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| COMMERCIAL LAW

Court of Justice of European Union Clarifies Conditions Under Which Right of Commercial Agent to Commission Can Be Extinguished

On 17 May 2017, the Court of Justice of the European Union ("ECJ") ruled on a request for a preliminary ruling from the Slovak *Dunajskà Streda* District Court (the "District Court") regarding the interpretation of Council Directive 86/653/EEC of 18 December 1987 on the coordination of the laws of the Member States relating to self-employed commercial agents (the "Directive") (ECJ, 17 May 2017, Case C-48/16, *ERGO Poist'ovňa a.s. v. Alžbeta Barlíková*).

The dispute at issue related to the reimbursement of commissions of a financial agent to her principal, a company operating in the insurance sector. The contract between the principal and the financial agent stipulated that the agent would receive a commission for each insurance contract concluded. However, pursuant to the contract, any non-payment of premiums by the customer would result in a forfeiture of the commission or a proportional reduction of such commission. Certain customers stopped paying their premiums indicating that they had lost confidence in the principal because the company had treated them inappropriately. Consequently, the insurance contracts were terminated early and the financial agent's right to commission was extinguished. The financial agent claimed that the termination of the insurance contracts was the fault of the principal and therefore refused to reimburse the commissions received. The principal then brought an action against the financial agent before the District Court.

The District Court considered that the agreement between the principal and the agent qualified as a contract for commercial agency relating to the sale of insurance services. Although the Directive only applies to agency contracts for the sale or purchase of goods, the District Court found that it nonetheless had to take the provisions of the Directive into account, in particular Article 11, since the Slovak implementing provisions of the Directive seek to ensure an identical treatment of agency contracts relating to goods and those relating to services. Article 11(1) of the Directive provides that the right to commission is extinguished "*if and to the extent that it is established that the contract between the third party and the principal will not be executed, and that fact is due to a reason for which the principal is not to blame*". Article 11(2) of the Directive further states that the agent must refund any commission it has already received if the right to that commission is lost, and Article 11(3) specifies that agency contracts cannot derogate from Article 11(1) "*to the detriment of the commercial agent*".

Uncertain as to how to apply Article 11 of the Directive to the agency contract at issue, the District Court decided to stay the proceedings and to refer a number of questions to the ECJ for a preliminary ruling.

The ECJ started its analysis by assessing whether the right to commission can be extinguished only in cases of complete non-execution of the contract between the principal and the third party or also in cases of partial non-execution (*e.g.*, non-compliance with the duration envisaged by that contract). While many language versions of Article 11(1) of the Directive provide that the right to commission will be extinguished "*if and to the extent that*" the contract will not be executed, the Czech, Latvian and Slovak language versions do not contain any such wording. According to settled case-law, in case of divergences, the provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. As the legislator's intention was to ensure that commissions become due as the execution of the contract progresses, the ECJ concluded that Article 11(1) of the Directive must be interpreted as also covering cases of partial non-execution.

Second, the ECJ was asked to rule on the scope of the reimbursement requirement of Article 11(2) of the Directive in case of partial non-execution of the contract between the principal and the third party. The ECJ analysed under which circumstances a contractual clause imposing the reimbursement of part of the agent's commission constitutes a derogation "*to the detriment of the commercial agent*" for the purposes of Article 11(3) of the Directive. The ECJ held that the reimbursement is consistent with the Directive as long as (i) the obligation to refund is strictly proportionate to the extent to which the contract has not been executed; and (ii) that non-execution is not due to a reason for which the principal is to blame.

Finally, the ECJ examined whether the concept of "*a reason for which the principal is to blame*" as used in Article 11(1) of the Directive relates only to the legal reasons that led directly to the termination of the contract between the principal and the third party (in the case at hand the non-payment of the premiums by the customers) or whether that concept covers all legal and factual circumstances for which the principal is to blame and which are the cause of the non-execution of that contract (in the case at hand the allegedly inappropriate treatment of the customers by the principal). Since the Directive seeks to protect the commercial agent in his relationship with the principal and to avoid any possible abuses by the principal, the ECJ came down in favour of considering all legal and factual circumstances attributable to the principal.

Law Introducing Five-Year Limitation Period for Public Utilities Claims Published

On 24 July 2017, the Law of 6 July 2017 on the simplification, harmonisation, computerisation and modernisation of provisions of civil law and civil procedural law as well as of the notarial profession, and containing miscellaneous provisions on justice was published in the Belgian Official Journal (*Wet van 6 juli 2017 houdende vereenvoudiging, harmonisering, informatisering en modernisering van bepalingen van burgerlijk recht en van burgerlijk procesrecht alsook van het notariaat, en houdende diverse bepalingen inzake justitie/ Loi du 6 juillet 2017 portant simplification, harmonisation, informatisation et modernisation de dispositions de droit civil et de procédure civile ainsi que du notariat, et portant diverses mesures en matière de justice* – the "Law").

The Law introduces a five-year limitation period for public utilities claims (*See, this Newsletter, Volume 2017, No. 1, p. 5*). Its Article 48 adds a second paragraph to Article 2277 of the Civil Code, pursuant to which "*claims relating to the supply of goods and the provision of services through distribution channels for water, gas or electricity, or the provision of electronic communication services, broadcasting transmission services and broadcasting services through electronic communication networks, are time-barred after five years*".

It appears from the preparatory works of the Law that this new provision applies to suppliers of any public utilities, regardless of (i) the type of customer (consumers or professionals); (ii) the nature of the invoice (interim invoice or regularisation invoice); and (iii) the nature of the supply (goods or services). In addition, the new provision also applies to distribution system operators that supply gas or electricity directly to the end customer in accordance with their public service obligations. Pursuant to the general rule of Article 2257 of the Civil Code, the five-year limitation period starts running from the final due date of the invoice.

Article 48 of the Law entered into force on 3 August 2017.

Law on Electronic Identification Published

On 9 August 2017, the Law of 18 July 2017 on electronic identification (*Wet van 18 juli 2017 inzake elektronische identificatie/Loi du 18 juillet 2017 relative à l'identification électronique* – the "Law") was published in the Belgian Official Journal.

The Law (i) gives full effect to Chapter II "*Electronic identification*" of Regulation (EU) No. 910/2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (the "eIDAS Regulation"), which aims to remove existing barriers to the cross-border use of means of electronic identification used to authenticate natural and legal persons in the context of public services in EU Member States; and (ii) provides a regulatory framework for electronic identification in connection with digital public services in Belgium (*See, this Newsletter, Volume 2017, No. 6, p. 3 and No. 7, p. 3*).

The Law entered into force on 19 August 2017, with the exception of the provisions implementing the eIDAS Regulation which will enter into force on a date yet to be determined by Royal Decree.

