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| COMMERCIAL LAW

ECJ Holds that French Courts Have Power to Block Sales on Foreign Websites

On 21 December 2016, the Court of Justice of the European Union (the "ECJ") delivered an interesting judgment on the interpretation of Article 5(3) of Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation") (Case C-618/15, *Concurrence SARL v. Samsung Electronics France and Amazon Services Europe SARL*).

Article 5(3) of the Brussels I Regulation provides that, in matters relating to tort, a person domiciled in an EU Member State may, in another EU Member State, be sued "*in the courts for the place where the harmful event occurred or may occur*".

The ECJ delivered the judgment in response to a question referred for a preliminary ruling by the French Supreme Court in proceedings between, on the one hand, Concurrence SARL ("Concurrence") and, on the other hand, Samsung Electronics France SAS ("Samsung") and Amazon Services Europe SARL ("Amazon").

Concurrence, one of Samsung's dealers, had complained that other Samsung dealers were selling products on Amazon websites with French, German, Italian, Spanish and UK domain names. These sales allegedly took place in breach of a contractual clause prohibiting online sales. Relying on a provision of French law pursuant to which a party assisting directly or indirectly in breaching the ban on sales outside a selective or exclusive sales network may be held liable, Concurrence had requested a French court to order Amazon to withdraw the products concerned from its various websites. After that court and an appeal court had both dismissed the action on the ground that they lacked jurisdiction over foreign websites not directed at the French public, the French Supreme Court finally referred the question for a preliminary ruling to the ECJ.

As a preliminary point, and referring to its earlier case law, the ECJ held that the expression "*place where the harmful event occurred or may occur*" in Article 5(3) of the Brussels I Regulation is intended to cover both the place where the damage occurred and the place of the event giving rise to it. Hence, the applicant may sue the defendant in the courts of either of those places.

In the case at hand, the place of the event giving rise to the damage (i.e., the sales on Amazon websites with non-French domain names) was situated outside France. Hence, the ECJ examined whether the French courts had jurisdiction on the basis of "*the place where the damage occurred*".

In this regard, the ECJ reiterated its earlier case law that the place where the damage occurred may vary according to the nature of the right allegedly infringed. In addition, the likelihood of damage occurring in a particular EU Member State is subject to the condition that the right which was allegedly infringed is protected in that EU Member State.

The ECJ then turned to the facts of the case. It found that it was justified to confer jurisdiction on the French courts as French law provides for liability for the infringement of the prohibition on resale outside a selective distribution network. Moreover, the alleged damage also occurred on French territory. In this regard, the ECJ noted that the damage suffered by a dealer in case of infringement of the conditions of a selective distribution network is the (i) reduction in the volume of its sales resulting from sales made in breach of the conditions of the network; and (ii) ensuing loss of profits.

Finally, the ECJ found it irrelevant that the websites at issue did not operate in France but in other EU Member States. According to the ECJ, it is sufficient that the events which occurred in those EU Member States resulted in or may have resulted in the alleged damage in the jurisdiction under control of the French court, which is something for the French court to ascertain.

In view of the above, the ECJ concluded that Article 5(3) of the Brussels I Regulation must be interpreted as conferring jurisdiction on the courts of the territory of the EU Member State which protects the prohibition on resale outside a selective distribution network, provided that the plaintiff allegedly suffered a reduction in its sales in that territory. This conclusion is in line with the opinion which Advocate

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General Wathelet had already issued on 9 November 2016 (*See, this Newsletter, Volume 2016, No 11, p. 3*).

The ECJ has thus taken a further step towards a generalised cross-border jurisdiction of Member State Courts in the EU.

The Brussels I Regulation was repealed with effect from 10 January 2015 by Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I*bis* Regulation"). However, the ECJ judgment remains fully relevant as the wording of Article 7(2) of the Brussels I*bis* Regulation is identical to that of Article 5(3) of the now repealed Brussels I Regulation.

Pharmacists' Case against Medi-Market Crashes on Procedural Grounds - Injunction Request Against Multiple Defendants Fails

On 5 October 2016, the President of the Walloon Brabant Commercial Court (the "President") gave judgment in cease-and-desist proceedings started by the Belgian Pharmacists' Association and three pharmacies against various companies, both pharmacies and para-pharmacies, of the "Medi-Market" group ("Medi-Market") (President of the Walloon Brabant Commercial Court, 5 October 2016, *L'Ordre des Pharmaciens, Pharmacie du Progrès SPRL, Pharmacie Piedboeuf SPRL and Pharmacie Engelbeen SPRL v. Medicare-Market SA, Medi-Market Pharmaclic A SA, Pharmaclic Medi-Market Charleroi SA, Medi-Market Parapharmacie Charleroi SA, Medi-Market Pharmacie Liège SA, Medi-Market Parapharmacie Liège SA, Medi-Market Parapharmacie Waterloo SA, Medi-Market Parapharmacie Evere SA and Pharmaclic Evere SA*).

The President dismissed as inadmissible the plaintiffs' claim that each and all of the defendants should cease and desist from each and all of a series of challenged acts, irrespective of whether the defendant is a parent company or a subsidiary, a pharmacy or a para-pharmacy, as they all allegedly engaged in an unlawful "concept" in breach of the Code of Economic Law (*Wetboek van Economish Recht/Code de droit économique*) and other statutes.

The dispute concerned Medi-Market's decision to open several pharmacies next to para-pharmacies that offer a large variety of cosmetic and personal hygiene products at sharp prices. The plaintiffs argued that Medi-Market was creating confusion in the mind of the public between (i) the space (real or virtual) dedicated to pharmacy activities, which is a regulated profession; and (ii) the space (real or virtual) dedicated to para-pharmacy activities, which is not a regulated profession.

The President held that cease-and-desist proceedings are not concerned with "concepts" but rather with their implementation (i) by a specific entity; (ii) in a given time and place; and (iii) through specific material acts. The President further held that the purpose of cease-and-desist proceedings is to limit the harm caused by unfair practices and that, therefore, they can only be directed against a company which has committed or threatens to commit such practices.

Lastly, the President pointed out that a "global" injunction sought by a claimant which is well aware of the fact that not all defendants can be held liable for each and all of the contested acts would require the judge to establish himself the link between a specific complaint and a specific defendant in order to assess whether the claim is admissible. According to the President, such a situation could cause the judge not only to infringe the principle that the parties delimit the subject matter of the proceedings (*beschikkingsbeginsel/principe-dispositif*) but also to impair the defendant's rights of defence.

The judgment demonstrates that a request for an injunction must properly identify not only the defendants but also the material acts with which they are charged. It remains to be seen whether the plaintiffs in the Medi-Market case will submit a new request for an injunction to the President or plan to appeal. The President's judgment gives no indication as to whether the plaintiffs' request might stand a chance on the merits.

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| COMPETITION LAW

Fine against bpost Annulled on "Double Jeopardy" Grounds

On 10 November 2016, the Brussels Court of Appeal (the "Court") annulled a fine imposed on bpost by the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA"). Bpost is the Belgian government-controlled incumbent postal services company.

On 10 December 2012, the BCA had imposed a fine of EUR 37,399,786 on bpost (then called *De Post / La Poste*) on account of an anticompetitive quantitative rebate scheme granted to large clients and intermediaries that had been applied from January 2010 until July 2011 (*See, this Newsletter, Volume 2012, No. 12, p. 3-4*).

This was not the first time bpost had been fined in relation to this rebate scheme. In July 2011, the Belgian Institute for Postal Services and Telecommunications ("BIPT") (*Belgisch Instituut voor Postdiensten en Telecommunicatie / Institut belge des services postaux et des télécommunications*), Belgium's federal telecommunications and postal regulator, had already fined bpost EUR 2,300,000 because it considered the rebate scheme discriminatory and in breach of the postal regulatory framework. In its subsequent decision, the BCA decided to deduct this amount from the fine which it imposed for breach of competition law.

Bpost appealed both decisions to the Brussels Court of Appeal. In a judgment dated 10 March 2016, the Court annulled the BIPT's decision as it found that there was no discrimination. Eight months later, on 10 November 2016, the same Court also annulled the BCA's decision, this time on "double jeopardy" grounds ("*non bis in idem*").

Pursuant to the *non bis in idem* principle, no one can be tried or punished for an offence for which he/she has already been convicted or acquitted (Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms). The Court found that the BCA had infringed this principle as BIPT had already fined bpost for the rebate scheme at issue. Although BIPT had based its fine on a different legal ground than the BCA, the Court found that the three conditions for the application of the *non 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 (*i.e.*, the same rebate scheme); and (iii) the judgment of the Court of 10 March 2016 made the BIPT proceedings final. As a result, the *non bis in idem* principle prevented the BCA from investigating and penalising bpost a second time. The Court noted that it was not sufficient for the BCA to deduct the fine already imposed by BIPT to avoid the application of the *non bis in idem* principle. Therefore, the Court annulled the decision of the BCA in its entirety.

