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Legal 500 2017

November 2018

VBB on Belgian Business Law

Highlights

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vbb@vbb.com
www.vbb.com

Table of contents

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

Phone: +32 (0)2 647 73 50 vbb@vbb.com
Fax: +32 (0)2 640 64 99 www.vbb.com

COMPETITION LAW

Draft Bill on Reform of Belgian Competition Law

On 16 November 2018, the Council of Ministers adopted a draft Bill (the "Draft Bill") amending numerous competition law provisions of the Code of Economic Law ("CEL"). While the Draft Bill will not bring about major substantive or procedural changes to the current competition rules and will also maintain the prevailing institutional architecture, a new text will replace in full Book IV of the CEL entitled "Protection of Competition". New definitions will also be introduced into Book I of the CEL.

The Draft Bill will simplify and unify existing procedures, cure difficulties of application, resolve issues of interpretation, remedy shortcomings and include amendments to reflect practical experience.

Despite this ostensibly modest objective, it is understood that the Draft Bill – the text of which is not yet public – will contain, inter alia, the following novelties:

- *Increased cap on fine* – The maximum amount of fines that the BCA can impose will be increased from 10% of the Belgian turnover of the firm concerned to 10% of its worldwide turnover. This is in line with a requirement imposed by the new "ECN+ Directive" which recently became law.

- *Competition infringements by individuals* – Unless the individual should be regarded as a firm, an infringement by an individual will be ancillary to the infringement committed by the legal person on whose behalf the individual acted.

- *Commitments in behavioural cases* – The competition prosecutor ("auditeur"/ "auditeur") will have the power to formally terminate proceedings in view of the commitments offered by the party under investigation (this is currently the exclusive prerogative of the Competition College).

- *New rules governing request for interim measures* – The Competition College will be expressly required to balance all interests at stake when assessing the merits of a request for interim measures.

- *Dawn Raids* – The investigating magistrate for Brussels will be competent to authorise on-site inspections on the entire Belgian territory.

- *New rules governing use of languages*.

- *New rules governing confidentiality before the Brussels Court of Appeal (Market Court).*

The Draft Bill is currently under review by the Council of State (*"Raad van State"/"Conseil d'Etat"*). Its fate is uncertain as the government is about to resign and Parliament will be dissolved.

European Commission Refers Telenet's Acquisition of De Vijver Media to Belgian Competition Authority

On 3 October 2018, the European Commission received the notification of a concentration whereby Telenet Group Holding NV (controlled by Liberty Global Plc - "Telenet") would acquire De Vijver Media NV ("De Vijver") from Mediahuis NV ("Mediahuis") and Waterman & Waterman. As a result of the acquisition, Telenet will solely control De Vijver, a holding company active in television and media and owning television production company *Woestijnvis* and several Belgian broadcasters in the Dutch-language region (such as *Vier* and *Vijf*).

On 17 October 2018, the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence* - "BCA") requested a referral from the European Commission under Article 9 of the EU Merger Regulation (*See, this Newsletter, Volume 2018, No. 10, p. 4*). On 23 November 2018, the European Commission accepted the referral considering that the BCA was best placed to review the proposed concentration.

In its review, the BCA will probably consider that the Belgian media landscape is becoming increasingly more concentrated (*See, this Newsletter, Volume 2018, No. 3, p. 4*). The BCA might also hear concerns from other players in the relevant markets, such as concerns already raised by media company De Persgroep in 2013 (*See, this Newsletter, Volume 2013, No. 10, p. 4 and Volume 2017, No. 7, p. 6*).

Belgian Competition Authority Adopts Draft Decision Against Professional Organisation of Pharmacists

The Investigation and Prosecution Service (*Auditoraat/Auditorat*) of the Belgian Competition Authority ("BCA") announced on 8 November 2018 that it has submitted a draft infringement decision against the professional organisation of pharmacists (*Orde der Apothekers/Ordre des pharmaciens* - the "PO") to the Competition College (*Mededingingscollege/Collège de la concurrence*).

The PO is tasked by law with organising the profession of pharmacists and maintaining the ethical standards of that profession. Pharmacists are also subject to a number of public service obligations.

The PO is currently being investigated by the BCA because of its alleged attempts to shield its members from a new form of competition from retailers that combine the sale of medicines with that of other, less regulated health products, cosmetics, nutrition products and the like. One such new market player is the Medi-Market Group (formerly Medicare-Market Group) which was allegedly restrained in its activities due to exclusionary practices and minimum resale prices imposed by the PO.

Back in June 2017, the Competition College rejected a request for interim measures against the PO as Medi-Market had not shown a risk of serious, imminent and irreparable harm (*See, this Newsletter, Volume 2017, No. 6, p. 4*). On the other hand, the Competition College had considered *prima facie* that the conduct of the PO may well constitute an infringement of competition law. The draft decision recently submitted by the Investigation and Prosecution Service is only a provisional step in the proceedings, but would seem to confirm the preliminary findings of the Competition College in its 2017 decision.

The case will now be reviewed on the merits by the Competition College.

Draft Bill against Abuse of Economic Dependence

According to the report of the meeting of the Committee for economic affairs of the Chamber of Representatives of 13 November 2018, the Minister of Economic Affairs indicated that a draft bill concerning the protection of business-to-business relationships (the "Draft Bill") was until recently under review by the government. The Draft Bill will modify the competition rules and, more particularly, combat abuses of economic dependence.

The Draft Bill will introduce a new restrictive practice into competition law for so-called abuses of economic dependence, which will be subject to the provisions of Book IV on the "Protection of competition" of the Belgian Code of Economic Law and will thus be punished like cartel agreements and abuses of a dominant position.

