for Damages Actions

On 15 July 2021, the Court of Justice of the European Union (the ***CJEU***) handed down a judgment following a request for a preliminary ruling on the interpretation of Article 7(2) of Regulation 1215/2012 on jurisdiction and the recognition and enforcement in civil and commercial matters (the ***Brussels Regulation (recast)***) (Case C-30/20 – *RH v. Volvo*).

The question was referred to the CJEU by Madrid's Commercial Court No. 2 in proceedings initiated by RH, a company domiciled in Cordoba, against various entities of the Volvo group (***Volvo***) located in Germany, Spain and Sweden. Following the decision of the European Commission (the ***Commission***) of 19 July 2016 sanctioning 15 truck manufacturers – including three Volvo entities – for infringing Article 101 TFEU (AT.39824 – *Trucks*) (the ***Commission decision***), RH sought to obtain damages for the loss sustained as a result of allegedly paying artificially high prices when purchasing five vehicles.

Pursuant to Article 7(2) of the Brussels Regulation (recast), in matters relating to tort, a person domiciled in an EU Member State may be sued before the courts of the place where the harmful event occurred. Under the CJEU's established case law, the "place where the harmful event occurred" denotes both the place where the damage materialised and the place where the event giving rise to that damage occurred. The claimant may choose to initiate proceedings in the courts of either of these places (*see, e.g.*, *Kolassa* (C-375/13), *Universal Music International Holding* (C-12/15), *flyLAL-Lithuanian Airlines* (C-27/17) and *Tibor-Trans* (C-451/18)). In this case, the Commission decision established that the infringement of Article 101 TFEU giving rise to the alleged damage covered the entire EEA market.

The referring court expressed doubt as to whether Article 7(2) of the Brussels Regulation (recast) and the CJEU case law on the scope of this provision (*e.g., CDC Hydrogen Peroxide* (C-352-13), *flyLAL-Lithuanian Airlines* (C-27/17) and *Tibor-Trans* (C-451/18)) were intended to determine only international jurisdiction of the courts of the Member State in which the damage occurred, or also local territorial jurisdiction of the courts within that Member State.

First, the CJEU noted that Article 7(2) of the Brussels Regulation (recast) does not preclude a Member State from conferring jurisdiction for a particular type of dispute to a single specialised court with exclusive jurisdiction, irrespective of where the damage occurred, as such centralisation may be in the interest of sound administration of justice. In the absence of a specialised court, the determination of the court with jurisdiction in relation to the place where the harmful event occurred must remain consistent with the aims of proximity between the court and the action, predictability of the rules governing jurisdiction, and sound administration of justice.

Second, while previous CJEU judgments established that Article 7(2) of the Brussels Regulation (recast) determined international jurisdiction with respect to damages actions, the *RH v. Volvo* judgment refines this principle by establishing that Article 7(2) confers both international and local territorial jurisdiction on the courts of the place where the damage occurred.

In light of the above, in the absence of a specialised court, the CJEU held that Article 7(2) of the Brussels Regulation (recast) must be construed as meaning that, within the market affected by the anticompetitive conduct, the court with international and local territorial jurisdiction to hear a claim for damages allegedly incurred because of artificially high prices resulting from a cartel is either the court within whose jurisdiction the claimant purchased the goods affected by the cartel or, if the claimant purchased the goods in several places, the court within whose jurisdiction the claimant's registered office is located.

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