The BCA can appeal this judgment to the Supreme Court (*Hof van Cassatie / Cour de cassation*) on points of law only.

BCA Opens In-Depth Investigation into Pharma Belgium / Belmedis Merger

On 21 December 2016, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*) ("BCA") decided to open a second, in-depth phase in its review under Belgian merger control rules of the contemplated acquisition by McKesson group of Belmedis, Espafarmed, Cophana, Alphar Partners and Sofiadis.

This acquisition would bring together two wholesalers of pharmaceutical products, Pharma Belgium and Belmedis. During the first phase of the merger review, the BCA obtained information on possible anticompetitive practices that caused it to launch a separate competition investigation and in November 2016 carry out unannounced inspections at the premises of several wholesalers of pharmaceutical and para-pharmaceutical products. The BCA suspects that these wholesalers might have concluded anticompetitive agreements or adopted concerted practices regarding the services which they offer to both pharmaceutical suppliers and pharmacies.

As far as the contemplated merger is concerned, the opening of an in-depth investigation indicates that the BCA has "*serious doubts*" regarding the admissibility of the merger

(Article 61(2) of the Belgian Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*)). This second phase will provide the BCA with additional time to investigate the matter before reaching a final decision on the admissibility of the concentration.

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| DATA PROTECTION

Article 29 Working Party Releases Guidance on Data Portability, Data Protection Officers and Lead Supervisory Data Protection Authority

On 16 December 2016, the Article 29 Working Party (the "WP29") published three guidance papers on key implementation issues arising under the EU General Data Protection Regulation (the "GDPR"). The WP29 is an independent advisory body composed of representatives from data protection authorities of the Member States, the European Data Protection Supervisor and a representative of the European Commission. As part of its advisory role, the WP29 will provide guidance on the implementation of the GDPR.

The guidance issued concerns three important topics that are relevant under the GDPR, namely: (i) the right to data portability; (ii) data protection officers ("DPOs"); and (iii) the determination and role of the Lead Supervisory Authority. The WP29 published guidance and FAQs on each of these topics. The documents provide useful guidance for companies to bring their processing activities in line with the GDPR by 25 May 2018, the date of its entry into force.

Right to Data Portability

The right to data portability is one of the main and controversial new rights granted by the GDPR to data subjects. The right is intended to give individuals more control over their personal data. Importantly, the right will also have implications for competition and innovation. The WP29 explains that the purpose of the right to data portability is consumer empowerment. At the same time, the WP29 notes that the right should foster opportunities for innovation and the sharing of personal data amongst controllers.

Article 20 of the GDPR, defines the right of data portability as follows:

"*The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the data have been provided.*"

The WP29 opinion offers guidance on the implementation and interpretation of this new right to data portability. It helpfully clarifies the conditions under which the right applies and provides concrete examples and criteria to illustrate the circumstances in which it will arise.

The WP29 distinguishes two elements of the right to data portability: (i) a right for data subjects to **receive** personal data processed by a data controller and to store it for their own personal use on a device; and (ii) a right to **transmit** personal data from one controller to another without hindrance. The WP29 cites the second element as being fundamental for consumer empowerment and encouraging innovation in data portable technologies. Controllers must implement tools to ensure compliance with both elements of the data portability right. The WP29 encourages controllers not only to offer direct download opportunities to the data subjects, but also to allow data subjects to transmit data directly to another data controller through an application programming interface (API).

If data are transferred from one service provider to another for use in another service, the WP29 indicates that both the transferring and the receiving service providers should ensure compliance with the GDPR. For instance, the transferring service provider will have to assess whether it can keep a copy of the data after the transfer. On the other hand, the recipient should determine whether the data provided are relevant and not excessive, with regard to that new data processing. The WP29 also points out that the receiving organisation may become a new data controller. It must therefore clearly and directly state the purpose of the new processing before any request for transmission of the portable data is made.

Conditions for Right to Data Portability

The guidance also clarifies the conditions under which the right to data portability applies:

› **Consent or performance of a contract**. The right to data portability only applies if the legal basis for the data processing is the data subject's *consent* or the necessity to *perform a contract*. Conversely, the data portability right does not apply to data that have been processed on another legal basis, such as processing that is required by law, or for the legitimate interest of the controller.

› **Provided by the data subject.** The data portability right is limited to personal data provided by the data subject. The WP29 adopts a broad interpretation of 'provided by the data subject' which suggests that the right does not only cover data actively and knowingly provided by the data subject (for example, by completing an online form) but also data provided by the data subject by virtue of the use of the controller's services or devices (such as search history, traffic data, or location data). By contrast, the WP29 excludes from the right to data portability 'inferred data' and 'derived data' created by the data controller on the basis of the data supplied by the data subject, such as a credit score or analysis of the user's health.

› **Rights and freedoms of others.** The right to data portability cannot adversely affect the rights and freedoms of others. Controllers must assess whether the data includes information about third parties, and whether the transfer of this information could affect the third parties' rights and freedoms. Controllers may need to exclude other data subjects' data or implement consent mechanisms for other data subjects involved. The guidance indicates that such issues are unlikely to arise on the occasion of the transfer of a bank account history, which will include data on other persons, provided that the transferred information is used for the same purpose (*i.e.*, bank account history). However, if the information is to be used for a different purpose, such as a contact directory or for marketing purposes, the third party's rights and freedoms are likely to be affected.

Obligations for Data Controllers

The guidelines also clarify a number of obligations for data controllers:

› Data controllers must inform the data subjects regarding the availability of the right to portability. Controllers should also include information about the right to data portability before any account closure.

› Data controllers must adopt procedures to identify data subjects wishing to exercise their data portability right.

› The procedures adopted by the data controller must ensure that the right is complied with "without undue delay" and in any case within one month of receipt of the request (this term may be extended to three months for complex cases).

› Data controllers are encouraged to ensure the interoperability of the data format provided in the exercise of a data portability request, and to include as much metadata as possible.

› The data controller is responsible for taking all security measures necessary to ensure that personal data is securely transmitted (*e.g.*, by use of encryption) to the right destination (*e.g.*, by use of additional authentication information). Because of the risk that data subjects might request for their data but then fail to keep it secure, controllers responding to portability requests should recommend appropriate format(s) and encryption measures to help the data subject maintain security.

The WP29 guidelines on the right to data portability can be found here. The FAQs can be found here.

Data Protection Officers

Under the GDPR, many companies will have to appoint a Data Protection Officer ("DPO") and register the DPO with the supervisory data protection authority.

Article 37(1) of the GDPR requires the designation of a DPO:

› where the processing is carried out by a public authority or body;

› where the core activities of the controller or the processor consist of processing operations that require regular and systematic monitoring of data subjects on a large scale; or

› where the core activities of the controller or the processor consist of processing on a large scale of special categories of data (as defined in Article 9 of the GDPR).

The designation of a DPO imposes an important obligation on companies. However, the vague wording of the GDPR created uncertainty. Therefore, the WP29 guidance provides welcome clarifications on the criteria of 'core activities', 'regular and systematic monitoring' and 'large scale' as possible triggers for the mandatory DPO.

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The WP29 defines 'core activities' as "*key operations necessary to achieve the controller's or processor's goals*". It specifies that 'core activities' include activities for which the processing of data "*forms an inextricable part of the controller's or processor's activity*". For example, a hospital's requirement to process patients' health records is part of its core activity of providing health care services. Conversely, processing personal data merely to pay employees or conduct standard IT support activities do not qualify as 'core activities'.

As to the 'large scale' criterion, the WP29 recommends considering the following factors:

› the **number of data subjects** concerned, either as a specific number or as a proportion of the relevant population

› the **volume of data** and/or the **range** of different data items being processed;

› the **duration**, or permanence, of the data processing activity; and

› the **geographical extent** of the processing activity.

The WP29 cites as an example of 'large scale' processing a hospital's processing of patients' data or the processing of customer data in the regular course of business by an insurance company or a bank. By contrast, the processing of patient data by an individual physician or an individual lawyer's database of clients' convictions are not considered to be 'large scale'.

Based on this, the WP29 explains the notion of 'regular and systematic monitoring of data subjects'. According to the WP29, the notion of 'monitoring the behaviour of data subjects' includes all forms of tracking and profiling on the internet, but is not limited to the online environment and online tracking. The monitoring activity must be 'regular' (*i.e.*, on-going; recurring; or constantly or periodically taking place) and 'systematic' (*i.e.*, occurring according to a system; pre-arranged, organised or methodical; or taking place as part of a general plan; or carried out as part of a strategy).