The definition of an abuse of economic dependence will be based on two criteria:

1. the absence of a reasonable alternative, available within a reasonable time period and subject to reasonable conditions and cost; and

2. the fact that a business imposes obligations or conditions that would not be obtained in normal market conditions.

The following factors will play a role in the assessment of a situation of economic dependence:

1. the relative market power;

2. the share of the business of the commercial partner subject to the dependence;

3. the level of technology and know-how;

4. the strength of the brand, the shortage of the product, the perishable nature of the product or the loyal purchase behaviour of consumers;

5. access to resources for essential infrastructure;

6. the fear for economic disadvantage, retaliation, or termination of a contractual relationship;

7. the offer of special and individual conditions to specific commercial partners and not to others in similar circumstances; and

8. the need to subject itself to a position of economic dependence.

The Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence*) will be tasked with the enforcement of these new provisions.

The fate of the Draft Bill has become uncertain as the government is about to resign.

CONSUMER LAW

General Court Annuls Delegated Regulation 665/2013 on Energy Labelling of Vacuum Cleaners

On 8 November 2018, the General Court (the "GC") handed down a judgment annulling Delegated Regulation 665/2013 of 3 May 2013 supplementing Directive 2010/30/EU with regard to energy labelling of vacuum cleaners (the "Delegated Regulation") at the request of Dyson (GC, 8 November 2018, Case T-544/13, RENV, *Dyson Ltd v. European Commission*).

The GC held that in failing to provide a method of calculation for the energy performance of vacuum cleaners which allows for the measurement of energy performance in conditions as close as possible to actual conditions of use, the Commission disregarded an essential element of Directive 2010/30 of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products (the "Energy Labelling Directive"). As a result, the GC found the Commission to have exceeded the limits of its competence in adopting the Delegated Regulation.

This decision follows an earlier ruling by the GC dismissing Dyson's action for annulment of the Delegated Regulation (GC, 11 November 2015, Case T-544/13, *Dyson Ltd v. European Commission*), which was subsequently overturned by the Court of Justice of the European Union (the "ECJ") and referred back to the GC on two points of law (ECJ, 11 May 2017, Case C-44/16 P, *Dyson Ltd v. European Commission*).

In accordance with the Energy Labelling Directive, energy-related products placed on the market must include an energy label informing customers about the energy efficiency and energy consumption of such products. The Delegated Regulation specifically described the content and design of such labels for vacuum cleaners and provided that the measurement methods for energy efficiency and consumption should be based on tests carried out with empty vacuum cleaner receptacles.

According to Dyson, such a requirement placed bagless vacuum cleaners (such as Dyson's vacuum cleaners) at a disadvantage, insofar as tests which only consider the energy consumption of empty receptacles do not take into account the decline in energy performance suffered by bagged vacuum cleaners, which become less efficient "*with use*". This was argued to be inconsistent with the essential objective of the Energy Labelling Directive, namely to promote energy efficiency by providing end users with accurate information relating to the consumption of energy and other essential resources "*during use*". Therefore, in failing to account for the energy performance of vacuum cleaners under actual usage conditions, the test provided for by the Delegated Regulation did not offer consumers accurate information on the energy efficiency and consumption of vacuum cleaners.

The GC agreed, referring to the ECJ ruling of 11 May 2017 which held that in order to provide consumers with accurate, relevant and comparable information on energy consumption during use in accordance with the essential objective of the Energy Labelling Directive, the energy performance of vacuum cleaners must be measured in conditions as close as possible to the actual conditions of use. In particular, this was found to require vacuum cleaner receptacles to be "*filled to a certain level*". Furthermore, the GC confirmed that testing methods allowing consumers to be informed as to the energy efficiency of products during use must satisfy specific requirements concerning the "*scientific validity of the results" and the "accuracy of the information supplied*".

On this basis, the GC annulled the Delegated Regulation in its entirety, rejecting the possibility of a partial annulment, *i.e.*, annulling the Delegated Regulation only insofar as it contained a calculation method based on an empty receptacle. As all of the information to be collected for inclusion on energy labels is based on the relevant calculation method, that method cannot be severed from the Regulation as a whole. The GC reasoned that this, in turn, justified the annulment of the Delegated Regulation in its entirety.

Interestingly, this judgment follows a ruling by the ECJ of 25 July 2018 in parallel proceedings brought by Dyson against

BSH Home Appliances for failing to provide consumers with information on the testing conditions that resulted in the energy classification indicated on vacuum cleaner energy labels (ECJ, 25 July 2018, Case C-632/16, *Dyson Ltd and Dyson BV v BSH Home Appliances NV*). Specifically, the ECJ found that failure to provide such information does not constitute a "misleading omission" within the meaning of Article 7 of Directive 2005/29 of 11 May 2005 concerning unfair business-to-consumer commercial practices (the "Unfair Commercial Practices Directive"), as the provision of information relating to testing conditions is not covered by the exhaustive list of information that must be brought to the attention of the consumer by means of an energy label (*See, this Newsletter, Volume 2018, No 8, p. 5*).

In the light of the ECJ's most recent decision, the annulment of the Delegated Regulation means that it will no longer be possible to rely on that Regulation to object to other information obligations under EU consumer law, including Article 7 of the Unfair Commercial Practices Directive. New rules on the energy labelling of vacuum cleaners have yet to be adopted by the European Commission.