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| COMPETITION LAW

Belgian Competition Authority Ends Investigation Against AMP

On 18 July 2017, the College of Competition Prosecutors (*Auditoraat/Auditorat*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence*) ("BCA") announced its decision to close its investigation against newspapers and magazines distributor AMP.

The investigation started in 2010 following a complaint against AMP by the non-profit organisations Buurtsuper.be, Prodipresse and Vlaamse Federatie van Persverkopers for breach of Articles IV.1 and IV.2 of the Belgian Code of Economic Law (*Wetboek van Economisch Recht/Code de droit économique*), which prohibit anticompetitive agreements and abuses of a dominant position. The complaint targeted the exclusivity clauses contained in contracts concluded by AMP with publishers of newspapers and magazines regarding the distribution of their publications to retail press outlets. The complaint also challenged the monthly fee charged by AMP to these outlets for structural costs, the increase in AMP's transportation costs, the modification of the service for "exceptional returns" (*i.e.*, returns of press products occurring before or after the standard return time), and the introduction of "Axon", a new system monitoring and financing unsold newspapers and magazines.

The BCA ultimately found no reason to continue its investigation on any of these grounds. First, the BCA considered that the commitments offered by Belgian postal company bpost when acquiring AMP, approved by the BCA on 8 November 2016, made it unnecessary to investigate the exclusivity clauses (*See, this Newsletter, Volume 2016, No. 11, p. 6*). Second, the BCA noted that, further to a judgment of the Brussels Court of Appeal of 29 May 2012 finding AMP's transportation costs abusive, AMP had reduced its transportation costs to the indexed amount considered as objectively justified by the Court (*See, this Newsletter, Volume 2012, No. 6, p. 2*). Third, the BCA found that an investigation of the claim related to the monthly fee of EUR 69.44 charged to outlets with an annual turnover below EUR 31,662.96 for their participation in AMP's structural costs would not be justified. Finally, the BCA dismissed as unfounded the claims regarding the modification of the exceptional returns service and the introduction of Axon.

As a result, the BCA decided to close its investigation also referring to its enforcement priorities and its limited resources. It is worth noting that all complainants had withdrawn their complaint, which constituted a further factor in support of the BCA's decision.

European Commission Intervenes in Belgian bpost Case to Propose Preliminary Reference to Court of Justice of European Union

On 23 August 2017, it was made public that the European Commission will request the Belgian Supreme Court (*Hof van Cassatie/Cour de cassation*) to make a request for a preliminary ruling to the Court of Justice of the European Union ("ECJ") on whether distinct fines imposed for the same facts by a postal regulatory authority and a competition authority can amount to double jeopardy contrary to the "*ne bis in idem*" principle.

This is a new and interesting development in a protracted legal battle between bpost, the Belgian incumbent postal company, and the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence*) ("BCA") concerning the impact of bpost's quantitative rebate scheme on so-called "consolidators", *i.e.*, intermediaries offering postal services such as preparing, processing and transporting mail to bpost's distribution points.

On 10 December 2012, further to a complaint filed by consolidators, the BCA imposed a fine of EUR 37.4 million on bpost for abusing its dominant position by applying a discriminatory rebate system. From January 2010 until July 2011, bpost had applied a "model per sender" rebate system, which awarded rebates to large clients on the basis of the volume of the mail or the degree of preparation of the mail for further treatment. bpost's discount applied to both senders and consolidators but was calculated on the basis of the turnover generated by each sender individually. As a result, this rebate system did not allow consolidators to aggregate all the mail they processed for different senders. In practice, a sender which provided a large volume of mailings to bpost benefited from a higher rebate than that obtained by a consolidator which handed over an equivalent volume of mail on behalf of several senders. The BCA found that this system was discriminatory (*See, this Newsletter, Volume 2012, No. 12, p. 3*).

However, in July 2011, bpost had already been given a EUR 2.3 million fine by the postal regulator, the Belgian Institute for Postal Services and Telecommunications ("BIPT"), when BIPT decided that this rebate system was incompatible with postal regulations. The BCA reduced the amount of its own fine to take into account the prior fine imposed by BIPT.

bpost appealed both decisions to the Brussels Court of Appeal. As regards the BIPT decision, the Court of Appeal requested the ECJ to issue a preliminary ruling on the case. In a judgment of 11 February 2015, the ECJ held that bpost's quantity discount scheme did not discriminate against consolidators. The difference in treatment between senders and consolidators would constitute a form of discrimination prohibited by Article 12 of Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service only if (i) senders and consolidators were in comparable situations on the postal distribution market; and (ii) there was no objective justification for the difference in treatment. The ECJ found that senders and consolidators were not in comparable situations, since quantity discounts aim to increase the volume of mail handled by bpost in order to achieve economies of scale, which consolidators cannot do since they only consolidate mail, rather than sending it, and thus have no impact on actual volumes sent (*See, this Newsletter, Volume 2015, No. 2, p. 3*). Following this preliminary ruling, the Brussels Court of Appeal annulled BIPT's decision on 10 March 2016.

Subsequently, the Brussels Court of Appeal also annulled the decision of the BCA, but for an entirely different reason: the Court of Appeal found that the decision infringed the "ne bis in idem" principle, pursuant to which one cannot be tried or punished for an infringement for which it has already been convicted or acquitted. The Court found that the BCA infringed this principle as BIPT had already fined bpost for the same rebate scheme. Although BIPT had based its reasoning on a different legal ground (the postal regulation and not competition law), the Court of Appeal found that the three conditions for the application of the "ne bis in idem" principle were satisfied: (i) both the BIPT's and the BCA's fines were of a criminal nature; (ii) both proceedings concerned the same facts (the rebate scheme); and (iii) the judgment of the Court of Appeal of 10 March 2016 had made the BIPT decision final. As a result, the Brussels Court of Appeal annulled the BCA's decision (*See, this Newsletter, Volume 2016, No. 12, p. 5*).

The BCA filed a further appeal against this latter judgment before the Belgian Supreme Court (appeal limited to points of law only). The BCA argued that the Brussels Court of Appeal did not properly assess whether the BCA's fine amounted to a breach of the "*ne bis in idem*" principle. It is in the context of these ongoing proceedings before the Supreme Court that the European Commission intends to request the Court to refer the case to the ECJ for a preliminary ruling, which would lead the highest European Court to review this case for the second time.

The impact of this preliminary ruling is expected to be significant as it will help shape the relationship between decisions adopted by antitrust authorities and regulatory bodies across the European Union.

Belgian Competition Authority Publishes Decision Clearing Acquisition of Coditel by Telenet

In July 2017, the Belgian Competition Authority (*Belgische Mededingingsautoriteit/ Autorité belge de la Concurrence*) ("BCA") published its decision of 12 June 2017 authorising cable operator Telenet to acquire Coditel (operating under the commercial name SFR) subject to conditions.