The WP29 emphasises that Article 37 of the GDPR does not require that the DPO be someone working within the controller or processor's organisation. As a result, the DPO can also be a third party. However, the WP29 states that the personal availability of a DPO (whether physically on the same premises as an employee or via a hotline or other secure means of communication) is essential to ensure that data subjects will be able to contact the DPO.

In its guidelines, the WP29 further explains the independent position of the DPO in an organisation, as well as the required qualifications and tasks of the DPO. The WP29 recommends that DPOs should adopt a risk-based approach and focus on forms of processing that present the highest data protection risk.

The WP29 underlines that the data controller (*i.e.*, the company and not the DPO) remains responsible for the processing activities and for compliance with the GDPR. For companies that do not fall within the categories whose designation of a DPO is mandatory, the company can still voluntarily appoint a DPO. In that case, it will have to comply with the provisions applicable to DPOs under the GDPR (including registration of the DPO with the supervisory data protection authority and protection against dismissal of the DPO). Lastly, companies that voluntarily appoint staff or outside consultants to oversee GDPR compliance but are not DPOs, should ensure that it is clear from the title, status, position and task of these persons that they are not DPOs within the meaning of Article 37 of the GDPR.

The WP29 guidelines on the DPO can be found **here**. The FAQs can be consulted **here**.

Lead Supervisory Data Protection Authority

The third guidance paper published by the WP29 on 13 December 2016 discusses the "Lead Authority", which under the GDPR must provide a one-stop-shop for cross-border processing.

First, the WP29 explains that the one-stop-shop principle only applies to situations of cross-border processing of personal data or processing which substantially affects data subjects in more than one Member State. By contrast, situations involving a mere local processing will be dealt with by the local supervisory authority. Moreover, the one-stop-shop principle does not apply to processing by companies that are not established within the EU (even if the company has a local representative in the EU).

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For the processing activities to which the one-stop-shop principle applies, the WP29 offers guidance for identifying the 'lead supervisory authority' which will be the main point of contact for the controller and will coordinate the application of the data protection rules with other concerned supervisory authorities.

The WP29 states that identifying the lead supervisory authority depends on determining the location of the controller's 'main establishment' in the EU (or the location of the 'single establishment' if there is only one). In principle, for the controller, the main establishment will be the place of its central administration, i.e., the place where decisions regarding the purposes and means of the processing of personal data are taken.

However, in cases where decisions about different types of data processing are made in different Member States by distinct members of an organisation, more than one lead authority may be identified. The example given by WP29 is that of a bank whose banking processing activities take place in Germany where its headquarters are based, but whose insurance department is located in Austria. In such a case, the Austrian supervisory authority will be the lead authority for the cross border processing of personal data for insurance purposes, while the German supervisory authority will supervise the processing of personal data for banking purposes.

The WP29 makes it clear that the GDPR does not permit 'forum shopping'. This means that if a supervisory authority does not agree with the controller on the main establishment, the relevant supervisory authority will decide which supervisory authority will be considered as the 'lead', using objective criteria and looking at the facts at hand.

The WP29 guidelines for identifying a controller or processor's lead supervisory authority can be found here. The FAQs on this topic are available here.

The WP29 announced that more opinions and guidance will follow, including guidelines on Data Protection Impact Assessments and Certification.

Article 29 Working Party Adopts Implementing Measures for EU-US Privacy Shield

On 16 December 2016, following its plenary meeting, the Article 29 Working Party (the "WP29"), announced developments with respect to the EU-U.S. Privacy Shield, the new framework for transatlantic exchanges of personal data replacing the Safe Harbour agreement. The WP29 is an independent advisory body composed of representatives from data protection authorities of the Member States, the European Data Protection Supervisor and a representative of the European Commission.

The WP29 adopted specific communication tools for both individuals and companies that will be published on the WP29's website as a resource for Data Protection Authorities ("DPAs"). The plenary meeting further involved the auditioning of U.S. representatives from the U.S. Department of Commerce, the Federal Trade Commission and the Office of the Director of National Intelligence. The EU-U.S. Privacy Shield Ombudsperson was also heard.

Finally, the WP29 confirmed that it will take on the role of 'EU centralised body', which is the EU complaint handling body set up under the Privacy Shield to review complaints from individuals regarding data transferred to the U.S. for commercial purposes and further accessed for national security purposes.

European Commission Issues Amendments to Decisions on Standard Model Clauses and Whitelisting Countries

On 16 December 2016, the European Commission issued updated decisions permitting the international transfer of personal data to countries outside the EU/EEA. In particular, Implementing Decision 2016/2297 amends Commission Decisions 2001/497/EC and 2010/87/EU on Standard Contractual Clauses for the transfer of personal data to third countries and to processors established in such countries ("Standard Contractual Clauses Decisions"); and Implementing Decision 2016/2295 amends a number of Commission Decisions on the adequate protection of personal data by specific countries ("Whitelisting Decisions").

The judgment of the Court of Justice of the European Union in *Schrems* (*See, this Newsletter, Volume 2015, No. 10, p. 8 and 9*) formed the impetus for these changes. In *Schrems*, the Court held that the European Commission cannot restrict the powers of national data protection authorities ("DPAs") to restrict transfers to third countries in situations where adequate protections are not sufficient.

With respect to Standard Contractual Clauses Decisions, non-EU entities are permitted to utilise Standard Contractual Clauses allowing them to receive data from EU parties. The Commission's amendment removes Article 4 of the Standard Contractual Clauses Decisions. As a result, national DPAs now have the power to order the suspension of cross-border data flows or ban them altogether. In such cases, the Member State authority is under an obligation to inform the European Commission immediately, which will then forward the information to other Member States.

With respect to the Whitelisting Decisions, the European Commission previously had eleven agreements with non EU-member states providing that EU data could be adequately transferred there. This allowed European companies to transfer data to such countries without a need to comply with transfer mechanisms such as standard contractual clauses or binding corporate rules. Under the amended provision, the DPAs can order a suspension or definite ban of data flows to a whitelisted non-EU member state, as long as the Commission is informed immediately.

The new rules furthermore create an information-exchange and coordination mechanism between the Commission and DPAs. The European Commission will now monitor developments as to the protection of personal data by relevant public authorities. Member States and the European Commission will inform each other of cases where the actions of the authorities responsible for ensuring compliance with standards of protection are not satisfactory. They will also advise each other of cases where data protection is compromised by law enforcement or other public interest activity. If there are inadequate levels of protection, the European Commission will inform the relevant authority. Finally, if the Commission is of the opinion that the whitelisted country no longer ensures adequate protection of personal data, it will inform the competent authority and, if necessary, draft a repealing or suspending instrument.

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| INTELLECTUAL PROPERTY

Supreme Court Acknowledges Objective Justification for Parallel Importation of Pharmaceuticals

The Supreme Court (*Hof van Cassatie/Cour de Cassation*) recently handed down two judgments on the repackaging of parallel imported pharmaceuticals. The judgments, both issued on 7 November 2016, clarify the requirement for an "objective justification" under the so-called "*BMS*"-criteria.

The BMS-criteria were developed by the Court of Justice of the European Union ("ECJ") in an attempt to balance the principle of free movement of goods with the protection of trade mark rights and public health considerations in the case of parallel importation of pharmaceuticals from one Member State into another. The ECJ held in *Bristol-Myers Squibb* (Case C-427/93) that parallel imported products could be repackaged (i) if repackaging is objectively necessary to market the product in the country of importation; (ii) if the repackaging does not affect the original condition of the product inside the packaging; (iii) if the new packaging clearly states who repackaged the product and indicates the name of the manufacturer; (iv) if the presentation of the repackaged product is not liable to damage the reputation of the trade mark or of its owner; and (v) if the importer gives notice to the trade mark owner before the repackaged product is put on sale, and, on demand, supplies him with a specimen of the repackaged product. In other words, if these five conditions are satisfied, the trade mark owner cannot legitimately object to the further marketing of a repackaged pharmaceutical.

Both cases before the Supreme Court concerned the parallel importation into the Belgian market of the pharmaceutical product based on the active ingredient "*losartan*" which is sold in Benelux under the Benelux trade marks "*Cozaar*" and "*Loortan*", both owned by Merck Sharp & Dohme ("MSD").