CORPORATE LAW

Agreement on European Foreign Direct Investment Screening Framework

On 20 November 2018, the European Parliament, the Council and the European Commission reached a political agreement on a European framework for foreign direct investment ("FDI") screening. The agreement results from the Commission's proposal for a Regulation establishing a framework for screening of foreign direct investments into the European Union of 13 September 2017 (the "Proposal").

The Proposal answers the need for protection of critical technology and infrastructure in Europe and scrutiny over purchases by foreign companies that target Europe's assets. Such critical infrastructure and technology includes the energy, transport, communications, data storage, space, financial, defence, biotechnology, artificial intelligence, robotics and semiconductors industries.

Importantly, the Proposal confirms that Member States are free to maintain their existing FDI-screening mechanisms. Any such screening mechanism should, however, be transparent and not discriminatory towards third countries. In addition, any such screening mechanism should protect confidential information made available during the screening process and provide the possibility to seek judicial redress.

The Proposal introduces a cooperation mechanism between the Commission and Member States whereby the Member States must inform the Commission and other Member States of any FDI that undergoes screening. Other Member States and the Commission can formulate their concerns regarding public order or security through non-binding comments or opinions, respectively. The Proposal confirms that the final decision rests with the Member State in which the FDI is planned or completed.

In addition, the Proposal includes a framework for enhanced cooperation for FDIs that are likely to affect projects or programmes of specific interest to the European Union on grounds of public order or security. In the context of such an FDI-screening, whilst the Commission can only issue a non-binding opinion regarding the FDI, the Member State in which the FDI is planned or completed must take "utmost account" of the Commission's opinion when taking a final decision and provide an explanation to the Commission if it does not follow the Commission's opinion.

In view of the non-binding nature of the Commission opinions, the Proposal is likely to have limited impact on existing FDI-screening mechanisms, other than their timeframe which will have to comply with the timeframes imposed by Proposal.

Although the Proposal would not require Member States to adopt FDI-screening mechanisms, the future Regulation may inspire Member States without an FDI-screening mechanism, such as Belgium, to consider adopting such a mechanism (currently, only 14 Member States have a FDI-screening mechanism in place).

Court of Justice of European Union Confirms Exclusive Competence of Courts of Member State of Primary Insolvency Proceedings for Claw-Back Procedures

On 14 November 2018, the Court of Justice of the European Union (the "ECJ") delivered a judgment relating to the interpretation of Council Regulation No 1346/2000 of 29 May 2000 on insolvency proceedings (the "Insolvency Regulation") (ECJ, 14 November 2018, case C-296/17, *Wiemer & Trachte GmbH v. Zhan Oved Tadzher*).

The judgment came in response to a request for a preliminary ruling from the Varhoven kasatsionen sad (Supreme Court of Bulgaria, the "Supreme Court") in proceedings between Mr. Zhan Oved Tadzher and the bankruptcy estate of Wiemer & Trachte GmbH ("Wiemer & Trachte"). Wiemer & Trachte had been declared bankrupt by the district court of Dortmund, Germany (the "Dortmund Court"). Despite a judicial order of the Dortmund Court prohibiting any disposal of assets, the Bulgarian branch of Wiemer & Trachte subsequently wired approximately EUR 40,000 to Mr. Tadzher.

In response, the liquidator of Wiemer & Trachte brought an action before the Sofia City Court against Mr Tadzher, claiming that those banking transactions were invalid because they had taken place after insolvency proceedings had been opened and sought repayment of such amounts together with statutory interest. Mr. Tadzher claimed, among others, that the Sofia City Court lacked jurisdiction to hear the case. Such argument was rejected and the Sofia City Court subsequently upheld the claim brought by the liquidator.

However, this judgment was overturned by the Court of Appeal of Bulgaria and the liquidator eventually appealed to the Supreme Court which then referred a preliminary question to the ECJ on whether or not the Bulgarian courts had competence in the case at hand.

In its judgment, the ECJ first confirmed its previous case law that the Insolvency Regulation also confers on the courts of the Member State having opened the primary insolvency proceedings the competence to hear and determine actions which derive directly from such primary insolvency proceedings and which are closely connected with them. The ECJ added that this competence also extends to claw-back claims, being actions that seek to set a transaction aside and aim to recover the assets of the insolvent firm.

The ECJ then held that, contrary to Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Insolvency Regulation does not contain any rules conferring jurisdiction on the courts of the Member State of the registered office or habitual residence of the defendant in the case of claw-back claims.

Furthermore, any optional jurisdiction of the courts of such Member State could be abused by forum-shopping parties in order to obtain a more favourable legal position.

The ECJ concluded that, other than in a number of exceptional cases set out in the Insolvency Regulation, only the courts of the Member State in which the primary insolvency procedure has been opened are competent to hear cases relating to claw-back claims.

Consolidation of Accounting Rules Applicable to Companies and Associations

On 1 November 2018, the Royal Decree of 21 October 2018 implementing Articles III.82 to III.95 of the Code of Economic Law came into force (the "Royal Decree on Accounting"). The Royal Decree on Accounting consolidates and modernises existing rules on accounting for companies and associations. To date, these rules were contained in four distinct instruments, *i.e.:*

- the Royal Decree of 12 September 1983 implementing the Law of 17 July 1975 on the accounting of companies;
- the Royal Decree of 12 September 1983 determining the content and the presentation of a minimum standard chart of account;
- the Royal Decree of 26 June 2003 on simplified accounting for specific non-profit associations, foundations and international non-profit associations; and
- the Royal Decree of 19 December 2003 on accounting duties and publicity of annual accounts of specific non-profit associations, international non-profit associations and foundations.

