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December 2017

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Highlights

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vbb@vbb.com
www.vbb.com

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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

COMMERCIAL LAW

Bill on Reform of Business Law

On 7 December 2017, a Bill on the reform of business law (*Wetsontwerp houdende hervorming van het ondernemingsrecht/Projet de loi portant réforme du droit des entreprises* – the "Bill") was submitted to the Federal Chamber of Representatives. The Bill centres on a new definition of the concept of a "business" and amends to this effect the main Belgian legislation in the area of business law (*See*, regarding the draft version of the Bill, *this Newsletter, Volume 2017, No. 7, p. 3*).

New concept of business

The Bill introduces a new, more inclusive, definition of the term "business" (*onderneming/entreprise*). The new definition will be inserted in Article I.1 of the Code of Economic Law of 28 February 2013 (*Wetboek van Economisch Recht/Code de droit économique* – "CEL") and is based on formal criteria.

The new definition of a "business" includes the following three categories of persons/entities:

1. any natural person pursuing a professional activity on a self-employed basis. By contrast, activities of employees and activities of self-employed persons in the context of the normal management of their personal assets are not caught by the concept of business.

2. any legal person, whether under private or public law. Legal persons under private law constitute businesses, irrespective of their statutory or actual activities. The concept of business thus also includes legal entities under private law which do not pursue an economic objective, such as associations and foundations. As regards legal persons under public law, the Bill excludes the following entities from the concept of a business: (i) entities of public law which do not offer goods or provide services on a market; and (ii) certain public authorities, such as the federal state, the regions, the communities, the provinces and the municipalities.

3. any other organisation without legal personality, with the exception of organisations without legal personality which neither aim to provide benefits nor actually provide benefits to their members or to any other person with a decisive influence on the management of the organisation. This third category of businesses thus targets organisations with a for-profit purpose, such as the partnership under Belgian law (*maatschap/société de droit commun*) or for-profit organisations without legal personality under foreign laws which have their centre of main interests in Belgium. *De facto* associations will normally not be considered as businesses as they do not have a for-profit purpose.

The new concept of "business" will be of general application throughout all areas of Belgian business law. Certain areas of law will not, however, be affected by the new definition. Most importantly, the new definition will not apply to competition law, price regulation and market practices (books IV, V and VI of the CEL). For the purpose of these rules, the term business (*onderneming/entreprise*) will continue to be defined on the basis of a material criterion, *i.e.,* as "*any natural or legal person which permanently pursues an economic goal, as well as their associations*".

In view of the new definition of a "business", the Bill deletes the obsolete and poorly defined concepts of tradesman (*handelaar/commerçant*), merchant (koopman/commerçant) and merchant acts (*daden van koophandel/actes de commerce*) from all legislation. In addition, the distinction between companies with a commercial purpose and those with a civil purpose will disappear.

Main consequences

The new concept of a "business" will affect the scope of application of many legislative texts, in particular the CEL, the Judicial Code and the Civil Code. The main consequences of the reform proposed by the Bill are summarised below.

First, the new concept will broaden the scope of application of the provisions on the Central Commercial Register (*Kruispuntbank van Ondernemingen/Banque-Carre-*

four des Entreprises) and the accounting obligations laid down in Book III of the CEL. The new definition of "business" was already introduced in the new insolvency legislation by the Law of 11 August 2017 introducing a new Book XX "Insolvency of businesses" in the CEL (*Wet van 11 augustus 2017 houdende invoeging van het Boek XX "Insolventie van ondernemingen", in het Wetboek van Economisch Recht, en houdende invoeging van de definities eigen aan Boek XX en van de rechtshandhavingsbepalingen eigen aan Boek XX in het Boek I van het Wetboek van Economisch Recht/Loi du 11 août 2017 portant insertion du livre XX "Insolvabilité des entreprises", dans le Code de droit économique, et portant insertion des définitions propres au livre XX, et des dispositions d'application au livre XX, dans le livre I du Code de droit économique*) (*See, this Newsletter, Volume 2017, No. 7, p. 13*).

Second, the Bill repeals Book XIV of the CEL on market practices and consumer protection with respect to practitioners of liberal professions. Following the introduction of the more inclusive concept of a business, the activities of liberal professionals will fall within the scope of the general Book VI of the CEL on market practices and consumer protection.