First Judgment

The first case concerned the parallel importation from the Italian market of "*losartan*" under the registered trade mark "*Loortan*" in a dosage form of 100 mg. In Italy, this product is only sold in packaging formats of 28 tablets, while in Belgium "*Cozaar*" and "*Loortan*" 100 mg are sold in packaging formats of 98 tablets. Pi Pharma, the parallel importer, repackaged the product into a new packaging of 98 tablets and affixed the trade mark "*Cozaar*". MSD claimed that Pi Pharma had infringed MSD's trade mark rights. At first instance, the President of the Commercial Court granted MSD's claims and ordered Pi Pharma to cease and desist the infringements. Conversely, the Court of Appeal of Brussels dismissed the claims of MSD. The reasoning of the Court of Appeal of Brussels echoes that of the Court of Appeal of Mons in its judgment of 14 September 2015 in a case between MSD and parallel importer Impexeco (*See, this Newsletter, Volume 2015, No. 10, p. 14*). Finally, the case was brought before the Supreme Court.

In order to assess the requirement of "objective necessity" under the first "BMS" criterion, the Supreme Court reasoned that the entire Belgian market of pharmaceuticals based on the active ingredient "*losartan*" in a dosage of 100 mg must be considered, rather than the Belgian market for the pharmaceutical "Cozaar 100 mg" in a packaging format of 98 tablets. In addition, the Supreme Court considered that the actual circumstances at the time of importation, including national rules and practices, must be taken into account to determine whether repackaging is necessary. Based on these considerations, the Supreme Court held that repackaging and affixing a different trade mark was objectively necessary in order to gain effective access to the Belgian market since the pharmaceutical product based on "*losartan*" 100 mg is solely sold by MSD in packaging formats of 98 tablets. Other packaging formats are not known by prescribing doctors or pharmacists and have not obtained reimbursement status in Belgium. Accordingly, objecting to the fact that parallel imported products of "*losartan*" 100 mg would be repackaged to a format of 98 tablets and sold under the trade mark "*Cozaar*" would result in foreclosure of the Belgian market for parallel imports.

Second Judgment

In the second case, Pi Pharma imported from the Polish market the pharmaceutical product based on the active ingredient "*losartan*" under the trademark "*Cozaar*" in a dosage form of 50 mg and in a packaging format of 28 tablets. The pharmaceutical product Cozaar 50 mg is sold by MSD on the Belgian market in packaging formats of 28, 56 and 98 tablets. The market share of the different packaging formats of MSD with regard to Cozaar 50 mg in the third quarter of 2012 was 2%, 9% and 89%, respectively. Pi Pharma repackaged the product into a new packaging format of 98 tablets and reaffixed on the new packaging the trademark "*Cozaar*". MSD claimed that Pi Pharma had infringed its trade mark rights in the verbal trade mark "*Cozaar*". Both at first instance and on appeal, the court dismissed the claims of MSD.

For its part, the Supreme Court again held that it must be determined to what extent the imported product in the packaging of the country of exportation can be sold in the entire market of the relevant product of the country of importation. The Supreme Court found that Pi Pharma was able to sell the pharmaceutical product in a dosage of 50 mg and in a packaging format of 28 tablets in only a limited part of the Belgian market, while a packaging format of 98 tablets represented most of the demand on the Belgian market. The Supreme Court thus held once more that repackaging was objectively necessary in order to gain effective access to the entire Belgian market.

Quality Labels as Trade Marks

On 1 December 2016, Advocate General Melchior Wathelet (the "AG") issued an opinion in answer to two questions referred to the Court of Justice of the European Union ("ECJ") for a preliminary ruling in case C-689/15 *GmbH, Wolfgang Gözze v. Verein Bremer Baumwollbörse*. The case deals with the possibility to use quality labels as individual trade marks within the meaning of Regulation 207/2009 of 26 February 2009 on the Community trade mark (the "Trade Mark Regulation").

The dispute arose between W. F. Gözze Frottierweberei ("Gözze") and its manager on the one hand, and the association Verein Bremer Baumwollbörse ("Verein") on the other hand. Verein owns a visual trade mark, a cotton flower, which it licences to companies active in the textile sector as a sign of high quality of cotton fibres. Gözze is active in the same sector and uses the cotton flower on its hangtags but did not obtain a licence. Verein consequently initiated infringement proceedings against Gözze. The matter was referred to the Higher Regional Court of Düsseldorf which requested the ECJ to determine whether (i) the use of a trade mark as a quality label can constitute use as a trade mark under the Trade Mark Regulation; and (ii) it is possible to revoke a trade mark used as a quality label if the right holder does not ensure expectations of high quality by failing to carry out regular quality controls.

As regards the first question, the AG established that quality labels are not covered by the Trade Mark Regulation. As a consequence, quality labels will only benefit from the protection offered by the Trade Mark Regulation if the label is also used as an indication of origin, which is the essential function of a trade mark.

The AG answered the second question in the negative. Since quality labels can only be protected as individual trade marks under the Trade Mark Regulation, they must only conform to the essential function of the trade mark, which is the indication of origin. According to the AG, nothing in the Trade Mark Regulation provides for any kind of quality control to satisfy quality expectations.

Distinctive Character of Sign Not Affected by Polysemy

On 27 October 2016, the General Court (the "Court") annulled a decision of the Fourth Board of Appeal of the European Union Intellectual Property Office (the "EUIPO") of 11 September 2015 that had rejected an opposition lodged by Spa Monopole, the holder of the trade mark "SPA", against the registration of the word mark 'SPA VILLAGE'.

First, the Court stressed that it is not necessary for the application of Article 8, paragraph 5 of Regulation 207/2009 of 26 February 2009 on the Community trade mark (the "Trade Mark Regulation") to show any likelihood of confusion between the trade marks at issue as long as the relevant public can link these marks together.

Second, having established the reputation of the word sign 'SPA', the Court went on to examine the similarities between the two word marks. Contrary to the EUIPO's decision, the Court retained a visual, graphic and conceptual similarity between 'SPA' and 'SPA VILLAGE' by attributing to the word 'SPA' a stronger distinctive character than to the word 'VILLAGE'. While admitting that the absence of polysemy is a criterion that has been used to determine whether a mark bears a distinctive character, the Court added that the polysemy of the word 'SPA' (*i.e.*, the coexistence of many possible meanings for that word) did not result in the loss of its unique/distinctive character.

Third, the Court recalled that there is a complementarity between non-alcoholic beverages and catering services (the mark 'SPA VILLAGE' had been sought for services consisting of, *inter alia*, the provision of food and drinks). Finally, the Court analysed the risk of exploitation and free-riding of the earlier trade mark. As the well-being image portrayed by the word mark 'SPA' can benefit the services covered by the word mark 'SPA VILLAGE', the Court concluded that the conditions laid down in Article 8, paragraph 5, of the Trade Mark Regulation were satisfied and annulled the EUIPO's decision.

Royal Decree Postpones Implementation of Specific Provisions of Book XI of Code of Economic Law

On 12 December 2016, a Royal Decree was adopted to postpone the implementation of specific provisions of Book XI of the Code of Economic Law (*Wetboek van Economisch Recht/Code de droit économique*) relating to intellectual property rights. Book XI was initially intended to enter into force on 1 January 2015 (*See, this Newsletter, Volume 2014, No 6, p. 9*), but has been repeatedly postponed since. The last postponement occurred on 18 December 2015 when a new Royal Decree determined the entry into force of Book XI on 1 January 2017. Now, the entry into force of a few specific provisions has again been postponed to 1 January 2018. The provisions at issue relate to (i) the reprography exception (Articles XI.190, 5° and 6°; XI.191, § 1, indent 1, 1° and 2° as well as XI.235 to XI.239); (ii) the fair compensation for performers and producers (Articles XI.212 to XI.214); and (iii) the single platform for the collection of copyright and related rights relating to the public performance of phonograms and films (Article XI.253, § 2, indent 4 and last indent).

Reprography exception

First, in case C572/13 *Hewlett-Packard Belgium SPRL v. Reprobel SCRL*, the Court of Justice of the European Union (the "ECJ") held that the remuneration system laid down in Belgian copyright rules (*i.e.*, a dual remuneration consisting of (i) a lump-sum paid in advance and calculated by reference to the speed of the device; and of (ii) an amount paid annually and based on the proportional number of copies produced without any possibility of reimbursement) is incompatible with Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (*See, this Newsletter, Volume 2015, No 11, p. 13-14*).

Secondly, as a result of the above judgment, the government submitted on 26 October 2016 a bill to the Chamber of Representatives modifying certain provisions of Book XI of the Code of Economic Law (*Wetsontwerp tot wijziging van sommige bepalingen van het boek XI, van het Wetboek van Economisch Recht/Projet de loi modifiant certaines dispositions du livre XI du Code de droit économique*) (the "Bill"). The Bill proposes to suppress the lump-sum remuneration and exclude from the remuneration reproductions made from unlawful sources as well as copies of sheet music (*See, this Newsletter, Volume 2016, No. 11, p. 13*). The text was adopted by the Chamber of Representatives on 15 December 2016 and will enter into force shortly.