With the exception of specific formal simplifications and the alignment with the recent reform that introduces the notion of "enterprise" into Belgian economic law, the Royal Decree on Accounting does not bring about any substantial modification to existing accounting rules.

The Royal Decree on Accounting now contains:

- The simplified accounting rules that apply to natural persons, organisations without legal personality, and specific forms of companies, including companies in collective name (*vennootschappen onder firma/ sociétés en nom collectif*) and legal partnerships (*commanditaire vennootschappen/sociétés en commandite simple*);
- Bookkeeping and safekeeping rules; and

- The minimum normalised accounting plans (*minimumindeling van een algemeen rekeningenstelsel/plan comptable minimum normalisé*) for enterprises and associations and foundations.

The Royal Decree on Accounting entered into force on 1 November 2018.

DATA PROTECTION

European Data Protection Board Reviews Belgian Data Protection Impact Assessment Guideline

On 25 September 2018, the European Data Protection Board (the "EDPB") issued its opinion on the draft list of the Belgian supervisory authority, the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit/L'Autorité de protection des données*) regarding the processing operations subject to the requirement of a data protection impact assessment ("DPIA") (the "Opinion").

The EU General Data Protection Regulation (the "GDPR") lays down several new obligations for data controllers, including the obligation to carry out a DPIA prior to specific data processing activities. The objective of DPIAs is to assess the risks associated with the rights and freedoms of natural persons that arise or threaten to arise in connection with the processing of personal data and to assess the possibilities for mitigating or managing these risks.

Article 35.4 of the GDPR requires the supervisory authorities to establish and make public a list of processing operations for which a DPIA will be required in any case. While the supervisory authority must apply the consistency mechanism in order to contribute to the consistent application of the GDPR, the GDPR does allow for minor differences between national DPIA lists. The supervisory authority has a margin of discretion with regard to the national or regional context and should take account of local legislation. The review by the EDPB is intended to avoid significant inconsistencies that may affect the protection of the data subjects.

In relation to the Belgian Data Protection Authority's list, the EDPB recommended the following:

- Add a statement that clarifies that the DPIA list is based on the Working Party 29 Guidelines WP248 and that it complements and specifies these guidelines;
- In relation to employee monitoring, make an explicit reference to the two criteria in the Working Party 29 Guidelines WP248 that state that employee monitoring processing which involves vulnerable data subjects and systemic monitoring could require a DPIA; and
- Amend the draft DPIA list to clarify that the processing of health data with the aid of an implant requires a DPIA.

Following the Opinion, the Belgian Data Protection Authority had two weeks to amend or maintain its draft list and inform the EDPB. If it does not decide to adhere to the Opinion in whole or in part, it will have to come up with grounds that explain its intention not to follow the Opinion. The Belgian Data Protection Authority has not yet finalised its DPIA list.

INTELLECTUAL PROPERTY

Taste of Food Product Does Not Qualify for Copyright Protection

On 13 November 2018, the Court of Justice of the European Union (the "ECJ") handed down its judgment in Levola Hengelo (case C-310/17) holding that the taste of food cannot be subject to copyright protection.

The dispute arose between Levola Hengelo BV ("Levola"), the parent company of a group producing and marketing fresh foodstuffs, and Smilde Food BV ("Smilde") which produces food products under its own trade mark.

Levola had purchased all rights related to "Heksenkaas", a popular cream cheese, and had put this product on the market in 2012. Two years later, Smilde started the production and sale of a similar product, "Witte Wievenkaas". Convinced that these practices infringed its copyright in the taste of "Heksenkaas", Levola brought an action against Smilde for copyright infringement.

In first instance, the Dutch court dismissed the action on 10 June 2015 on the ground that it was unable to assess whether the taste of the product is covered by copyright. It held that Levola had not put forward any elements capable of proving the original character and personal imprint of its product's taste and it was not for the judge to taste and try to describe the savour of a product.

On appeal, the Arnhem-Leeuwarden Court of Appeal decided to stay the proceedings and refer questions for a preliminary ruling to the ECJ asking, in essence, (i) whether the taste of a product – as its author's own intellectual creation – qualifies for copyright protection under Directive 2001/29 of 22 May 2001 on the harmonisation of specific aspects of copyright and related rights in the information society (the ''InfoSoc Directive''); and (ii) whether the intrinsic instability of taste can interfere with such protection. If the ECJ were to answer the first question positively, the Court of Appeal enquired (i) which requirements the taste of a product should satisfy to be covered by copyright; and (ii) whether the protection would apply to the taste as such or rather to the recipe of the product. The Court of Appeal also sought guidance as to how a court should assess the taste of a product in practice and, likewise, which elements an applicant should put forward when seeking protection.

The ECJ, following the line of reasoning of AG Wathelet in his opinion (*See, this Newsletter, Volume 2018, No. 7, p. 12*), found that while the InfoSoc Directive harmonises a number of rights and related exceptions and limitations which concern the exploitation of "works", it does not contain a definition of what constitutes a "work", nor does it make any reference to the laws of individual Member States. The ECJ concluded that in view of the need for a uniform application of EU law and the principle of equality, the concept of "work" should be given an autonomous and uniform interpretation throughout the European Union.

In the light of this, the taste of food only qualifies for copyright protection if it can be classified as a "work" under the InfoSoc Directive. The ECJ put forward two cumulative conditions for determining what constitutes a work under the Directive. First, the subject matter concerned (taste of food) must be original in the sense that it is the author's own intellectual creation. Second, only something which is the expression of the author's own intellectual creation may be classified as a work.