Third, the Bill modernises the rules of evidence that apply between and against businesses. The rules on evidence as currently laid down in the Commercial Code and applicable between merchants will be transferred to the Civil Code and will apply between and against any businesses, as defined above. Evidence between and against businesses thus remains free, meaning that evidence can be provided by all legal means. In addition, the Bill extends the rule that, between merchants, an accepted invoice is considered proof of a sale/purchase agreement to (i) any type of agreements; and (ii) any type of "businesses".

Fourth, the Bill transforms the Commercial Court (*Rechtbank van koophandel/Tribunal de commerce*) into the Business Court (*Ondernemingsrechtbank/Tribunal de l'entreprise*). The jurisdiction of this new court will be based on the new concept of a business. The Business Court will have jurisdiction to hear, at first instance, all cases between businesses, with the exception of cases falling within the special jurisdiction of another tribunal or court. Following the introduction of the new concept of business and the repeal of Book XIV of the CEL, the Business Court will also have jurisdiction to deal with injunction procedures initiated by practitioners of liberal professions. Furthermore, the Bill facilitates the introduction of legal actions by and against organisations without legal personality qualifying as a business through specific publication measures in the Central Commercial Register.

Further dismantling of Commercial Code

Finally, the Bill further dismantles the Commercial Code. As noted above, the provisions of the Commercial Code defining the concepts of tradesman, merchant and merchant acts will be deleted and the rules on evidence will be transferred to the Civil Code. Moreover, the rules on the bills of exchange and promissory notes will be moved to the CEL. Following these amendments, only Book II of the Commercial Code on maritime and inland navigation will remain in effect. Consequently, the former Commercial Code will be renamed "*Code on certain maritime privileges and miscellaneous provisions*".

The entry into force of the Bill is foreseen for 1 November 2018, subject to transitional measures, in particular regarding the changes to the rules on the Central Commercial Register and the accounting obligations.

COMPETITION LAW

Belgian Competition Authority Imposes Interim Measures in Equestrian Sector

On 20 December 2017, the Competition College (*Mededingingscollege/Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence*) ("BCA") imposed interim measures on the organisers of the Global Champions Tour (GCT) and the Global Champions League (GCL) as well as on the *Fédération Equestre Internationale* (FEI).

This decision is not yet public. According to the press release published by the BCA, these interim measures seek to ensure that "*at least 60% of the invitations for GCT events are sent to riders on the basis of their ranking in the official ranking of the FEI, and should not depend on the question whether riders are members of a paying team of the GCL*". These measures follow a complaint and a request for interim measures filed by a rider and a horse stable concerning a Memorandum of Understanding (MoU) concluded between FEI, GCT and GCL. This MoU decreased the percentage of invitations for GCT events sent on the basis of rankings from 60% to 30%, which the complainants found to exclude illegally riders who are not a member of a GCL paying team.

The BCA has previously acted in the equestrian sector and at one point also imposed interim measures (*See, this Newsletter, Volume 2015, No. 7, p. 4; Volume 2015, No. 10, p. 6; Volume 2015, No. 11, p. 6; Volume 2016, No. 5, pp. 4-5*).

BCA decisions imposing interim measures only offer interim relief and are without prejudice to the merits of the case.

Belgian Competition Authority and Belgian Commission for Electricity and Gas Regulation Create Collaborative Framework

On 15 December 2017, a Royal Decree (*Koninklijk Besluit/Arrêté royal*) of 3 December 2017 setting up a collaborative framework between the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence*) ("BCA") and the Commission for Electricity and Gas Regulation (*Commissie voor de Regulering van de Elektriciteit en het Gas/Commission de Régulation de l'Electricité et du Gaz*) ("CREG") was published in the Belgian Official Journal.

This Royal Decree provides for a yearly dialogue between the BCA and the CREG concerning the evolution of the electricity and gas sector and competition law issues, in order to ensure that sector-specific regulations and competition law rules are consistently enforced. This collaboration entails an exchange of all information (even confidential information) that is "*necessary and proportionate*" to the accomplishment of both agencies' missions, with the exception of confidential information obtained by the BCA through the European Competition Network or in the context of a leniency or settlement procedure.