Telenet is a Belgian cable operator which is part of telecommunications group Liberty Global. It runs a cable network covering Flanders, part of Brussels and one municipality in Wallonia. Telenet also owns a mobile network, which it acquired in 2015. Coditel, which belonged to the Altice telecommunications group, owns and operates a cable network covering several municipalities in Brussels and Wallonia.

The BCA found that the transaction did not significantly affect any retail market for telecommunication services, except for the wholesale market for access to television services. In order to obtain the clearance of the transaction, Telenet offered commitments aiming at ensuring that mobile communications operator Orange Belgium would be able to access Coditel's network.

In particular, Telenet committed to offer Orange Belgium access to Coditel's network within four months following the completion of the transaction, at the same tariff as the tariff imposed on Telenet by telecommunications regulators on 19 February 2016 for wholesale access to its own network. This regulated wholesale access would enable Orange

Belgium to offer competing fixed telecommunications services using Telenet's cable network.

Although the Belgian Institute for Postal Services and Telecommunications ("BIPT") pointed out that the mere fact that Telenet will acquire Coditel entails that the regulatory obligations imposed on Telenet's wholesale tariffs would also apply to the newly acquired cable network, the BCA found it necessary to include Telenet's commitment as a condition to approve the acquisition. The BCA noted that BIPT emphasised the importance of the level of wholesale tariffs on Orange Belgium's ability to access Coditel's network and emerge as a competing force in the region covered by this network.

The commitments made binding by the BCA also include the completion by Telenet of an operational IT interface applicable to Coditel's network and a prohibition for Telenet to offer new quadruple play services in the region covered by Coditel's network for an undisclosed period of time in order to prevent Telenet from gaining a competitive edge over Orange Belgium before the latter can access Coditel's network.

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| CONSUMER LAW

European Commission Publishes 2017 Consumer Conditions Scoreboard

On 25 July 2017, the European Commission (the "Commission") published its 2017 edition of the Consumer Conditions Scoreboard (*Consumer Conditions Scoreboard: Consumers at home in the Single Market – 2017 Edition*) (the "Scoreboard"). The annual report surveys how the Single Market operates for EU consumers. This particular issue focuses on (i) e-commerce; (ii) awareness of consumer rights; and (iii) handling of consumer complaints.

The key findings of the Scoreboard are as follows:

- The level of online shopping, and in particular cross-border online shopping, has dramatically increased in the last decade (from 29.7% in 2007 to 55% in 2017). Since the last Scoreboard (*See, this Newsletter, Volume 2015, No. 9, p. 9*) consumers' trust levels increased by 12% for purchases from retailers in the same country and by 21% for purchases from retailers in other EU Member States. Conversely, retailers remain hesitant to expand their online presence. Only 4 out of 10 retailers that are currently selling online are considering selling both domestically and cross-border in the coming year. Their chief concerns are (i) the high risk of fraud; (ii) non-payment in cross-border sales; and (iii) differing national tax regulations, contract law and consumer protection rules. Additionally, retailers continue to face payment and delivery issues in specific countries. Belgium, for example, is one of the countries with the highest levels of delivery problems (55.5%).

  The Commission has proposed modern digital contract rules in an effort to harmonise contract rules for the online sale of goods. It also seeks to promote access to digital content and online sales across the EU through these rules (*See, this Newsletter, Volume 2015, No. 12, p. 9*).

- Consumers are also increasingly aware of their rights. The average number of aware consumers increased from 9.4% in 2014 to 13% in 2017. Conversely, the Scoreboard finds that retailers have insufficient knowledge in this area (when they were asked questions on basic consumer rights, only 53.5% of the answers were correct) and this has not improved since the last edition of the Scoreboard.

  The level of awareness on the part of both consumers and retailers is uneven across the EU: generally higher figures are recorded in Northern and Western Europe than in Southern and Eastern Europe. For example, retailers in Belgium, being in the former category, are among those that have the highest average knowledge of consumer rights in the EU (59.8% - the third highest figure in the EU).

  The Commission proposed updating the consumer rules in order to ensure all European consumers are aware of their rights and that these rights are correctly enforced throughout the EU (See, this Newsletter, Volume 2017, No. 5, p. 9).

- Finally, regarding the handling of complaints, not only do consumers have reduced reasons to complain, but those that do complain are generally satisfied with the manner in which their complaints are handled. Northern and Western EU Member States generally score higher on the problems and complaints indicator (which focuses on domestic purchases) with Belgium, for example, scoring 91.7% (the third highest figure in the EU).

  Still, the Scoreboard also noted that approximately one-third of all consumers preferred not to complain on the basis that they thought the sums in question were too small (34.6% of consumers) or the procedure would take too long (32.5% of consumers).

  In an effort to remedy this, the Commission improved the Small Claims procedure in July 2017. This procedure provides consumers with a fast-track online procedure for claims of up to EUR 5,000. Additionally, the Commission is encouraging out-of-court settlements using its Online Dispute Resolution ("ODR") platform. This provides easy online access to alternative dispute entities for online transactions.

- The Consumer Conditions Index ("CCI") represents a global picture based on all the different components of the Scoreboard. When compared with the 2014 results, the overall consumer conditions in countries such as France, Ireland, Portugal, Slovenia and the United Kingdom have improved, while in countries such as Belgium, Denmark, Estonia, Finland, Iceland, the Netherlands, Norway and Slovakia they have worsened. However, the EU as a whole shows a clear overall improvement (+2.9 points).

The Scoreboard is available **here**.

Court of Justice of European Union Clarifies Scope of Unfair Commercial Practices Directive

On 20 July 2017, the Court of Justice of the European Union (the "ECJ") held that services of debt collection agencies fall within the scope of Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the "Directive") (ECJ, 20 July 2017, Case C-357/16, *UAB 'Gelvora' v. Valstybinė vartotojų teisių apsaugos tarnyba*).

The ECJ delivered its judgment in response to a request for a preliminary ruling from the Supreme Administrative Court of Lithuania in a dispute pitting Gelvora, a private debt collection agency, against the Lithuanian Consumer Rights Protection Authority (the "Authority"). Four consumers lodged a complaint with the Authority after Gelvora had launched proceedings for the recovery of debts under consumer credit agreements concluded between the consumers at issue and a number of banks. The Authority found that Gelvora had infringed the Lithuanian implementing provisions of the Directive. After this decision had been upheld by the Regional Administrative Court, Gelvora lodged an appeal against that decision with the Supreme Administrative Court which, in turn, decided to stay the proceedings and seek guidance from the ECJ on the scope of the Directive.

Article 2(d) of the Directive defines the term "*business-to-consumer commercial practices*" as "*any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers*". The term "*product*" includes "*any goods or services including immovable property, rights and obligations*" (See, Article 2(c) of the Directive). Furthermore, pursuant to its Article 3, read in conjunction with Recital 13, the Directive applies to unfair business-to-consumer practices in which a company engages, even outside of any contractual relationship, either before or after the conclusion of a contract, or following the conclusion of a contract or during the performance thereof.