According to the ECJ, for a "work" to exist as referred to in the InfoSoc Directive, the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form. The ECJ added that authorities responsible for ensuring that the exclusive rights inherent in copyright are protected must be able to identify, clearly and precisely, the subject matter so protected. The ECJ also wanted to eliminate any "element of subjectivity" which would run counter to the principle of legal certainty. It explained that the taste of a food product cannot "*be pinned down with precision and objectivity*" since taste is identified on the basis of "*taste sensations and experiences, which are subjective and variable since they depend, inter alia, on factors particular to the person tasting the product concerned, such as age, food preferences and consumption habits, as well as on the environment or context in which the product is consumed*".

Moreover, the ECJ emphasised that the current state of scientific development does not make it possible to achieve by technical means a precise and objective identification of the taste of a food product which enables it to be distinguished from the taste of other products of the same kind.

General Court Rules that Geographical Name May Qualify for Registration as Trade Mark

On 25 October 2018, the General Court of the European Union (the "Court") held that under specific conditions it is permissible to register a geographical name as a trade mark.

The dispute arose after Devin AD ("Devin") had obtained the registration for the word mark "DEVIN" with respect to goods consisting essentially of drinks, including mineral water. The Haskovo Chamber of Commerce and Industry of Bulgaria ("HCCI") filed a request for declaration of invalidity of that trade mark, arguing that the trade mark was descriptive, especially of the geographical origin of the products, within the meaning of Article 7(1)(c), (f) and (g) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark (the "Regulation") (since replaced by Regulation No 2017/001 of 14 June 2017 on the European Union trade mark). Devin is a town in southern Bulgaria which, according to the HCCI, possesses an abundance of hot springs and spa resorts as well as water reserves.

By decision of 29 January 2016, the Cancellation Division of the European Union Intellectual Property Office ("EUIPO") declared the trade mark invalid on the basis of Article 7(1)(c) of the Regulation, considering that the trade mark consisted of a geographical name deprived of any distinctive character. Devin appealed this decision to the Second Board of Appeal of the EUIPO which dismissed the appeal. Devin then brought an action before the Court. HCCI intervened in the proceedings.

Before the Court, Devin argued that the EUIPO had been wrong to hold that a large part of the relevant public – consisting of the average consumers of (i) Bulgaria; (ii) neighbouring countries such as Greece and Romania; and (iii) other Member States of the European Union – was likely to link the word "Devin" to the geographical origin of the goods covered by its trade mark.

At the outset, the Court recalled that it is in the public interest that geographical names remain available, as these can be an indication of quality and can influence consumer preferences. Moreover, the Court noted that the registration of geographical names is not possible if these names refer to famous geographical locations or are likely to be used by other firms as indications of the geographical origin of their goods. However, the Court added that the above did not preclude registration of (i) geographical names which were unknown to the relevant class of persons, or at least unknown as a designation of geographical location; or (ii) names which designated a type of place that is unlikely to be perceived by the public as the place of origin of the goods.

For its analysis, the Court decided to examine, first, the perception of the word "Devin" by the average consumer and, second, the ensuing availability of that geographical name.

Perception of Average Consumer

First, it was not disputed by Devin that the average Bulgarian consumer was likely to perceive the word "Devin" as the name of the related town. Nonetheless, it argued that, for these consumers, Devin was better known as a trade mark and had acquired distinctiveness through use as a water brand. The Court agreed with Devin and held that the trade mark had likely acquired a distinctive character in that region, thereby making it irrelevant to assess whether or not the average Bulgarian consumer recognised the word "Devin" as the name of the town.

With respect to the perception of average Greek or Romanian consumers, the EUIPO claimed that (i) the town of Devin had a detectable presence on the internet, notably appearing in searches for holiday destinations in Bulgaria; and (ii) the town of Devin also had substantial tourism infrastructure, including many spa hotels and luxury hotels. Therefore, the EUIPO argued, foreigners of neighbouring countries were likely to know the town of Devin and to associate that name with a geographical indication.

The Court rejected this line of reasoning as these elements did not suffice to establish that the town would be known by a significant part of the relevant public of Greece and Romania. More significantly, the Court held that the EUIPO had applied the wrong test by focusing on the perception

of foreign tourists visiting the town of Devin while, instead, it should have assessed the perception of the word "Devin" by the entire relevant public, including persons who do not necessarily visit the town of Devin or the country of Bulgaria. In addition, the Court emphasised that Devin had brought forward substantial evidence that a consumer in Greece and Romania would not make a direct link between the trade mark and any geographical origin.

Finally, as regards the average consumer in other Member States, the EUIPO maintained that, considering the growth of the Bulgarian tourist sector and the marketing efforts made in this respect to promote Devin as an international tourist destination and a famous place for its mineral water, that geographical name was likely to be understood soon by the average European consumers as a description of the geographical origin of the relevant goods. The Court rejected that argument as constituting a mere hypothesis. In particular, the Court highlighted that Devin was not even one of the fifty main tourist destinations in Bulgaria and that it was not reasonable to consider that the name Devin could, in the eyes of a European average consumer, designate the geographical origin of the goods concerned, even in the future.