Pursuant to this collaboration framework, the BCA will inform the CREG of any issue or procedure before the BCA relating to the electricity and gas sectors and the CREG will be entitled to intervene in such proceedings. The BCA may also give the CREG access to its draft decisions and/or to the case file if such an access is necessary to enable the CREG to express its views on the case. Finally, the CREG will also receive a copy of all final decisions of the BCA concerning the electricity and natural gas sectors.

Belgian Competition Authority Clears Acquisition of Sole Control by De Persgroep over Medialaan

On 22 December 2017, the College of Competition Prosecutors (*Auditoraat/Auditorat*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit/Autorité belge de la Concurrence*) ("BCA") cleared the acquisition by media company De Persgroep of sole control over audiovisual and mobile telecommunications company Medialaan. Medialaan is, *inter alia*, the parent company of VTM (TV channel) and Qmusic (radio channel).

Medialaan was initially jointly controlled by De Persgroep and by media group Roularta, each owning 50% of this joint venture. Through this transaction, De Persgroep purchases the shares owned by Roularta, thereby obtaining 100% of Medialaan.

This acquisition was reviewed by the BCA following the expedited and simplified merger control procedure set out in Article IV.63(1) of the Code of Economic Law (*Wetboek van Economisch Recht/Code de droit économique*). This is in line with the BCA's 2007 guidelines on the application of expedited procedures, which specifically mention the acquisition of sole control of a previously jointly controlled company as a type of merger that can be subjected to a fast-track review.

De Persgroep and Roularta also announced in October 2017 that De Persgroep would sell its 50% share in Mediafin to Roularta. Mediafin publishes business newspapers *De Tijd* and *L'Echo*. The other 50% of Mediafin is currently in the hands of news group Rossel. To date, this second acquisition has not yet been notified to the BCA.

CONSUMER LAW

Court of Justice of European Union Holds that Uber Is Transport Services Company

On 20 December 2017, the Grand Chamber of the Court of Justice of the European Union (the "ECJ") held that Uber's UberPOP ridesharing service is a "*service in the field of transport*" within the meaning of Article 58(1) of the Treaty on the Functioning of the European Union ("TFEU") (ECJ, 20 December 2017, Case C-434/15, *Asociación Profesional Élite Taxi v. Uber Systems Spain SL*).

The ECJ delivered its judgment in response to a request for a preliminary ruling from a Barcelona Commercial Court in a dispute between Asociación Profesional Élite Taxi ("Elite Taxi"), a professional taxi drivers' association in Barcelona, and Uber Systems Spain SL ("Uber"), a smartphone and technological platform interface and software application provider acting, for profit, as an intermediary between the owner of a vehicle and persons who wish to make an urban journey by car. Elite Taxi sought a declaration from the Barcelona Commercial Court that Uber had offered unlicensed taxi services without complying with legal licensing requirements and the competition rules. It further claimed that Uber should cease its alleged unfair conduct and be prohibited from engaging in such an activity in the future.

The Barcelona Commercial Court sought guidance from the ECJ on whether Uber's service should be regarded as a "*transport service*", an "electronic intermediary service" or an "*information society service*". Depending on the classification, Uber's UberPOP service would either (i) be subject to the EU Member States' national regulations on transport services; or (ii) benefit from the EU's fundamental freedom to provide services across EU Member States subject only to the rules of its 'home' EU Member State, in accordance with Directive 2000/31/EC of 8 June 2000 on specific legal aspects of information society services, in particular electronic commerce, in the Internal Market (the "E-commerce Directive") and Directive 2006/123/EC of 12 December 2006 on services in the internal market (the "Services Directive").

The E-commerce Directive prohibits EU Member States from restricting the freedom to provide information society services from another EU Member State. Article 2(a) of the Directive defines "*information society services*" as services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. The Services Directive, in turn, prohibits EU Member States from making access to (or the exercise of) a service activity subject to an authorisation scheme unless the criteria of non-discrimination, necessity and proportionality are satisfied. However, services in the field of transport, including urban transport and taxis, are expressly excluded from the scope of the Services Directive. The classification of Uber's services was therefore key.

In its judgment, the ECJ considered the extent to which Uber acts as an intermediary between drivers and passengers. It first held that, in principle, an intermediation service which enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver who will carry out the transport service using his or her own vehicle, satisfies the criteria for classification as an "*information society service*" within the meaning of the E- commerce Directive.