At the outset, the ECJ found that debt recovery activities, such as those performed by Gelvora, qualify as a "*product*" within the meaning of Article 2(c) of the Directive. In this regard, it noted that the words "*directly connected with the sale of a product*" in Article 2(d) of the Directive cover any measure taken in relation not only to the conclusion of a contract but also to its performance, and in particular the measures taken in order to obtain payment for the product.

The ECJ then considered that the activities in which debt collection agencies engage qualify as "*commercial practices*", which may be unfair as the measures which debt collection agencies adopt are liable to influence the consumer's decision in respect of the payment of the product. In this regard, the ECJ noted that if the application of the Directive were excluded in respect of credit repayment transactions in the event of the assignment of a debt, that could jeopardise the effectiveness of the protection afforded to consumers by that Directive, since professionals could be tempted to separate the recovery phase, in order not to be subject to the protective provisions of that Directive. The fact that, in the case at hand, (i) the obligation to pay the debt was confirmed by a court decision which had been passed on to a bailiff for enforcement; and (ii) Gelvora undertook other unilateral recovery measures in parallel to those enforcement proceedings, was considered irrelevant by the ECJ.

In view of this ruling, the number of consumer complaints for aggressive or otherwise unfair practices by debt collection agencies is likely to increase.

Commission Issues Notice on Market Surveillance of Products Sold Online

On 1 August 2017, the European Commission (the "Commission") published a Notice on the market surveillance of products sold online (the "Notice"). The Notice aims to assist national market surveillance authorities in better controlling

products sold online, as they are shipped directly to the purchasers' doors, circumventing the authorities' traditional control mechanisms.

The level of online shopping, and in particular cross-border online shopping, has significantly increased in the last decade (from 29.7% in 2007 to 55% in 2017), as recorded by the Commission's 2017 edition of the Consumer Conditions Scoreboard (*See, this Newsletter, Volume 2017, No. 8*). The Commission observed that the development of e-commerce poses challenges as well, in particular in relation to the protection of the health and safety of consumers from products that do not comply with the requirements set out in EU product legislation.

The Notice attempts to tackle this issue by detailing EU legislation applicable to products sold online if they are destined for the EU market, even if the producer is based outside the EU. In this regard, the two main legislative acts are (i) Directive 95/2001/EC of 3 December 2001 on general product safety; and (ii) Regulation (EC) 765/2008 of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products. The former ensures that all non-food consumer products placed on the EU market are safe, while the latter seeks to ensure a high level of protection of public health and safety in general, health and safety of users in the workplace, the environment, etc.

The Notice also offers examples of good practices for market surveillance of products sold online. Moreover, it details the responsibility of all actors in the supply chain, including fulfilment service providers who receive the order and package and send the product.

Lastly, the Notice seeks to raise awareness among consumers and businesses about the safety and compliance of products sold online. To this end, it provides best practice guidelines to EU Member State authorities.

The Notice is available **here**.

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| CORPORATE LAW

Creation of Belgian Ultimate Beneficial Owner Register Pursuant to New Anti-Money Laundering Law

On 20 July 2017, the Chamber of Representatives of the Federal Parliament (*Kamer van volksvertegenwoordigers/ Chambre des Représentants*) adopted the new law on the prevention of money laundering, terrorism financing and the limitation of the use of cash (*Wet tot voorkoming van het witwassen van geld en de financiering van terrorisme en tot beperking van het gebruik van contanten/Loi relative à la prévention du blanchiment de capitaux et du financement du terrorisme et à la limitation de l'utilisation des espèces* - the "Law"). The Law implements the fourth anti-money laundering Directive 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the "Directive") and replaces the current Law of 11 January 1993 on preventing use of the financial system for purposes of money laundering and terrorism financing (*See, this Newsletter, Volume 2017, No. 4, p. 8*).

One of the main novelties of the Law is the creation of a Belgian central register storing information on the identity of the ultimate beneficial owner ("UBO") of specific companies, trusts, non-profit organisations, foundations and other legal entities (the "UBO-Register" (*Register van uiteindelijk begunstigden/Registre des bénéficiaires effectifs*)).

The Directive contains a rather broad definition of UBO. In principle, the UBO of a corporate entity is defined as the natural person who ultimately owns or controls this legal entity through direct or indirect ownership of a sufficient number of shares, voting rights or ownership interest in this entity. A shareholding of 25 % plus one share or an ownership interest of more than 25 % will be an indication of direct ownership. However, in case an UBO cannot be identified or if there is any doubt, the natural person(s) who hold(s) the position of senior management of the entity may be considered to be the UBO of that entity.

The purpose of the UBO-Register is to make available satisfactory, accurate and up to date information on the identity of the UBO, such as the name, birth date, nationality and country of residence of the UBO, as well as the nature and the extent of the interest held by the UBO. The obligation to register such information in the UBO-Register will apply to all companies, trusts, non-profit organisations, foundations and other legal entities that have been incorporated in Belgium.

Pursuant to the Directive, access to the UBO-Register should be granted to (i) specific public authorities, such as tax administrations and financial intelligence units; (ii) entities that are legally required to perform a customer due diligence, such as financial institutions, notaries and lawyers; and (iii) other persons or organisations demonstrating a legitimate interest.

While access to the UBO-Register should only be granted for the purpose of preventing money-laundering, financing of terrorism and limitation of the use of cash, it is also expected that access to the UBO-Register for the persons and entities referred to under (ii) and (iii) above will be more restricted in order to limit the risk of fraud, kidnapping, blackmail or intimidation.

A Royal Decree will establish more detailed provisions on the access to the Belgian UBO-Register, the collection, use and protection of the information contained in it, and the daily management and functioning of the UBO-Register.

The Law can be found **here** and will enter into force ten days after its publication in the Belgian Official Journal.

New Law on Disclosure of Non-Financial and Diversity Information

On 11 September 2017, the Law concerning the disclosure by specific large companies and groups of non-financial information and information related to diversity was published in the Belgian Official Journal (*Wet betreffende de bekendmaking van niet-financiële informatie en informatie inzake diversiteit door bepaalde grote vennootschappen en groepen/Loi relative à la publication d'informations non financières et d'informations relatives à la diversité par certaines grandes sociétés et certains groupes* - the "Law"). The Law implements Directive 2014/95/EU of 22 October 2014 as regards disclosure of non-financial and diversity information by certain large undertakings and groups, and amends to that effect the Belgian Companies' Code.

Disclosure of Non-Financial Information

The Law provides that disclosure of non-financial information should at least cover (i) environmental matters; (ii) social and employee-related matters; and (iii) respect for human rights, anti-corruption and bribery matters, in so far as necessary to understand the development, the results and the position of the company, as well as the potential impact of the companies' operations on these matters.