Availability of Geographical Name

Having found that the word "Devin" was not recognised as the designation of a geographical origin by the relevant consumers (other than those in Bulgaria), the Court went on to examine the consequences of this conclusion for the general interest of preserving the availability of geographical names. In this respect, it recalled that the protection granted to a trade mark is not unconditional. In particular, Article 12(1)(b) of the Regulation provides that the holder of a trade mark cannot prohibit a third party from using, in the course of trade, indications concerning the geographical origin of the goods. This provision essentially guarantees the right of third parties to use a trade mark consisting of a geographical name as an indication of geographical origin, provided that this use is in accordance with industrial and commercial honest practices. The Court thus pointed out that, contrary to what HCCI feared, registering Devin's trade mark would not impede efforts to develop the reputation of the town of Devin for its spa waters, as it does not prevent third parties from making a descriptive use of the trade mark for that purpose.

The Court added that Article 9(2) of the Regulation also obliged the holder of a trade mark to tolerate the use by a third party of a sign identical or similar to its trade mark with "due cause", in particular if that third party can demonstrate that the sign had been used before and that the use of the sign is in good faith. Similarly, it follows from Article 8(5) of the Regulation that the holder of a trade mark must not oppose registration of such a sign. In view of these elements, the Court held that the name of the town of Devin remained available to third parties for descriptive use (e.g., the promotion of tourism in that town) and even as a distinctive sign if justified by a "due cause".

Therefore, the Court held that there were enough safeguards limiting the exclusive rights of Devin with respect to its trade mark and that, as a consequence, there was no reason to cancel the registration of that trade mark. It also referred to similar cases in which the registration of a trade mark originating from an eponymous geographical name had been upheld and cited the VITTEL and EVIAN trade marks as examples.

The Court upheld the appeal and, consequently, annulled the contested decision.

Burden of Proof of Exhaustion of Intellectual Property Right Rests With Alleged Infringer

On 25 September 2018, the Court of Appeal of Antwerp (*Hof van beroep/Cour d'appel*) (the "Court") ruled on a dispute between spirits company Bacardi & Company Ltd ("Bacardi") and Alcimex, a beverage wholesaler. Bacardi contended that specific bottles offered for sale by Alcimex infringed its trade marks as they were marketed in the European Union without its consent. After gathering sufficient proof of the infringement of its trade mark through a descriptive seizure (*beschrijvend beslag/saisie-description*), Bacardi started a procedure on the merits to claim damages.

Pursuant to Article 9(2)(b) of Regulation 207/2009 of 26 February 2009 on the Community trade mark, Article 9(3)(b) of Regulation 2017/1001 of 14 June 2017 on the European Union trade mark and Article 2.20(2) of the Benelux Convention on Intellectual Property of 25 February 2005 (the "BCIP"), trade mark holders may prohibit the offering of goods, their putting on the market or their stocking for

these purposes under its European or Benelux trade marks in the European Union and the Benelux. However, this right does not extend to goods that have been put on the market in the European Union (or Benelux) under that trade mark by the proprietor or with his consent. This limitation to the rights of trade mark owners is known as "exhaustion".

In the case at hand, Alcimex first argued that it had not infringed the intellectual property rights of Bacardi since the contested goods had been brought on the EU market with Bacardi's consent. It added that Bacardi had not provided enough evidence to show that it had not provided consent for each and every contested good.

The Court held that the burden of proof in trade mark infringement procedures initially rests on the trade mark owner as it must show that it owns a trade mark and that the alleged infringer used that trade mark. However, once sufficient proof to that effect has been produced, it is then for the alleged infringer wishing to rely on the principle of exhaustion to demonstrate that the trade mark holder consented to bringing the contested goods in the European Union (or Benelux). As stated on several occasions by the Court of Justice of the European Union (the "ECJ") (in, for example, *Sebago* and *Davidoff*), the consent of the trade mark holder must be shown for each individual item of the product in respect of which exhaustion is contended.

Given that Alcimex had not provided sufficient evidence to that effect, the Court held that Bacardi's trade marks had not been exhausted with regard to the contested goods.

Alcimex then argued that as a storage facility, it could not be held to infringe Bacardi's trade marks.

Relying on the reasoning of the ECJ in *Top Logistics* (*See, this Newsletter, Volume 2015, No. 07, p. 10*), the Court dismissed this argument as well. Indeed, the ECJ held that the holder of a trade mark is not obliged to wait for the release for consumption of the goods covered by its trade mark to exercise its exclusive right. It can also object to specific acts committed without its consent before the release for consumption. Such acts include the importation of the goods concerned and their storage for purposes of putting them on the market. The Court also noted that Alcimex was in fact not solely a storage facility as it had already sold certain contested goods.

The Court concluded that Alcimex had infringed Bacardi's trade mark rights and granted Bacardi damages. It also ordered the destruction of the contested goods and the publication of extracts of the judgment in two national newspapers.

LABOUR LAW

Voluntary Occupational Pension for Employees

Background and Previous Regulatory Framework

On 31 October 2018, the Belgian Government submitted a bill to Parliament introducing a voluntary occupational pension for employees ("VOPE") (*Wetsontwerp tot instelling van een vrij aanvullend pensioen voor de werknemers en houdende diverse bepalingen inzake aanvullende pensioenen/Projet de loi instaurant une pension libre complémentaire pour les travailleurs salariés et portant des dispositions diverses en matière de pension complémentaire*) (the "Bill").

At present and in general, employees are only entitled to an occupational pension scheme if this was provided by their employer or by the industry sector to which their employer adhered.

The Bill now seeks to give all employees the possibility to finance an occupational pension in addition to their statutory pension, whilst minimising the administrative formalities for the employer.

New Regulatory Framework

Employees who are not entitled to an occupational pension scheme on industry or company level, or can only benefit from a limited occupational pension scheme, will be able to set up an occupational pension on their own initiative, with a pension provider of their choice, through deductions from their salary.