Fair compensation for certain holders of related rights

The provisions at stake relate to the fair compensation for performers and producers in case of public performance or radio broadcasting of their works. Parliament is of the opinion that further enforcement measures must be adopted before these provisions can enter into force.

Single platform

The platform has not yet been set up.

No Patentability for Products of Essentially Biological Processes

On 3 November 2016, the European Commission (the "Commission") adopted a Notice on certain articles of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (the "Notice").

The Notice follows a decision from the Enlarged Board of Appeal of the European Patent Office (the "Enlarged Board") of March 2015 which held that although it follows from Directive 98/44/EC (the "Directive") that an essentially biological process for the production of a plant or animal is not patentable, a patent may nonetheless be granted for plants/plant material or animals resulting from this process.

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The Enlarged Board reached this decision after stating that exclusions from the general principle of patentability have to be interpreted narrowly. Article 4 of the Directive specifically excludes from the scope of patentable subject-matter "*essentially biological processes for the production of plants and animal*", such as crossing and selection, but leaves unaddressed the issue of patentability for products obtained from these processes.

Following this decision, the European Parliament asked the Commission in December 2015 to look into the patentability of these products.

In the Notice, the Commission diverges from the Enlarged Board's decision as it believes that the European legislator's intention when adopting the Directive was to exclude from patentability products that are obtained by essentially biological processes. The Commission emphasises that this interpretation stems from the preparatory works and from recital 32 of the Directive which states that "*if an invention consists only in genetically modifying a particular plant variety, and if a new plant variety is bred, it will still be excluded from patentability even if the genetic modification is the result not of an essentially biological process but of a biotechnological process*". The Commission adds that specific provisions of the Directive will only form a consistent framework if plants/animals obtained by essentially biological processes are understood as excluded from the scope of the Directive.

In addition, the Commission addresses two further issues relating to the Directive following a request from the European Parliament that an access to, and use of, material obtained from essentially biological processes for plant breeding be guaranteed.

First, the Commission calls for further analysis of the compulsory cross-licensing system under the Directive which enables a breeder who cannot acquire or exploit a plant variety right without infringing a prior patent to apply for a compulsory licence for non-exclusive use of the invention protected by the patent if the licence is necessary for the exploitation of the plant variety under protection, subject to payment of an appropriate royalty. The Commission believes that this further analysis should focus on the conditions triggering access to such cross-licensing system (*i.e.*, Article 12(3)(b) of the Directive).

Second, the Commission examines Article 13(3) of the Directive which regulates the access to and deposit of biological material for the purpose of patent procedures. It takes the view that the wording of this provision offers balanced access to patented material of biological origin.

Although the Notice is not binding on the European Patent Office (the "EPO"), the EPO announced in a Notice of 24 November 2016 that, in view of the potential impact of the Notice, all proceedings before it relating to the patentability of a plant or animal obtained by an essentially biological process will be stayed while the concrete effects of the Notice are under discussion with the EPO members.

General Court Rules on Acquired Distinctive Character of Kit Kat Shape Mark

On 15 December 2016, the General Court (the "Court") issued a judgment on the distinctive character acquired through use of a shape trade mark. The judgment provides useful guidance on how to demonstrate acquired distinctiveness of a shape mark (Case T-112/13, *Mondelez UK Holdings & Services v. EUIPO*).

The dispute arose when Société de produits Nestlé SA ("Nestlé") filed an application for the registration of a three-dimensional sign (the Kit Kat chocolate bar) with the European Intellectual Property Office (the "EUIPO"). Cadbury Schweppes plc ("Cadbury") objected and claimed that the trade mark should be declared invalid on the grounds of lack of distinctive character. While the Cancellation Division declared the trade mark invalid, the EUIPO held on appeal that Nestlé had sufficiently showed that the trade mark had acquired a distinctive character through use. Cadbury further appealed to the Court in order to obtain the annulment of the decision of the EUIPO.

First, the Court looked at Cadbury's assertion that the trade mark had not been used with respect to all the relevant goods. The Court recalled that when a trade mark only covers certain products of a category of products in the Nice classification, the trade mark can be granted for sub-categories. The Court went on to state that a trade mark can also be protected for goods and services that are not *per se* covered by the trade mark but that are similar and belong to the same group. The Court determined that in the case at hand, the Kit Kat bar could be classified as a sweet, a

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candy or a biscuit but did not fall into the category of bakery products, pastries, cakes and waffles (contrary to what the EUIPO had stated).

Second, the Court examined whether the trade mark had been used in the form in which it was registered. Cadbury indeed asserted that the Kit Kat three-dimensional sign (*i.e.*, the four chocolate fingers) had acquired its distinctive character through its word mark Kit Kat and not through its shape. However, referring to its previous case law relating to Kit Kat chocolate bars (*See, this Newsletter, Volume 2015, No 9, p. 12*), the Court held that the trade mark as such must indicate the commercial origin of the goods, *i.e.* enable the consumers to identify the goods as originating from a particular undertaking. The Court then added that it is irrelevant whether or not the shape of the trade mark appears on the packaging or is visible at the time of the sale.

Since various surveys had shown that consumers were associating the shape trade mark with the word mark Kit Kat, the Court decided that the trade mark had been used in the form in which it was registered and that it had acquired distinctiveness through use. The Court based its conclusion on the evidence presented by Nestlé (*i.e.*, surveys, market shares, turnover and advertisement expenditure, advertising material and the long-standing use of the trade mark) which it held was sufficient to assess distinctiveness.

Third, the Court looked at the territory within which the acquired distinctive character must be shown. While it is not necessary to provide the same kind of evidence for every relevant Member State, the Court held it to be necessary for the trade mark holder to demonstrate that a significant proportion of the population of each of the relevant Member States can identify the shape trade mark as relating to Kit Kat chocolate bars. The Court found that Nestlé did not provide sufficient evidence to show acquired distinctiveness in specific Member States. Hence, it held that the EUIPO had erred when it considered that a trade mark had acquired distinctiveness when a substantial proportion of the EU public, regardless of the EU Member States taken individually, could identify the goods as being Kit Kat chocolate bars.

As a side note, the Court also stated that the EUIPO is not bound by decisions from national intellectual property offices which reject, for their own territory, the distinctive character of the trade mark.

Based on the foregoing, the Court referred the case back to the EUIPO to reassess the acquired distinctiveness in those Member States where it had not sufficiently assessed the evidence in the decision under appeal.

Enforceability of Revoked Trade Marks

On 18 November 2015, the President of the Commercial Court of Antwerp referred a request for a preliminary ruling to the Benelux Court of Justice ("BJC") with regard to the interpretation of Articles 1.14, b) and 4.5, paragraph 3 of the Benelux Convention on Intellectual Property ("BCIP"). In the resulting preliminary ruling, the BJC held that the right holder can enforce the trade mark rights as long as the judgment invalidating the trade mark has not become irrevocable.

The case brought before the President of the Commercial Court of Antwerp concerned an infringement proceeding between BVBA Upper At Home ("Upper At Home") and BVBA The Works ("The Works"). Upper at Home organises home-sale activities for erotic products under the name "upper" or "upperdare", and registered these signs as Benelux trade marks. Upper At Home claims that The Works, the defendant, uses "upperdare" for its own activities and thereby infringes its registered trade marks "Upper" and "upperdare". In return, the Works claimed the invalidity of the trade marks on which Upper At Home relies.

In a judgment of 3 June 2015 in separate proceedings between Upper At Home and Funtoys, the Commercial Court of Antwerp revoked the trade mark "upper" and partially revoked the trade mark "upperdare". Upper At Home appealed against the decision before the Court of Appeal of Antwerp.

Faced with this situation, the President of the Commercial Court of Antwerp asked the BCJ whether the owner of a trade mark that has been revoked can still enforce the rights arising from this trade mark against a party that is not the counterparty in the dispute in which the court had decided that the trade mark must be revoked (i) in the period in which remedies are still available or pending; or (ii) as long as the revocation has not been recorded in the Register of Trade Marks.

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On 4 November 2016, the BCJ held that, for reasons of legal certainty, a judgment invalidating or revoking a trade mark can only have effect against third parties when the judgment can no longer be contested. Article 1.14 of the BCIP states that the removal from the register ordered by the court can only occur if the judgment ordering this measure has become irrevocable. The BCJ therefore held that the trade mark owner can still enforce his trade mark rights against third parties, even though a court's decision has revoked or invalidated the trade mark, as long as there are remedies available or pending against that decision. This is also the case if the judgment is enforceable under national law.