This information must be disclosed in a non-financial statement in the annual report of the company. For each of these matters, the statement should give a fair and comprehensive description of (i) the operations of the company; (ii) the policies adopted by the company in relation to these matters, including the company's due diligence processes and their outcome; (iii) the main risks related to these matters; and (iv) the relevant non-financial essential performance indicators.

This obligation applies to companies, which (i) are of public interest (i.e. listed companies, credit institutions, insurance companies and liquidation institutions); (ii) have on their balance sheet date an average number of employees of more than 500; and (iii) either have a balance sheet total of EUR 17 million or a net turnover of EUR 34 million. Unless the company is a parent company, this last condition must be assessed on an individual basis. Furthermore, the obligation to disclose non-financial information applies to parent companies of large groups, which (i) are of public interest; and (ii) have on their balance sheet date an average number of employees of more than 500.

Companies that fall within the scope of the Law are not required to adopt a policy for each of these matters. However, in the absence of any given policy, the company must offer a clear and reasoned explanation of that decision in its annual report.

Disclosure of Diversity Information

Listed companies must disclose their diversity policies that apply to the members of the board of directors and the management committee, the daily managers and the *de facto* directors. Furthermore, listed companies must also provide a description of the objectives, the implementation method and the outcome of the adopted diversity policies.

This information should be included in the company's corporate governance statement which forms part of its annual report. While a company is not required to adopt a diversity policy, it should explain in its corporate governance statement why no such policy exists.

The Law can be found **here** but its entry into force has not yet been determined.

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| DATA PROTECTION

Court of Justice of European Union Declares Passenger Name Record Agreement With Canada Incompatible with Fundamental EU Rights

On 26 July 2017, the Court of Justice of the European Union (the "ECJ") handed down its opinion regarding the envisaged agreement between the European Union and Canada on the transfer of Passenger Name Record Data ("PNR Data") (Opinion 1/15). On 8 September 2016, Advocate General Paolo Mengozzi had issued an opinion in which he questioned the validity of the agreement (*See, this Newsletter 2016, No. 9, p. 12-13*).

In 2014, the European Union and Canada signed an agreement on the transfer and processing of PNR Data (the "Agreement"). Before approving the Agreement, the European Parliament requested the ECJ to determine the compatibility of the Agreement with fundamental EU rights, including the provisions related to respect for private life and the protection of personal data. It is the first time that the ECJ had to issue an opinion on the compatibility of a draft international agreement with the EU Charter of Fundamental Rights.

The ECJ observed that the Agreement permits the systematic and continuous transfer of PNR Data to a Canadian authority of all air passengers flying between the EU and Canada. Furthermore, the ECJ noted that PNR Data, taken as a whole, may disclose several types of information, such as information on the financial situation of air passengers, as well as their complete travel itinerary and their relationships with other individuals, but also more sensitive types of data, such as dietary habits or their state of health. Accordingly, the ECJ held that the transfer of PNR Data interferes with the fundamental right to respect for private life, as well as the right to the protection of personal data. The ECJ examined whether such interferences could be justified.

The ECJ found that the processing of PNR Data under the Agreement is not based on the consent of air passengers. According to the ECJ, the transfer of the PNR Data serves an objective of general interest, namely the protection of public security and the fight against terrorist offences and serious transnational crime. The ECJ held that even though the transfer of the PNR Data to Canada is appropriate to ensure that the objective is achieved, several provisions go beyond what is strictly necessary. In the ECJ's view, the agreement cannot therefore be concluded in its current form and several changes are necessary.

According to the ECJ, clear and precise rules should govern the transfer of the PNR Data. In that regard, the ECJ found the Agreement lacking as it fails to define PNR Data in a clear and precise manner. The ECJ also considered that the Agreement should provide for additional safeguards and guarantees regarding (i) the rights of the data subjects; (ii) the reliability and non-discrimination of the data used; (iii) the databases to which the Agreement relates; and (iv) the third parties to whom the PNR Data may be disclosed. Finally, the ECJ pointed out that the Agreement did not provide a sufficiently clear justification for the transfer of sensitive information. As a result, it held that the Agreement is incompatible with the fundamental rights of the EU.

Accordingly, since the interferences which the Agreement entails are not all limited to what is strictly necessary and are therefore not entirely justified, the ECJ concluded that the Agreement cannot be entered into in its current form.

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| FINANCIAL LAW

Belgium Completes Implementation of New European Market Abuse Regime

The Law of 31 July 2017 amending the Law of 2 August 2002 on the supervision of the financial sector and on financial services (the "Law of 2 August 2002") was published in the Belgian Official Journal on 11 August 2017 (*Wet van 31 juli 2017 tot wijziging van de wet van 2 augustus 2002 betreffende het toezicht op de financiële sector en de financiële diensten/Loi du 31 juillet 2017 modifiant la loi du 2 août 2002 relative à la surveillance du secteur financier et aux services financiers* - the "Law").

The main purpose of the Law is to implement into Belgian law remaining provisions of (i) Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse (the "Market Abuse Directive") that had not yet been transposed in Belgian law by means of the Law of 27 June 2016; and (ii) Commission Implementing Directive 2015/2392 of 17 December 2015 on Regulation 596/2014 as regards reporting to competent authorities of actual or potential infringements of that Regulation (the "Notification Directive").

In particular, the Law (i) introduces a whistle-blowing scheme, in accordance with the Notification Directive; (ii) amends the previous criminal regime applicable to market abuses; (iii) implements and fine-tunes specific powers of investigation of the Financial Services and Markets Authority ("FSMA") and other measures it may take in case of an infringement of Regulation 596/2014 of 16 April 2014 on market abuse (the "Market Abuse Regulation").

Whistle-blowing Scheme

1. General Principles

The Law introduces a whistle-blowing scheme for notifications of possible or actual infringements of market abuse provisions and other offences that fall under the supervisory powers of the FSMA.

Pursuant to this new whistle-blowing regime, whistle-blowers will be protected against civil, criminal or disciplinary sanctions if their notifications were made in good faith. In addition, whistle-blowers will not be deemed to have violated confidentiality obligations and may therefore not be held liable in this regard. FSMA will also keep the identity of whistle-blowers confidential. This regime of protection only applies to notifications made to FSMA and will not apply to notifications made to other parties (*e.g.*, press).

2. Additional Protection for Employee-Whistle-blowers

The Law grants additional protection against retaliation, discrimination and other kinds of unfair treatment of employees who notify, in good faith, violations of market abuse provisions within the workplace.

If any sort of unfair treatment occurs following whistle-blowing, the burden of proof will lie with the employer, who will have to demonstrate that any treatment considered as unfair is not the result of whistle-blowing. Under specific circumstances (*e.g.*, in case of dismissal), employee whistle-blowers will also be entitled to claim damages or request reinstatement in their function, while the person accused of a violation of market abuse provisions may only claim damages because of a loss actually suffered (notwithstanding any sanctions for committing the offense). Additional incentives may be granted to whistle-blowers by Royal Decree.