However, in the ECJ's view, Uber's commercial offering consists of more than an intermediary service. It noted that Uber is involved in the selection of the non-professional drivers and provides them with the application required to connect with service users. Moreover, Uber also exercises a decisive influence over the conditions under which the drivers can provide their service, such as (i) determining a maximum fare; (ii) receiving the fare from the passenger; (iii) subsequently forwarding the fare to the driver; and (iv) exercising a degree of control over the quality of the vehicle and the conduct of the driver.

According to the ECJ, Uber's activities should therefore be regarded as intermediation services forming an integral part of an overall service, the main component of which is a transport service. Accordingly, Uber offers a "*service in the field of transport*" which falls outside the scope of the Services Directive.

As the Services Directive implements Article 56 TFEU on the free movement of services, the ECJ considered that the intermediation services provided by Uber are not covered by Article 56 TFEU but, instead, by Article 58(1) TFEU which relates specifically to the freedom to provide services in the field of transport. This Article 58(1) provides that the "[f]*reedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport*", *i.e.*, Articles 90 through 100 TFEU.

The ECJ continued by noting that the European Parliament and the Council of the European Union have not yet adopted any common rules based on Article 91(1) TFEU on non-public urban transport services and services that are inherently linked to those services, such as the intermediation service at issue in the main proceedings. Consequently, it is for the EU Member States to regulate the conditions under which Uber can provide its intermediation services.

The ECJ's judgment is a set-back for Uber in that it creates additional regulatory challenges for the company. Uber will indeed have to comply with the national rules of each EU Member State on transport services and/or on intermediation services in the field of transport.

The judgment is likely to have a significant impact on the pending national court proceedings against Uber in countries such as Belgium. For instance, in December 2017, the pre-trial division of the Brussels Court of First Instance (*Raadkamer/Chambre du Conseil*) referred Uber to the Brussels Criminal Court for having illegally operated the UberPOP service in Belgium in 2014 and 2015. The referral came about even though the Public Prosecutor had advised against it. Uber announced that it has appealed the decision of the pre-trial division to the indictment division of the Brussels Court of Appeal (*Kamer van Inbeschuldigingstelling/Chambre des mises en accusation*). It will be interesting to see whether the Public Prosecutor will reconsider his decision not to file charges against Uber in the light of the ECJ's judgment.

DATA PROTECTION

Article 29 Working Party Calls for Urgent Action After Review of EU-US Privacy Shield

On 5 December 2017, the Article 29 Working Party (the "WP29"), an EU advisory body composed of representatives from the national privacy authorities of all Member States, the European Commission and the European Data Protection Supervisor, published its opinion on the first annual joint review of the EU-US Privacy Shield (the "Privacy Shield"). While the WP29 acknowledges the progress brought about by the Privacy Shield in comparison with the invalidated Safe Harbour Regime, its opinion still identified a number of significant concerns that need to be addressed by both the European Commission and the US authorities. The WP29 indicates that national data protection authorities could take action that may lead to the invalidation of the Privacy Shield if these issues are not resolved.

When the Privacy Shield was adopted, it was agreed that the adequacy of the scheme would be reviewed on an annual basis by the European Commission. On 18 October 2017, the European Commission concluded its first annual review (*See, this Newsletter, Volume 2017, No. 8, p. 8*). Thus, the WP29 opinion follows the European Commission's report on the first annual review of the functioning of the EU-U.S. Privacy Shield.

The WP29 calls on the European Commission and the US authorities to address three concerns by 25 May 2018, the date on which the General Data Protection Regulation (Regulation 679/2016 - the "GDPR") will start to apply throughout the EU.

First, the WP29 requests that the US authorities should appoint an independent Ombudsperson. The Ombudsperson would be responsible for processing requests from EU individuals relating to national security access to data transmitted from the European Union to the United States. The Ombudsperson mechanism complements the existing means of redress. According to the WP29, this is meant to compensate for the uncertainty of effective redress in surveillance matters before a US court. Currently, an acting Ombudsperson has been appointed, but the WP29 calls on the US to designate, as a matter of urgency, a permanent and independent Ombudsperson.