Conversely, when the judgment invalidating or revoking a trade mark becomes irrevocable, *i.e.* when there are no remedies available or pending against that decision, the owner of the trade mark will no longer be able to enforce his trade mark rights, even if the trade mark has not yet been removed from the register.

Copyright and Communication to Public in Hotel Rooms

On 25 October 2016, Advocate General Szpunar ("AG") issued an opinion on the interpretation of the terms "communication to the public" and "places accessible to the public against payment of an entrance fee" (Case C 641-15, *Verwertungsgesellschaft Rundfunk v Hettegger Hotel Edelweiss*). In essence, the AG is of the opinion that hotel rooms do not qualify as "places accessible to the public against payment of an entrance fee" under Copyright law.

The opinion of the AG stems from a reference for a preliminary ruling from the Vienna Commercial Court in proceedings between *Verwertungsgesellschaft Rundfunk* ("Rundfunk") – a collecting society for the management of copyright and related rights – and *Hettegger Hotel Edelweiss* ("Edelweiss"). Rundfunk is a collecting society representing the interests of television broadcasters and sought to impose a levy on Edelweiss. Rundfunk argued that Edelweiss, by enabling a television signal to be received in the rooms of the hotel which it operates, is communicating to the public in a place accessible to the public against payment of an entrance fee the broadcasts of television broadcasters. According to Rundfunk, Edelweiss must thus pay the appropriate fees to obtain authorisation from the right holders.

The Vienna Commercial Court decided to stay the proceedings and refer a question to the Court of Justice of the European Union ("ECJ") concerning the interpretation of Article 8(3) of Directive 2006/115/EC of 12 December 2006 on rental rights and on certain rights related to copyright in the field of intellectual property ("Rental Rights Directive").

With regard to the term "communication to the public", the AG departed from the previous case law of the ECJ and stated that installing television sets in hotel rooms and providing a television signal via them constitutes communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC of 22 May 2001 on the harmonisation of copyright and related rights in the information society ("InfoSoc Directive").

However, the object of the relevant provision under the Rental Rights Directive is different from that of the InfoSoc Directive. Under the Rental Rights Directive, the exclusive right of broadcasting organisations is limited to situations where communication to the public takes place in "places accessible to the public against payment of an entrance fee". According to the AG, the interpretation of that term is not straightforward. Therefore, the AG examined whether hotel rooms constitute places accessible to the public against payment of an entrance fee.

First, the AG adopted a historical approach to the interpretation of the Article 8(3) of the Rental Rights Directive. Article 8(3) is modelled on Article 13(d) of the Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961 ("Rome Convention"), which also restricts the scope of the right of communication to the public to places accessible to the public against payment of an entrance fee. Therefore, the intention of the EU legislator was to protect the rights of broadcasting organisations to authorise or prohibit the communication to the public of their broadcasts to the extent to which that right is protected by the Rome Convention.

In this context, the AG specified that the term "payment of an entrance fee" must not be interpreted literally. When a fee is not directly linked to the possibility of viewing a television broadcast but is merely being levied for other services, such as catering services, that situation does not fall within the scope of the term "places accessible to the public against payment of an entrance fee".

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Second, the AG also embraced a dynamic approach and interpreted Article 8(3) of the Rental Rights Directive under current technical and market conditions. The AG specified that such a dynamic interpretation is justified only if it takes account of the objective of the provisions at issue and if that objective cannot be replaced with another objective. Accordingly, the AG insisted on the fact that the signatories of the Rome Convention aimed to exclude from the scope of the exclusive right cases of communication to the public of broadcasts in places such as catering establishments where no special fees are levied for communicating those broadcasts. Consequently, a dynamic interpretation requires that hotel rooms also be excluded from the scope of the exclusive right, based on the objective of Article 13(d) of the Rome Convention

On that basis, the AG concluded that the communication of a television or radio signal through television sets installed in hotel rooms does not constitute communication to the public of broadcasts of broadcasting organisations in a place accessible to the public against payment of an entrance fee within the meaning of Article 8(3) of Directive 2006/115/EC.

Advocate General in Favour of Broad Protection against Hyperlinking to Copyright Works

On 8 December 2016, Advocate General Campos Sanchez-Bordona ("AG") issued an opinion on the interpretation of the term "communication to the public" (the "Opinion"). The Opinion finds that a media player integrating illegal hyperlinks to copyright protected works infringes the rights of the right holders of these works.

The Opinion follows a recent judgment of the Court of Justice of the European Union ("ECJ") (Case C 160-15, *GS Media v. Sanoma Media Netherlands*), in which the ECJ addressed the question of whether hyperlinks ought to be considered as an act of communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society ("InfoSoc Directive") (*See, this Newsletter, Volume 2016, No. 9, p. 15*).

The Opinion of the AG stems from a reference for a preliminary ruling from the Central Netherlands District Court in proceedings between *Stichting Brein* (""Brein") – a foundation involved in the protection of copyright and other related rights – and Mr *Jack Frederik Wullems* ("Wullems"), who developed a multimedia player under the name "*Filmspeler*". In the multimedia player, Mr Wullems installed add-ons with hyperlinks to websites offering unrestricted access, free of charge, to digital content protected by copyright, without the authorisation of the right holders. End-users can purchase the add-ons which include the hyperlinks to the websites on which unrestricted access is provided to protected works without the consent of the right holders. Brein argued that Mr Wullems, through the sale of the *Filmspeler* player, was carrying out a "communication to the public" and thus infringed the copyright and related rights of the owners, including associations of producers and importers of image and sound carriers, film producers, film distributors, multimedia producers and publishers.

The Central Netherlands District Court decided to stay the proceedings and refer questions to the ECJ concerning the interpretation of Article 3(1) and Article 5 of the InfoSoc Directive. In particular, the District Court asked the ECJ whether or not there is a communication to the public if the work has been previously published but without the right holder's authorisation and whether there is "lawful use" within the meaning of Article 5(1)(b) InfoSoc Directive if a temporary reproduction is made by an end-user during the streaming of a copyright-protected work from a third-party website where that copyright-protected work is offered without the authorisation of the right holders. Furthermore, the District Court inquired whether the making of a temporary reproduction by an end-user during the streaming of a copyright-protected work from a website where that copyright-protected work is offered without the authorisation of the right holder is contrary to the "three-step test" referred to in Article 5(5) InfoSoc Directive. According to the three-step test, the exceptions and limitations to the right of reproduction only apply (i) in special cases; (ii) which do not conflict with a normal exploitation of the work; and (iii) do not unreasonably prejudice the legitimate interests of the right holder.

In response to the first question, i.e., whether there is a communication to the public in the case at hand, the AG first referred to the points made by the ECJ in the *GS Media*-case. In *GS Media*, the ECJ held that (i) the provision of clickable links to protected works must be considered to be "making available" and, therefore, such conduct is an "act of communication"; (ii) an act of communication refers to any transmission of the protected works, irrespective of the technical means or process used; and (iii) there is a rebuttable presumption that the posting of a hyperlink to a work unlawfully published (without the authorisation of the right holders) on the internet amounts to a "communication to the public" within the meaning of Article 3(1) InfoSoc Directive if it is done in pursuit of profit.

Furthermore, *GS Media* defined two alternative requirements: it is required that the communication is either (i) made by a specific method different from those used before or; failing this, (ii) that the work is distributed to a "new public", deemed to be a public which the right holders did not take into account when they authorised the original (limited) distribution of the work.

The facts underlying *GS Media* differ from the case at hand, inasmuch as the present case concerns a multimedia player, whereas *GS Media* related to the publishing of hyperlinks. However, according to the AG, there is no significant difference between posting hyperlinks to protected works on a website and, as in the case at hand, installing hyperlinks in a multimedia device designed specifically for use with the internet.

The AG underlined the indispensable role of the multimedia player: "[*i]t is therefore possible to refer to the indispensable role, within the meaning of the case-law, played by Mr Wullems in the communication to the public of protected works; his intervention is performed deliberately and with full knowledge of the consequences entailed. That is clear, in particular, from the examples of the advertising he uses to promote his device.*" Consequently, the *Filmspeler* cannot be regarded as a mere "physical facility" within the meaning of Recital 27 of the preamble to the InfoSoc Directive, but must be seen as a type of communication to the public of copyright-protected works that were unlawfully uploaded to the internet.

With regard to the question whether the public warrants the description "new", the AG first pointed out that the requirement of a "new public" must be satisfied where the communication of the protected work *is not made by means of a specific method which differs from the methods used up to that time*. According to the AG, Mr Wullems' method does not appear to involve any new features but is rather a combination of other, pre-existing methods. In addition, the multimedia player widens the pool of users beyond that intended by the authors of those works, inasmuch as it links both to websites distributing such digital content without authorisation and to sites containing protected works and making them available only to certain users who have to pay for access. Consequently, the AG reaches the conclusion that the requirement of a "new public" is satisfied.