3. Internal Notification Procedures for Whistle-blowers

All institutions with an inscription with or licenced by FSMA or the Belgian National Bank will have to put appropriate internal procedures in place to implement this new whistle-blowing scheme.

Criminal and Administrative Sanctions

1. Criminal Sanctions

The Law introduces key modifications to the criminal sanction regime previously in force under the Law of 2 August 2002.

- The Law broadens the scope of application of the market abuse regime as to persons, places and conduct, in line with the Market Abuse Directive and the Market Abuse Regulation. As a result, each legal entity

and individual involved in the violation of market abuse provisions may be penalised. Furthermore, the general jurisdiction rules applicable to national criminal offenses will apply to market abuse situations. Finally, the Law goes beyond the minimum standards set by the Market Abuse Directive by also criminally sanctioning an attempt to commit any type of market abuse.

- The substantive scope of "**insider trading**" is broadened to include (i) the prohibition to cancel or amend an order on the basis of insider information or to advise another person to do so; and (ii) the prohibition of the use and transfer of recommendations or incentives to buy or sell financial instruments in case one knows or should have known that the recommendation or incentive is based on insider information. However, market surveys that are conducted in line with the Market Abuse Directive fall outside the scope of insider trading.

- "**Market manipulation**" no longer requires the use of fraudulent means. A mere intent suffices (algemeen opzet/dol général). Also, the definition of market manipulation does not only apply to transactions or the placing of an order, but also to any other activity or behaviour resulting in the manipulation of the market. However, the Law contains exceptions that apply to actions in line with market practices.

- The maximum **term of imprisonment** for violations of applicable market abuse provisions has been increased from two to four years in case of market manipulation, from one to four years in case of insider dealing, and from one to two years in case of violation of the prohibition of unlawful disclosure of information. In addition, the perpetrator may be sentenced to pay a criminal fine amounting to maximum the triple of the proceeds gained as a result of the violation.

2. Administrative Sanctions

In addition to criminal sanctions, administrative sanctions may also be imposed. However, the *non bis in idem* principle has to be respected if both criminal and administrative sanctions apply.

Powers of FSMA

Under the previous regime, FSMA was entitled to seize financial assets temporarily, unless such assets were located in a private residence. The Law now provides that the auditor of FSMA is entitled to request the investigating judge to conduct a search of the premises (including private residences) and seize IT systems, documents, data and valuables that may contribute to revealing the truth regarding an alleged market abuse.

Furthermore, while the automatic prohibition on the exercise of professional activity was abolished, FSMA may impose a temporary prohibition.

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INSOLVENCY

Court of Justice of European Union Confirms Enforceability of Choice of Law Provisions in Insolvency Context

On 8 June 2017, the Court of Justice of the European Union (the "ECJ") confirmed that a party to an agreement entered into with an insolvent company may, subject to specific conditions, rely on the fact that the agreement was submitted to the law of another Member State to escape the voidability of the agreement pursuant to otherwise applicable insolvency law, even if there is no clear link between the chosen law and the agreement itself or the parties (Case C-54/16, *Vinyls Italia v. Mediterranea di Navigazione*, judgment of 8 June 2017).

This ruling constitutes a concrete application of Article 13 of Regulation 1346/2000 of 29 May 2000 on insolvency proceedings (the "Regulation") (which is largely replicated in Article 17 of Regulation 2015/848 of 20 May 2015 on insolvency proceedings (recast) – the "New Insolvency Regulation"). This provision contains an exception to the general principle that the law of the country where the insolvency proceedings have been opened governs the question of the voidability and unenforceability of legal acts against the insolvency estate. In accordance with Article 13 of the Regulation, this general principle does not apply if it is proven that the legal act is subject to the law of another Member State that does not allow any means of challenging it.

In the case at hand, two Italian companies, Vinyls Italia and Mediterranea di Navigazione ("Mediterranea"), had entered into a ship charter contract, subject to English law. After making several payments to Mediterranea, Vinyls Italia eventually entered into an insolvency procedure in Italy and was subsequently put into liquidation.

In the aftermath of this liquidation, the liquidator claimed that since (i) it was well-known that Vinyls Italia was insolvent; and (ii) the payments to Mediterranea had been made after the contractual deadlines had expired, the payments could be set aside for the benefit of the insolvency estate pursuant to Italian law. Conversely, Mediterranea contended that the agreement was subject to English law which did not provide for similar means to challenge the payments. The dispute was brought before the competent Italian court, which requested a preliminary ruling from the ECJ on a range of issues, including the question whether parties could rely on the law of a foreign Member State governing their agreement (in this case, English law), despite all elements relevant to the situation being situated in and governed by the law of another Member State (in this case, Italian law).

The ECJ confirmed that such a situation does not preclude the application of Article 13 of the Regulation. However, the ECJ tempered the potentially far-reaching consequences of its judgment by stressing that a party cannot rely on Article 13 (under the New Insolvency Regulation, Article 17) if the choice of law was inspired by abusive or fraudulent ends. Nevertheless, the ECJ added that the mere fact that the parties submit their agreement to a law different from that of the Member State where they are located does not automatically point to such abusive or fraudulent intent.

The ECJ had already mitigated the impact of Article 13 of the Regulation in a previous case (Case C-310/14, *Nike European Operations Netherlands BV v Sportland Oy*, EU:C:2015:690) by specifying that the party invoking a choice of law clause bears the burden of proof of demonstrating that the law normally applicable to the agreement effectively does not allow a challenge of the act in the specific case at hand.

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| INTELLECTUAL PROPERTY

Signs "Au Château Magique" and "Laser Magique" Are Descriptive and Are Denied Trade Mark Protection

On 30 June 2017, the Brussels Court of Appeal (*Hof van Beroep/Cour d'appel*) (the "Court") confirmed two decisions of the Benelux Office for Intellectual Property (the "BOIP") refusing to grant trade marks to the signs "Au Château Magique" and "Laser Magique" on the grounds that they are descriptive.

On 18 December 2015, Château Magique SPRL had filed applications for registration of the two above signs, with respect to the following products and services: rides and theme park attractions, amusement park services and lasers for non-medical use. In decisions of 2 and 22 August 2016, the BOIP refused registration on the ground that these signs were descriptive within the meaning of Article 2.11.1 of the Benelux Convention on Intellectual Property (the "BCIP"). Château Magique appealed these decisions to the Court on 3 October 2016.

The Court first recalled that the refusal to register descriptive trade marks served an objective of general interest, namely to ensure that signs that are descriptive of one or more characteristics of a product or service can be freely used by all economic operators offering the same products or services.