The main characteristics of the Bill can be summarised as follows:

- The employees concerned will be able to conclude a VOPE agreement with a pension provider of their choice. In that case, the employer will be obliged to deduct a VOPE contribution from the employee's net salary and to transfer the same contribution to the pension provider;
- At least two months in advance, the employee must inform his/her employer about the amount and the frequency of the contributions to the VOPE. In addition, the employee should provide his/her employer with a certificate from the pension provider, confirming the VOPE agreement and the identification details of the chosen pension provider;
- The employer is not a contracting party of the VOPE agreement and only has an administrative task, *i.e.*,. deducting the VOPE contributions from the employee's net salary and transferring them to the pension provider;
- The employee can autonomously decide on the amount of the VOPE contribution, with a maximum of 3% of the pensionable salary (*i.e.*, the gross salary subject to social security contributions) earned in the second year (year n-2) preceding the year of accrual/payment of the contributions (year n). However, if 3% of the pensionable salary amounts to less than EUR 1,600 (amount 2019), the maximum VOPE contribution amounts to EUR 1,600;
- The employees are not entitled to a guaranteed investment return from their employer on their contributions paid into the occupational pension scheme. Hence, they will only benefit from the investment return offered by the pension provider; and
- No specific tax or social security implications apply for the employer, as VOPE contributions will be deducted from the net salary. In principle, employees will be entitled to a tax deduction of 30% related to the VOPE contributions. Nevertheless, the employee should pay a 4.4% premium tax (for the benefit of the pension provider) on the VOPE contributions.

Parliament adopted the Bill on 22 November 2018.

Bill on Various Employment Provisions: Highlights

On 5 November 2018, the government submitted to Parliament a bill regarding various employment provisions (*Wetsontwerp houdende diverse arbeidsbepalingen/Projet de loi portant des dispositions diverses relatives au travail* – the "Bill"). Parliament approved the Bill on 6 December 2018. Its principal features are as follows:

Exclusion Outplacement

The Bill modifies the provisions governing outplacement included in the Law of 5 September 2001 on the improvement of the employment rate of employees (*Wet van 5 september 2001 tot de verbetering van de werkgelegenheidsgraad van de werknemers/Loi du 5 septembre 2001 visant à améliorer le taux d'emploi des travailleurs*) ("Law of 5 September 2001") based on the advice of the National Labour Council.

The Law of 5 September 2001 will determine that the employer will not be obliged to provide outplacement support to employees who are not required to be available for the general labour market, such as employees entitled to bridge pension.

On the other hand, the employer must offer outplacement support to part-time employees with an employment percentage of less than 50% who request such support. However, this obligation will not apply if the employee concerned is not required to be available for the general labour market.

Clarification Calculation Method Profit Premium

The Program Law of 25 December 2017 (*Programmawet van 25 december 2017/Loi-programme du 25 décembre 2017*) modifying the Law of 22 May 2001 on the employees' participation in the capital of companies (*Wet van 22 mei 2001 betreffende de werknemersparticipatie in het kapitaal van de vennootschappen en tot instelling van een winstpremie voor de werknemers/Loi du 22 mai 2001 relative à la participation des travailleurs au capital des sociétés et à l'établissement d'une prime bénéficiaire pour les travailleurs*) ("Law of 22 May 2001"), introduced, subject to specific conditions, a new regime of employees' financial participation, *i.e.*, the profit premium (*winstpremie/prime bénéficiaire*), allowing companies to distribute (part of) their profit to their employees by means of a tax favourable premium in cash.

The Bill aims to clarify the calculation method of the profit premium and the application of the *pro rata temporis* principle.

At present, the profit premium can only be granted on a *pro rata temporis* basis in case of a voluntary suspension of the employment contract or if the employment contract was terminated (except in case of a dismissal for serious cause). This implies that the employer cannot modify the profit premium in function of the employee's actual working percentage.

The Bill now introduces the possibility for employers to adjust the amount of the profit premium on the basis of the actual work performance. When employers opt for such a *pro rata temporis* calculation of the profit premium, the periods of suspension of the employment contract that are legally equated with actual work performances must be taken into account.

However, employers are not obliged to apply the *pro rata temporis* principle for the calculation of the amount of the profit premium. For instance, an employee who is employed on a part-time basis can be entitled to the amount which is granted to a full-time employee.

Furthermore, the Bill provides for the possibility to exclude two categories of employees from such a benefit, *i.e.,* employees who have been dismissed for serious cause and employees who resigned (except in case of serious cause attributable to the employer) during the latest completed financial year.

Advice of National Labour Council to Amend Legislation on Social Elections of 2020

At the end of October 2018, the National Labour Council ("NLC") published its advice concerning a few proposals of the Federal Public Service Employment, Labour and Social Dialogue to amend the legislation governing the social elections of 2020.

This advice, which should still be translated in specific legislation, sets forth:

- The dates of the social election period; and

- A modified reference period for the calculation of the employment threshold in order to determine whether or not social elections should actually be organised in any given case.

Dates Election Period

The NLC proposes that the social elections should take place between Monday 11 and Sunday 24 May 2020. In function of the specific election day (day Y), all other dates of the election calendar will be determined.

Advanced Reference Period to Determine Average Number of Employees

If an employer employs an average of 50 employees during a particular reference period, social elections for the establishment of a committee for prevention and protection the work floor should be organised, whilst social elections for a works council should be organised if an average of 100 employees has been employed during the reference period.

For previous social elections, the entire calendar year preceding the social elections was always the reference period to determine whether or not an employer should organise social elections.