As regards the second question, the AG indicated that there can be no "lawful use" within the meaning of Article 5(1)(b) InfoSoc Directive. According to the AG, the use is not lawful when the end-user has access to works for which the right holders did not allow or restricted the distribution of the digital content concerned and did not authorise unrestricted communication to the public of that content on websites to which the hyperlinks installed in the *Filmspeler* connect. The AG added that none of the three conditions of the three-step test of Article 5(5) InfoSoc Directive is satisfied.

The AG concluded that the sale of a multimedia player in which hyperlinks to websites are installed which, without the authorisation of the right holders, offer unrestricted access to copyright-protected works, constitutes "communication to the public" and does not qualify for the "lawful use" exception laid down in Article 5(1) InfoSoc Directive. In addition, such a sale does not satisfy the requirements of the three-step test referred to in Article 5(5) InfoSoc Directive.

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| LABOUR LAW

New Rules for Flexible Employment of Students

As a general rule, every employee, even if a student, must pay social security contributions (13.07 %) to the National Social Security Office (*Rijksdienst voor Sociale Zekerheid/ Office national de sécurité sociale*) in order to finance health insurance, pensions, unemployment, child allowances and other social benefits.

However, a student may be exempt from these social security contributions, and be responsible only for the payment of a solidarity premium, if specific conditions are satisfied. The solidarity premium amounts to 8.13%, of which 5.42% is payable by the employer and 2.71% is payable by the student. Students employed under a student contract were entitled to work at highly reduced employers' labour costs if they worked a maximum of 50 working days per calendar year.

Since 1 January 2017, the 50 days in which students may work with reduced social security contributions have been converted to 475 hours per calendar year, which is the equivalent of almost 60 working days. Moreover, specific sectors in which students only worked on a part-time basis should no longer take account of a full day of employment but only the number of hours actually performed by the students. This enhanced flexibility is expected to benefit both employers and students.

The changes came into effect following a modification of the regulatory framework comprised of:

› the Law of 1 December 2016 modifying the Royal Decree of 5 November 2002 (*Wet van 1 december 2016 tot wijziging van het Koninklijk Besluit van 5 november 2002 tot invoering van een onmiddellijke aangifte van tewerkstelling/Loi du 1er décembre 2016 modifiant l'arrêté royal du 5 novembre 2002 instaurant une déclaration immédiate de l'emploi*);

› Royal Decree of 13 December 2016 modifying article 17bis of the Royal Decree of 28 November 1969 (*Koninklijk Besluit van 13 december 2016 tot wijziging van artikel 17bis van het Koninklijk Besluit van 28 november 1969 betreffende de maatschappelijke zekerheid der arbeiders/Arrêté royal du 13 décembre 2016 modifiant l'article 17bis de l'arrêté royal du 28 novembre 1969 concernant la sécurité sociale des travailleurs*).

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| LITIGATION

Law to Create Market Court in Brussels Court of Appeal

On 30 December 2016, the Belgian Official Journal published a law which provides for various changes to Belgium's judicial system (*Wet tot wijziging van de rechtspositie van de gedetineerden en van het toezicht op de gevangenissen en houdende diverse bepalingen inzake justitie/ Loi modifiant le statut juridique des détenus et la surveillance des prisons et portant des dispositions diverses en matière de justice*) (the "Law"). The Law establishes a Market Court within the Brussels Court of Appeal.

As previously reported, the Market Court will hear cases in relation to specific regulated markets which already fall under the jurisdiction of the Brussels Court of Appeal. These are appeals against decisions of the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence*), the Financial Services and Markets Authority (*Autoriteit voor Financiële Diensten en Markten/ Autorité des services et marchés financiers*), the Belgian Institute for Postal Services and Telecommunications (*Belgisch Instituut voor Postdiensten en Telecommunicatie/ Institut belge des Services Postaux et des Télécommunications*), and the Commission for the Regulation of Electricity and Gas (*Commissie voor de Regulering van de Elektriciteit en het Gas/ Commission de Régulation de l'Électricité et du Gaz*) (*See, this Newsletter, Volume 2016, No. 9, p. 20*).

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| MARKET PRACTICES

Supreme Court Rules on Prohibition of Sales at a Loss

On 16 September 2016, the Supreme Court held that the prohibition of sales at a loss as laid down in Article 101, §1 of the now repealed and replaced Law on Market Practices and Consumer Protection (*Wet van 6 april 2010 betreffende marktpraktijken en consumentenbescherming/Loi du 6 avril 2010 relative aux pratiques du marché et à la protection du consommateur* – the "Law") is incompatible with Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices (the "Unfair Commercial Practices Directive") (Supreme Court, 16 September 2016, *Euronics Belgium CVBA v. Kamera Express BV and Kamera Express Belgium BVBA*).

Article 101 of the Law provided for a general prohibition of offers or sales at a loss. Article 101, §1, second subparagraph of the Law defined a sale at a loss as "*any sale at a price which is not at least equal to the price at which the undertaking purchased the item or which the undertaking would have to pay to replenish its stock, after any discounts granted and permanently obtained*".

In its judgment, the Supreme Court dismissed the appeal against a judgment of the Ghent Court of Appeal of 16 December 2013 in a dispute pitting Euronics Belgium against Kamera Express BV and Kamera Express Belgium BVBA. The Supreme Court thus confirmed a finding of the Court of Appeal of Ghent that the prohibition of sales at a loss as laid down in Article 101, §1 of the Law (i) falls within the scope of the Unfair Commercial Practices Directive as it seeks to protect not only competing retailers but also the consumer; (ii) is stricter than the Directive; and (iii) is thus in breach of Article 4 of the Unfair Commercial Practices Directive which prohibits EU Member States from adopting stricter rules than those provided for in the Directive. This is because Article 101, §1 contains a general and automatic prohibition of practices involving the offering for sale or selling goods at a loss. Yet, it follows from the Unfair Commercial Practices Directive that such practices can only be prohibited if they are found to be unfair in the light of the specific factual circumstances of the case.

Before the Supreme Court, Euronics Belgium CVBA claimed that Article 101, §1 of the Law falls outside the scope of the Unfair Commercial Practices Directive in that it supposedly seeks to protect competing retailers only. The Supreme Court dismissed this claim. Referring to the legislative preparatory works of the Law, the Supreme Court noted that Article 101, §1 of the Law pursued a twofold objective, that involves the protection of both the economic interests of competitors and those of the consumers.

This ruling is in line with the order which the Court of Justice of the European Union (the "ECJ") issued on 7 March 2013 in the same dispute. In response to a question referred to it by the Ghent Commercial Court, the ECJ held that the Unfair Commercial Practices Directive precludes a national provision such as Article 101 of the Law "*in so far as that provision pursues objectives relating to consumer protection*" (ECJ, 7 March 2013, Case C-343/12, *Euronics Belgium CVBA v. Kamera Express BV and Kamera Express Belgium BVBA – See, this Newsletter, Volume 2013, No. 3, p. 15-16*).

The Law, including its Article 101, has in the meantime been repealed and replaced by Book VI of the Code of Economic Law (*Wetboek van Economisch Recht/Code de droit économique* – "CEL"). Article VI.116, §1 CEL, which is the equivalent of the former Article 101, §1 of the Law, now provides explicitly that the prohibition of sales at a loss aims to ensure fair market practices "*between companies*". Moreover, the legislative preparatory works of Article VI.116 §1 CEL state expressly that this provision protects competition, specifically the position of small retailers vis-à-vis that of large chains (*See also, this Newsletter, Volume 2013, No. 5, p. 9*). It remains to be seen whether this legislative approach suffices to exclude the prohibition of sales at a loss from the scope of the Unfair Commercial Practices Directive.

ECJ Rules on Definition of Pyramid Promotional Schemes

On 15 December 2016, the Court of Justice of the European Union (the "ECJ") held that a prohibited pyramid promotional scheme would exist within the meaning of point 14 of Annex I to Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices (the "Unfair Commercial Practices Directive") even if there is only an

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indirect link between the contributions paid by new members of the scheme and the compensation paid to existing members (ECJ, 15 December 2016, Case C-667/15, *Loterie Nationale — Nationale Loterij NV van publiek recht v. Paul Adriaensen, Werner De Kesel and The Right Frequency VZW*).

Point 14 of Annex I to the Unfair Commercial Practices Directive ("Point 14") provides that the following commercial practice is in all circumstances considered to be unfair and thus prohibited: "*Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products*".