The Court then went on to state that, as regards the sign "Au Château Magique", the word "Château" specifically referred to a well-known and specific type of building. It also found that the adjective "Magique" was commonly used in the sector of amusement parks and encompassed numerous qualities. According to the Court, the sign "Au Château Magique", as a whole, is perceived by the relevant public as designating a seigniorial or royal building whose effects are extraordinary or come out of reality and, hence, is descriptive.

The reasoning of the Court regarding the sign "Laser Magique", was fairly similar. In particular, the Court underlined that the word "Magique" provided a laudatory indication of the product's quality, *i.e.*, that it had extraordinary effects. Therefore, the Court held that, taken as a whole, the sign "Laser Magique" was descriptive of a product intended to intensify rays of light in an extraordinary way.

In both cases, the Court also emphasised that the term "Magique" was commonly used in the sector concerned (*i.e.*, amusement parks) and that it was therefore in the general interest to ensure that this sign could be freely used by all.

Brussels Commercial Court Clarifies Start of Period of Acquiescence and Finds Trade Mark Infringement

On 31 July 2017, the Commercial Court of Brussels (*Rechtbank van Koophandel/Tribunal de Commerce*) (the "Court") handed down a judgment in relation to the alleged acquiescence by a trade mark holder in the use of its trade marks by a third party.

Merck Sharp & Dohme ("Merck") had brought actions against MSD Europe ("MSD") for the infringement of its Benelux and EU trade marks. MSD argued that its use, in its business name and domain name, of several trade marks similar and identical to the registered trade marks of Merck did not infringe the latter's trade marks as Merck had acquiesced in the use of its trade marks by MSD. MSD relied on Article 54 of the European Union Trademark Regulation (Regulation (EU) 2015/2424, the "EUTMR") and Article 2.24 of the Benelux Convention on Intellectual Property (the "BCIP") in that respect. Both provisions state that the holder of a trade mark who has acquiesced for five successive years in the use of a later trade mark, while being aware of that use, can no longer apply for a declaration that the later trade mark is invalid, unless the registration of the later trade mark was applied for in bad faith.

Assessing MSD's position, the Court first pointed out that MSD did not prove that Merck had acquiesced in the use of its registered trade marks. Indeed, although Merck knew that MSD was using signs similar to its trade marks, it was unaware that these signs had been registered by MSD as trade marks. The Court noted in that regard that the period of acquiescence only starts as from the moment the trade mark holder is aware of the use of a registered similar or

identical later trade mark. The mere acknowledgment of the use of a sign before the registration of the later trade mark is not relevant.

Second, the Court held that the opposition of Merck in 2008 against the registration by MSD of the trade mark in question concerning goods in trade mark class 10 clearly indicated that there was no acquiescence by Merck to such registration.

Lastly, the Court held that the alleged infringer bears the burden of proof in establishing the acknowledgement of the trade mark holder in a possible infringing use of its trade mark.

The Court concluded that MSD's use of Merck's trade mark infringed Merck's rights pursuant to Article 2.20.1.c) BCIP and Article 9.2.c) EUTMR.

Blogging Activities Are No Trade Mark Infringement If For Leisure Only

On 18 August 2017, the Brussels Commercial Court (*Rechtbank van Koophandel/Tribunal de Commerce*) (the "Court") ruled on an infringement claim brought by Mr. Gallop ("Gallop") against Mr. Van Waetermeulen ("Van Waetermeulen"). The former is the owner and editor of the Facebook page "Belgian Foodie" and of the corresponding domain name and trade mark dedicated to culinary publications and recipes, while the latter is engaged in the same type of activities via his own website and Facebook page.

Gallop argued that, by making use of the domain name "thebelgianfoodie.com", Van Waetermeulen had infringed his trade name and trade mark rights in "Belgian Foodie". Gallop added that such a use also constitutes an unfair trade practice pursuant to Articles VI.95, VI.98, VI.104 and VI.105 of the Code of Economic Law (*Wetboek Economisch Recht/ Code de Droit Economique*). Van Waetermeulen brought counterclaims arguing, first, that the claimant's trade mark was descriptive and, therefore, had no distinctive character and, alternatively, that the trade mark was misleading.

The Court first held that the "Belgian Foodie" trade mark had sufficient distinctive character as it did not enable the relevant public to perceive, directly and without any effort, the description of one of the products' or services' characteristics.

Then, moving on to the main application, the Court recalled that the protection of trade names and trade marks only enables the holder to prohibit the use of that trade name or trade mark "in the course of business". In this respect, the Court referred to the case-law of the Benelux Court of Justice which clearly holds that a use "in the course of business" should be understood as referring to any use other than for scientific or purely private purposes, the objective of which is to procure an economic advantage. The Court added that it is for the claimant to demonstrate that this condition is met.

Van Waetermeulen maintained that his blogging activities were for leisure purposes only and that he did not receive any donations or gifts in this respect. The Court found that Gallop had indeed failed to show that Van Waetermeulen had obtained an economic advantage or received gifts or donations in relation to his blogging activities. Gallop had thus failed to show any use of the sign "Belgian Foodies" in the course of business. The Court therefore dismissed the claims involving trade name and trade mark infringements. The Court added that, as Van Waetermeulen was a natural person, Articles VI.95, VI.98, VI.104 and VI.105 of the Belgian Code of Economic Law on unfair trade practices did not apply.

Finally, the Court also rejected the defendant's counterclaim that Gallop's trade mark was misleading as to the geographical origin of the services in question given that Gallop presented himself as an American gourmet rather than a Belgian one and used his trade mark in the United States rather than in Belgium. This was because the claimant had lived for 25 years in Brussels and had both the American and Belgian nationalities.

EU General Court Denies Protection for Figurative Trade Mark Consisting of Three Vertical Lines

On 20 July 2017, the European Union General Court (the "Court") rejected the appeal of Basic Net against the refusal of the European Union Intellectual Property Office ("EUIPO") to register a figurative sign consisting of three vertical lines in three different colours (Case T-612/15, *Basic Net SpA v. EUIPO*).

To reach this conclusion, and after determining the relevant public, the Court examined the different elements of the sign in question. It found the sign to be a simple rectangle without any variation. According to the Court, the existence of three vertical coloured lines is not sufficient to decide otherwise. The three coloured lines are not particular in any way and it is likely that the relevant public will perceive the sign as an esthetical element or a "design". Hence, the Court considered that the three coloured lines are not sufficient to distinguish the goods of Basic Net from those of other companies. Consequently, the Court held that the sign is not in itself distinctive.

The Court thus concluded that the EUIPO had legitimately decided that the sign in question lacked the necessary distinctive character.

The Court also examined whether the sign had acquired distinctive character through use in the EU as relevant territory. However, according to the Court, Basic Net had not provided sufficient evidence of the acquisition of distinctive character through use.

Consequently, the Court rejected the appeal.