Second, the powers of the Ombudsperson should be clarified in the rules of procedure. According to the WP29, the powers of the Ombudsperson to remedy non-compliance with regard to the intelligence authorities are not sufficient in view of Article 47 of the EU Charter of Fundamental Rights, as the Ombudsperson cannot be considered to be an "effective remedy before a tribunal" within the meaning of that provision.

The third concern of the WP29 is the pending appointment of the new members of the Privacy and Civil Liberties Oversight Board (the "PCLOB").

If these issues are not resolved before 25 May 2018, the WP29 threatens to bring the Privacy Shield before national courts so that these can make a reference to the Court of Justice of the European Union for a preliminary ruling.

In addition to these urgent issues, the WP29 identified a number of further concerns that should be addressed by the time of the second joint annual review. They include the following:

- Clarification from the US Department of Commerce and the Federal Trade Commission is needed on the practical implementation of the principles of the Privacy Shield;
- The possibility of redress for EU citizens before US courts is still to be guaranteed in practice because of the problematic admissibility threshold of the standing requirement;
- Another concern is the collection of and access to personal data for national security purposes under section 702 of FISA and under executive order 12333, as both of these US regulations confer wide surveillance powers on US authorities; and
- The lack of oversight and supervision of compliance with the principles of the Privacy Shield.

Currently, approximately 2,500 organisations rely on the Privacy Shield to transfer personal data from the EU to the US. A challenge to the Privacy Shield would cast doubt over the legal certainty of this mechanism.

Article 29 Working Party Issues Draft Guidelines on Consent under GDPR

On 12 December 2017, the Article 29 Working Party ("WP29") published draft guidelines (the "Guidelines") on consent under General Data Protection Regulation 2016/679 (the "GDPR").

Consent is one of six "lawful bases" that allow for the processing of personal data listed in Article 6 of the GDPR (or Articles 9 and 10 of the GDPR for "sensitive" categories of data). Other lawful bases under Article 6 permit, *inter alia*, the processing of personal data (i) that are necessary for the performance of a contract; (ii) to comply with a legal obligation; or (iii) to pursue a legitimate interest of the controller. Controllers should carefully consider whether consent is the appropriate lawful basis for the envisaged processing or whether another lawful basis should be relied on instead.

Once the GDPR applies, controllers are not allowed to swap the lawful bases provided for by Article 6 GDPR. Moreover, the WP29 reminds organisations that obtaining consent does not diminish the controller's obligations with regard to fairness, necessity, proportionality and data quality. In other words, even if an organisation obtains consent, it is still not permitted to collect personal data that are "not necessary in relation to a specified purpose of processing and fundamentally unfair".

Elements of valid consent

According to the WP29, the concept of consent, and the requirements for obtaining a valid consent have "evolved" under the GDPR. Consent can only be an appropriate lawful basis if a data subject is offered control and is offered a genuine choice with regard to accepting or declining the terms offered or declining them without detriment. This also follows from Article 4(11) of the GDPR which defines consent as: "*any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her*". In its guidelines, the WP29 provides an analysis of the following elements of valid consent:

(i) Free/freely given

This element implies real choice and control for data subjects. According to the WP29, if consent is bundled up as a non-negotiable part of terms and conditions, it is presumed not to have been freely given, and is therefore invalid as a legal basis for the processing of personal data under Article 6 of the GDPR.

Further, the WP29 offers examples of an imbalance of power (e.g. in relation to public authorities or in the employment context) and is of the opinion that in those situations it is unlikely that consent is free. As a result, such consent would be invalid. Nevertheless, the WP29 indicates that even in such situations, it may be possible, depending on the situation at hand, for the controller to demonstrate that the data subject is free to consent. For instance, an employer could rely on the consent of the employee if giving or refusing consent for a specific purpose would have no adverse consequences for the employee.

Moreover, if a service involves multiple processing operations for more than one purpose, the WP29 urges controllers to seek separate consent for each purpose ("granularity").

(ii) Specific

According to the WP29, in order to comply with the requirement of 'specific' consent the controller must, when requesting consent: (i) be specific in defining the purpose so as to safeguard against "function creep", *i.e.* the gradual widening or blurring of purposes for which data are processed, after a data subject has agreed to the initial collection of data; (ii) apply granularity in consent requests (*e.g.* a separate opt-in for each purpose to allow users to give specific consent for each specific purpose); and (iii) supply separate information related to obtaining consent for the use of personal data from information about other matters.