The ECJ delivered its judgment in response to a request for a preliminary ruling from the Antwerp Court of Appeal (the "Court") in legal proceedings between the Belgian National Lottery (the "National Lottery") and the organisers of a scheme of collective participation in the Belgian national lotteries called "*Lucky4All*" (the "Lucky4All scheme"). The National Lottery argued that the Lucky4All scheme constitutes a prohibited pyramid promotional scheme within the meaning of Point 14.

Under the Lucky4All scheme, groups of lottery players play together in an eight-level pyramid scheme. The underlying idea is that players mutually increase their chances of success if they play together. Through the scheme, a complete group of players can play up to 9,841 combinations at the same time. Members pay an initial contribution of EUR 10 and a monthly contribution of EUR 43, allowing them to purchase 10 lottery combinations a week. The winner of a combination receives 50% of the winnings while 40% is allocated to members in higher levels of the scheme, including the Lucky4all scheme itself. The remaining 10% are reinvested in the purchase of new combinations. The possible winnings of Lucky4All players are capped at EUR 1 million.

According to Point 14, for a pyramid promotional scheme to exist, the following conditions should be fulfilled: (i) consumers must be attracted by the promise of improved chances of winning; (ii) the realisation of that promise depends on the introduction of ever more new players; and (iii) the contributions of new members essentially fund the compensation paid to existing members.

Examining the Lucky4All scheme, the Court found that both the first and the second conditions were satisfied, given that every player has an interest in recruiting new players to improve his or her position as the winnings are distributed to the players depending on their position.

However, being uncertain as to whether the third condition was satisfied as well, the Court decided to stay the proceedings and ask the ECJ for guidance on whether (i) the realisation of the financial promise to existing members should depend primarily or mostly on the direct transfer of the contributions of the new members ("direct link"); or (ii) it is sufficient that the realisation of this financial promise depends primarily or mostly on an indirect payment through the contributions of existing members, i.e. existing members depend for the realisation of the financial promise primarily or mostly on the introduction and contributions of new members ("indirect link").

Referring to its earlier case law, the ECJ reiterated that classification as a pyramid promotional scheme requires (i) that the members of the scheme pay a financial contribution; as well as (ii) a link between the contributions paid by new members and the compensation received by existing members. It continued that the wording of Point 14 does not imply that the financial link must be direct. It suffices that there is an indirect link between the contributions paid by new members and the compensation received by existing members. The ECJ noted that any different interpretation of Point 14 would deprive this provision of its effectiveness as it would become easy to circumvent the absolute prohibition of pyramid promotional schemes by making the link indirect.

Against this background, the ECJ held that the Lucky4All scheme seems to satisfy the third condition as well. This is because not only the chances of winning are linked to the introduction of new members but the winnings are also capped at EUR 1 million, a factor which contributes to the funding of the scheme. Accordingly, the ECJ concluded that the financial link between the contributions paid by the new members and the compensations received by existing members seems to be indirect but certain. However, it left it to the Court to make a final determination and also decide whether the Lucky4All scheme qualifies as a "commercial practice" (which, according, to the ECJ, appears to be the case).

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| STATE AID

ECJ Finds Arco Guarantee Granted by Belgium Incompatible with EU Law

On 21 December 2016, the Court of Justice of the European Union ("ECJ") delivered a judgment on the guarantee scheme granted by Belgium to three financial cooperatives of the ARCO group (Case C-76/15, *Paul Vervloet and Others v Ministerraad*).

The judgment of the ECJ stems from a request for a preliminary ruling from the Belgian Constitutional Court, which had to decide on several questions with regard to the constitutionality of the ARCO guarantee. In November 2011, the Belgian authorities decided to grant to the 800,000 ARCO shareholders the same protection as that provided for savings deposits and life insurance, *i.e.*, a protection of funds limited to EUR 100,000 per investor. In the event of default on the part of the ARCO cooperatives, the Belgian state would repay up to EUR 100,000 of the funds invested by natural persons in shares issued by the financial cooperatives. ARCO, one of the main shareholders of the Belgian-French Dexia Bank, was thus protected against the threat of the flight of private investors from the three financial cooperatives.

By decision of 3 July 2014, the European Commission classified the ARCO guarantee as unlawful state aid (since it had not been notified in a timely manner) and incompatible with the internal market. Belgium and the three financial cooperatives brought actions before the General Court for annulment of the Commission's decision (Cases T-664/14 *Belgium v Commission* and T-711/14 *Arcofin and Others v Commission*). Those proceedings were stayed pending the ECJ's response to the questions referred by the Belgian Constitutional Court in the present proceedings.

The ECJ was asked to rule on the compatibility of the ARCO guarantee with EU law, in particular with Directive 94/19/EC of 30 May 1994 on deposit-guarantee schemes ("Directive 94/19/EC") and on the validity of the Commission's decision of 3 July 2014.

The ECJ first held that the shares of companies such as recognised cooperatives operating in the financial sector do not fall within the scope of the term "deposit", as defined in Article 1(1) of Directive 94/19/EC, since such shares are essentially participations in ARCO's capital, while deposits form part of the borrowed capital of a credit institution. The ECJ insisted on the fact that recognised cooperatives operating in the financial sector cannot be considered to be a "credit institution" within the meaning of Article 1(1) Directive 94/19. On that basis, the ECJ held that Directive 94/19 does not impose on Member States an obligation to adopt a guarantee scheme with regard to shares in recognised cooperatives operating in the financial sector, such as ARCO. According to the ECJ, the Directive does not prevent Member States from extending the deposit-guarantee scheme to shares in recognised cooperatives operating in the financial sector. However, such an extension must not undermine the practical effectiveness of the scheme that Directive 94/10/EC requires Member States to establish. This assessment must be made by the national courts, which must take into account, *inter alia*, the number of beneficiaries of the additional guarantee and the beneficiaries' contributions towards the financing of the guarantee. In addition, the ECJ stressed that national courts must assess whether the extension is compatible with the Treaty, in particular the provisions relating to state aid.

As regards the state aid rules, the ECJ confirmed the validity of the Commission's decision of 3 July 2014. The ECJ considered that the Commission did not erroneously classify the ARCO guarantee as state aid, that the Commission's decision was sufficiently reasoned and that the Commission was entitled to conclude in its decision that the guarantee scheme was unlawfully put into effect by Belgium.

Law to Recover State Aid Granted to Multinationals through Belgian "Excess Profit" Tax Scheme Published

On 29 December 2016, the Programme Law of 25 December 2016 (*Programmawet van 25 december 2016/Loi-programme du 25 décembre 2016* – the "Programme Law") was published in the Belgian Official Journal (*Belgisch Staatsblad/Moniteur Belge*). The Programme Law provides for a regulatory framework for the recovery of the state aid granted by Belgium to a group of multinational companies

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through the so-called "Excess Profit" tax scheme.

Under this tax scheme, multinational companies could obtain a binding tax ruling from the Belgian tax authorities allowing them to reduce their corporate tax base by 50%-90% to discount for so-called "excess profits", *i.e.*, the alleged difference in profits between the actual recorded profits of a multinational compared with the hypothetical average profits of a stand-alone company in a comparable situation.

On 11 January 2016, the European Commission (the "Commission") qualified the "Excess Profit" tax scheme as illegal state aid (*See, this Newsletter, Volume 2016, No. 1, p. 21 and Volume 2016, No. 5, p. 17*). Consequently, the Commission ordered the Belgian state to recover the aid.

Unpersuaded by the Commission's reasoning, on 22 March 2016 Belgium filed an appeal against the decision before the European General Court (the "General Court"). Several beneficiaries of the tax advantages equally appealed the decision. As such appeal did not suspend its obligation to recover the tax advantages, Belgium requested the General Court to suspend the operation of the contested decision until the General Court delivered its judgment on the main action. The General Court dismissed this application on 19 July 2016, holding that the suspension of the recovery of the alleged state aid was not justified because Belgium had failed to establish urgency.

Since Belgium was obliged to give immediate effect to the Commission's decision of 11 January 2016, Parliament adopted the Programme Law which stipulates that the alleged state aid corresponds to the amount of taxes that was not collected as a result of the application of the "Excess Profit" tax scheme, increased with the compound interest calculated from the moment the aid was granted until the actual repayment of the aid. Such amounts will be entered in the assessment register on an annual basis through tax assessments. Moreover, the amount of recovered aid will be determined per taxable period for each taxable period starting from the first grant of the aid until the tax period associated with the tax year 2015.

Interestingly, the Programme Law explicitly provides that the recovered tax advantages will be returned to the beneficiaries within a period of twelve months if the Commission's decision of 11 January 2016 is annulled by a final judgment of the General Court or the Court of Justice of the European Union.

The provisions of the Programme Law relating to the recovery of the aid entered into force on 29 December 2016.

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