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| LABOUR LAW

Summer Agreement 2017: Overview of Main Employment Measures

On 26 July 2017, the Belgian Council of Ministers concluded a so-called "Summer Agreement" encompassing a range of measures across a number of economic areas (hereafter "the Agreement"). The Agreement includes reforms to create jobs, increase purchasing power and augment social cohesion. In particular, the Agreement provides for a reform of the corporate tax rates, measures for fairer taxation, as well as a number of social and economic measures. At this stage, it is unclear how these measures will be implemented in the coming months. Below follows an overview of the principal employment measures:

1. Reintroduction of Trial Period

The Law governing a Unified Status for blue collar and white collar workers created, effective as of 1 January 2014, new fixed notice periods based only on the seniority of the employee (*Wet van 26 december 2013 betreffende de invoering van een eenheidsstatuut tussen arbeiders en bedienden inzake de opzeggingstermijnen en de carenzdag en begeleidende maatregelen/Loi du 26 décembre 2013 concernant l'introduction d'un statut unique entre ouvriers et employés en ce qui concerne les délais de préavis et le jour de carence ainsi que de mesures d'accompagnement*). As these new notice periods are relatively short at the beginning of the employment, the trial periods were abolished.

However, the Government now plans to introduce a limited trial period for all categories of employees that applies to both indefinite and fixed term contracts. In the first three months of employment, the notice period will be reduced from two weeks to one week. In the following months, the duration of the notice period will increase gradually.

2. Outplacement

For employees with a notice of at least thirty weeks who receive an indemnity in lieu of notice, four weeks of salary will at present be deducted from the indemnity in lieu of notice, as compensation for a right to outplacement. However, as regards employees for whom outplacement will provide no added value (*i.e.*, employees whose state of health does not allow them to participate in the outplacement), the employer no longer has to offer outplacement. These employees will be entitled to the indemnity in lieu of notice without any deduction.

3. Jobs for Starters

The labour costs relating to young employees from 18 up to 21 years will be reduced as from 1 January 2018 in order to promote their recruitment. The net salary of these young employees will not be affected.

4. Extension "Flexi-jobs"

As from 2018, retired employees will also be able to make use of the beneficial system of what is referred to as "flexi-jobs". A "flexi-job" is a form of occasional work, enabling persons who meet specific requirements to take up an additional job in the catering industry under favorable conditions. Furthermore, the scope of "flexi-jobs" will be expanded beyond the catering industry to include other sectors, such as retail.

5. Students

The Government intends to allow students between the ages of 16 and 18 years to work on Sundays in different sectors.

6. Temporary Agency Work

Temporary agency work will be allowed as from 2018 across the private sector and, in some cases, in the public sector.

7. E-commerce Measures

As from 2018, a specific two-year regulated framework will be created for night work and Sunday work for e-commerce activities. Interested companies will have to modify their work rules. After this two-year period, it will be possible to implement night work and Sunday work permanently for e-commerce purposes through a collective bargaining agreement or an adaptation of the work rules.

8. Welfare and Health

In companies with more than 100 employees, a burn-out coach will be appointed to curb the psychosocial risks within the company (prevention, advice and treatment).

9. Fight against Discrimination: Mystery Calls

Subject to prior permission of the labour auditor, the Social Inspectorate will be able to carry out anonymous tests if there are objective indications of discrimination in a given company. Mystery calls are intended to reveal discrimination but are not designed to provoke, arise or reinforce discrimination by the suspected perpetrator.

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| LITIGATION

New Law Brings Limitation to Challenge Judgments by Default

On 24 July 2017, the Belgian Official Journal published a law that once more provides for various changes to Belgium's judicial system (*Wet van 6 juli 2017 houdende vereenvoudiging, harmonisering, informatisering en modernisering van bepalingen van burgerlijk recht en van burgerlijk procesrecht alsook van het notariaat, en houdende diverse bepalingen inzake justitie/Loi du 6 juillet 2017 portant simplification, harmonisation, informatisation et modernisation de dispositions de droit civil et de procédure civile ainsi que du notariat, et portant diverses mesures en matière de justice*) (the "Law Pot-Pourri V").

Although the Law Pot-Pourri V mainly deals with issues unrelated to corporate litigation (such as family law and adoption), it provides for an important limitation to the possibilities to challenge a judgment by default.

Prior to the Law Pot-Pourri V and pursuant to Article 1047 of the Judicial Code (*Gerechtelijk Wetboek/Code Judiciaire*), a defendant who had failed to show up in court had the option to either lodge an appeal against the judgment given by default or object to this judgment ("*Verzet*"/"*Opposition*" procedure). This last option was particularly beneficial to defendants since it resulted in the case being reheard by the same judge who had initially heard the case. In addition, the defendant remained entitled to appeal the second judgment issued by the first instance judge if this judgment again found against him.

Since the entry into force of the Law Pot-Pourri V, an objection against a judgment by default is no longer possible if the judgment is appealable. Consequently, the defendant who has failed to appear before the first instance judge will only be in a position to lodge an appeal and will no longer have the possibility to object to the judgment by default issued by the first instance judge.

For judgments which are not subject to appeal, objection proceedings remain available.

The new rule entered into force on 3 August 2017.

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STATE AID

European Commission Requires Belgium to Abolish Corporate Tax Exemptions for Ports

On 27 July 2017, the European Commission (the "Commission") adopted a decision under EU State aid rules requiring Belgium to abolish the corporate tax exemptions granted to ports.

This decision follows the opening of an in-depth investigation on 8 July 2016 (*See, this Newsletter, Volume 2016, No. 7, p. 19*). The Commission investigated whether the Belgian tax regime applying to ports was in line with the EU State aid rules. The investigation concerned the commercial operation of port infrastructure by a number of sea and inland waterway ports in Belgium, notably the ports of Antwerp, Bruges, Brussels, Charleroi, Ghent, Liège, Namur and Ostend, as well as along the canals in Hainaut Province and Flanders. These ports are subject to a different tax regime, with a different taxable base and tax rates, resulting in an overall lower level of taxation for Belgian ports as compared to other companies in Belgium.

In its decision of 27 July 2017, the Commission considered that the corporate tax exemption granted to Belgian ports provides them with a selective advantage, in breach of the EU State aid rules. In particular, the tax exemption does not pursue a clear objective of public interest. By contrast, the tax savings generated can be used by the port operators to fund any type of activity or to subsidise the prices charged by the ports to customers, to the detriment of competitors and fair competition.

Belgium must now take the necessary steps to remove the tax exemption before the end of 2017. As the tax exemption for ports already existed before the establishment of the European Union in 1958, the aid is regarded as "existing aid". Consequently, the Commission cannot ask Belgium to recover any aid granted up until that date. By 1 January 2018, however, all ports must be subject to the same corporate taxation rules as other companies.

On 27 July 2017, the Commission also announced a negative final decision regarding corporate tax exemptions granted to the main French ports. In January 2016, the Commission had already come to a similar decision regarding corporate tax exemptions granted to the Dutch public seaports.

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