(iii) Informed

In order for consent to be 'informed', it must take account of the requirement for transparency in Article 5 GDPR. The WP29 provides a non-exhaustive list of informational elements that must be provided to data subjects, including the identity of the controller, the purpose of the processing activity and the existence of the right to withdraw consent.

Furthermore, the WP29 requires controllers to use clear and plain language and provide the information in an intelligible and easily accessible form. Controllers must also clearly describe the purpose for data processing for which consent is requested.

(iv) Unambiguous indication of wishes

Under the GDPR, consent must always be given through an "active motion or declaration". Accordingly, the WP29 declares that the use of pre-ticked opt-in boxes is invalid under the GDPR. Also, silence or inactivity, as well as merely proceeding to use a service without opposition, does not result in valid consent. The WP29 furthermore maintains that a blanket acceptance of general terms and conditions of a service cannot be regarded as clear affirmative action to consent to the use of personal data.

In an electronic context, the WP29 considers that physical motions, such as swiping, can qualify as a clear and affirmative action in compliance with the GDPR. It warns, however, of a certain degree of "click fatigue" because in a digital context data subjects might too often be faced with requests for consent. Accordingly, the WP29 argues that the actual warning effect of consent mechanisms is diminishing.

The WP29 furthermore emphasises, in accordance with its previous opinions, that consent should be given prior to the processing activity.

In addition, the WP29 provides guidance on obtaining explicit consent in specific situations where serious data protection risks emerge. In such situations, the data subject must be able to exercise a high level of control over his personal data. According to the WP29, this means that the data subject must give an express statement of consent.

Withdrawing consent

In accordance with Article 7(3) GDPR, controllers must ensure that consent can be withdrawn at any given time as easily as it was for giving consent. The controller must also inform the data subject of their right to withdraw consent. As the withdrawal of consent is an essential element of the consent mechanism, the WP29 is of the opinion that consent would be invalid if the method for withdrawing consent were overly burdensome. In an example, the WP29 explains that a requirement to contact a call-centre during business hours to withdraw consent, when the initial consent was granted by a one-click mechanism on the website, would fall short of this obligation and invalidate the consent mechanism.

Moreover, the WP29 explains that data subjects should be able to withdraw consent without detriment. This means that the controller must make withdrawal of consent free of charge and without lowering service levels.

Accountability and retention of proof of consent

Finally, the WP29 recalls the controller's obligation to demonstrate consent under the accountability principle of the GDPR. Therefore, it is advised to keep proof of when and how consent was given.

However, and since the GDPR does not provide for a specific time limit for how long consent will last, the WP29 recommends as a best practice that consent should be refreshed at appropriate intervals. Furthermore, after the processing activity ends, proof of consent should be kept no longer than strictly necessary in accordance with Article 17(3b) and (3e) GDPR.

As with the draft guidance on transparency, published on the same day (see below), the WP29 invites comments to be submitted by 23 January 2018. The full text of the draft guidelines on consent can be consulted here.

Article 29 Working Party Prepares Draft Guidelines on Transparency under GDPR

The Article 29 Working Party ("WP29") published draft guidelines (the "Guidelines") on transparency under General Data Protection Regulation 2016/679 (the "GDPR") and invites stakeholders to submit comments by 23 January 2018.

The Guidelines explain the central role of transparency for the GDPR in informing data subjects about the processing of their personal data. In addition, the transparency obligation relates to communicating with data subjects about their rights and about exercising these rights. The Guidelines also link the principle of transparency with the obligation for "fairness" and the new principle of "accountability" under which controllers must be able to demonstrate compliance with their obligations under the GDPR.

Which information to provide?

The GDPR lists the information that must be provided to data subjects, including the contact details of the controller; information on the purpose for the processing; the legal basis of the processing activity; the categories of data (if the data have not been obtained directly from the data subject); and the rights of the data subject over his or her data. In addition to the information listed in Articles 13 and 14 of the GDPR, the WP29 explains that the information notice should also describe the most important consequences of the processing for the data subjects.