For the social elections of 2020, the application of this rule would imply that the calendar year 2019 would be decisive to verify whether social elections should be organised.

However, the NLC now advises that the reference period for the social elections of 2020 should run between 1 October 2018 and 30 September 2019.

This proposal was made on the grounds that the social election procedure is currently launched 150 days before the actual elections in December of the year preceding the social elections, while the reference period is still running. This could lead to a situation in which an employer starts the election procedure at the beginning of December, whilst at the end of December it becomes apparent that the employer does not reach the threshold.

In addition to the company's employees, temporary employees hired via a temporary staffing agency during the last quarter of the reference period should be included in the average number of employees (except for temporary employees hired to replace absent employees).

LITIGATION

Belgian Government Submits Bill on New Rules of Evidence

On 31 October 2018, the Belgian government submitted to Parliament a bill (the "Bill") inserting Book 8 "Evidence" (the "Book on Evidence") in the new Civil Code.

According to the explanatory statement annexed to the Bill, this reform is necessary in the light of modern-day means of communication. The Book on Evidence will also correct some discrepancies and bring some clarity and uniformity with respect to key provisions on evidence.

Overall, the Book on Evidence largely confirms existing rules (such as the keystone principles according to which (i) all factual or legal allegations must be proven; and (ii) the burden of proof lies with the person making the allegation).

However, in some respects, the Book on Evidence departs from currently applicable law and brings some important clarifications.

First, Article 2 of the Book on Evidence increases clarity by defining key legal concepts such as written evidence (*geschrift/écrit*), signature, electronic signature, act under private signature (*onderhandse akte/acte sous signature privée*), authentic act (*authentieke akte/acte authentique*), signed written evidence (*ondertekend geschrift/écrit signé*), beginning of written evidence (*begin van bewijs door geschrift/commencement de preuve par écrit*), testimony (*getuigenis/témoignage*), presumption of fact (*feitelijk vermoeden/présomption de fait*), confession (*bekentenis/aveu*), complex confession (*samengestelde bekentenis/aveu complexe*), oath (*eed/serment*), probative value (*bewijswaarde/valeur probante*) and probative strength (*wettelijke bewijswaarde/force probante*).

The definition of written evidence is adapted to modern-day technology and applies to any kind of durable medium. Therefore, written signs communicated through electronic media (*e.g.,* text messages and emails) will be considered written evidence. In addition, a signature – defined as a "*demonstration of the identity of the signer as well as an expression of will*" – may now be either handwritten or in electronic form.

Second, the Book on Evidence also provides that in exceptional circumstances the judge may shift the burden of proof when it is clear that a straightforward application of the traditional rules would be unreasonable.

Third, the Book on Evidence distinguishes the notions of "*probative value*" of evidence on the one hand and "*probative strength*" of evidence on the other hand. "*Probative value*" constitutes the ability of a piece of evidence to convince a judge. As a general rule, judges are free to determine the probative value of evidence. However, under specific circumstances, the Book on Evidence determines that specific pieces of evidence are sufficiently strong (and therefore enjoy a "*probative strength*") so as to bind the judge who must then rule on the case based on that evidence.

Fourth, while the Book on Evidence maintains the principle of "free evidence" (*i.e.*, the principle according to which the demonstration of factual or legal allegations may be brought through any means), it also provides that when the amount at stake in a dispute exceeds EUR 3,500, legal allegations must be demonstrated through a signed written evidence. This is a notable modification of the existing rule since the current ceiling is EUR 375.

Importantly, however, this ceiling will not apply in disputes against or between "*enterprises*" (with the notable exceptions of disputes in which the defendant is a natural person). In those cases, the principle of "*free evidence*" will remain applicable.

Fifth, the value of accounting books as a mode of evidence is clarified. An enterprise's accounting books will only have "*probative strength*" (*i.e.*, meaning that their production will prevail over any other evidence) if their contents are corroborated by those of the opposing enterprise. In addition, the "*probative strength*" of an enterprise's accounting books only exists between the parties and must not be used against third parties to the dispute or against a person who is not an enterprise.

Finally, the Bill also provides for amendments to the rules on evidence in other specific laws.

The fate of the Bill is uncertain as the government is about to resign and Parliament will be dissolved.

"Commercial Court" Becomes "Enterprise Court"

On 1 November 2018, the Law of 15 April 2018 reforming the law of enterprises (*Wet houdende hervorming van het ondernemingsrecht/Loi portant réforme du droit des entreprises*) (the "Law") entered into force. Among other things, the Law replaced the "commercial court" (*rechtbank van koophandel/tribunal de commerce*) with the so-called "enterprise court" (*ondernemingsrechtbank/tribunal de l'entreprise*) (*See, this Newsletter, Volume 2018, No. 4, p. 4*).

Under Article 573 of the Belgian Judicial Code (*Gerechtelijk Wetboek/Code judiciaire*), the "*enterprise court*" has jurisdiction to rule in disputes between "*enterprises*" (*i.e.,* legal persons, any organisation without legal personality, as well as natural persons performing an independent professional activity). An action against an enterprise can be filed before the "*enterprise court*" even if the applicant is not an enterprise.

The "*enterprise court*" does not have jurisdiction to hear disputes involving (i) a public entity which does not offer goods or services on the market; (ii) state entities (*e.g.,* the Federal State, the regions, communities and provinces); or (iii) an organisation without legal personality which does not distribute dividends to its members or to people who have a decisive influence on the policy of the organisation.

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VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

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

vbb@vbb.com
www.vbb.com