In order to provide this information, the controller (*i.e.*, the organisation responsible for the processing of personal data) must offer an overview of how it is using personal data. In general, information should be as specific and clear as possible, while vague or conditional terms should be avoided. For instance, the WP29 notes that the data subjects should be informed of the "categories of recipients", listing actual (named) recipients.

How to provide information

The GDPR requires the information for the data subjects to be presented in a concise, transparent, intelligible and easily accessible form, using clear and plain language. In this regard, the WP29 recommends using a "layered approach" in the online environment, which should allow data subjects to locate easily the relevant information that they are looking for. Moreover, controllers may use "just-in-time" techniques, which provide information to data subjects at the time that such information is relevant. For example, if a data subject provides information while purchasing a product, information can be provided in pop-up screens explaining that the information will only be used for the purpose of making contact regarding the purchase and will only be shared with the delivery service. If the controller chooses to use more general wording (*e.g.* only specifying "categories" of recipients, such as "delivery companies"), it will have to document why such an approach is fair to data subjects.

In addition, the Guidelines recommend using privacy dashboards and "learn more" tutorials providing "*a more user-centric transparency experience for the data subject*". With privacy dashboards, users can manage their privacy preferences, for instance to indicate how they wish to receive the services on different devices.

The Guidelines also discuss the use of standardised icons as a visualisation tool to provide information to data subjects. For instance, icons could be used to indicate that personal data are used for direct marketing, or are transferred outside the EU/EEA territory. The WP29 indicates that the European Data Protection Board to be set up under the GDPR may, after "extensive research", provide the European Commission with an opinion on icons that could be used. However, the WP29 adds that such icons should only be used in addition to full information provided in plain language.

When to provide information to data subjects?

The WP29 also provides guidance on the timing of the provision of information. When the personal data have been obtained directly from the data subject (Article 13 of the GDPR), the information must be provided when the personal data are collected.

In other cases, for instance when personal data were obtained from a third party, public sources, a data broker or another data subject, there is more flexibility regarding timing. Still, Article 14.3(a) of the GDPR requires that the information must be provided at the latest within one month of obtaining the personal data. Moreover, if the personal data are used to communicate with the data subject, the information must be provided at the latest at the time of the first such communication. In addition, if the data are disclosed to a third party, the information must be provided at the latest when the personal data are first disclosed. In other cases, the one-month time limit is a maximum period and the information should be provided as soon as possible.

In addition, the WP29 points out that the obligation to provide information applies throughout the processing life cycle. Accordingly, the data subjects must be updated on the processing of their personal data when the content or the conditions of the processing activity change. If these changes were to have an impact on the data subject, the information should be provided to the data subject well in advance of the change taking effect so as to allow the data subject to consider exercising his or her rights (*e.g.* the withdrawal of consent).

Data subjects' rights

The transparency requirement also relates to the rights that the GDPR grants to data subjects. In particular, the information that is provided to data subjects must comply with a triple obligation: (i) to provide information to data subjects on their rights; (ii) to provide this information in a concise, transparent, intelligible and easily accessible form, using clear and plain language; and (iii) to provide the terms allowing data subjects to exercise their rights.

Exceptions

The transparency principle and the obligation to inform data subjects apply irrespective of the legal basis of the processing activity. In other words, even if the processing does not rely on the consent of the data subject, but is instead necessary to perform a contract or comply with a legal obligation, the controller will still have to provide information on the processing activity to the data subject. The GDPR only allows limited exceptions as to when informing the data subject is not required.

If the personal data are collected directly from the data subject, the GDPR only provides one exception where the data subject does not need to be informed, namely when the data subject already has the information.

By contrast, if personal data have not been obtained directly from the data subject, the controller may be exempt from informing the data subject about the processing of his or her data if:

- the provision of such information would be impossible or involve a disproportionate effort;
- the controller is subject to national or EU law requirements to obtain or disclose the personal data and the law provides for appropriate protection for the data subject's legitimate interests; or
- the processing must remain confidential due to an obligation of professional secrecy.

The full text of the Guidelines can be found here.

Global Privacy Enforcement Network Sweep Reveals Shortcomings in Privacy Notices and User Controls

The Global Privacy Enforcement Network (the "GPEN"), an alliance of worldwide data protection authorities, issued its annual 'Sweep'. This year's report examined privacy communications and practices in relation to user controls over personal information by relying on online available information, the creation of accounts or profiles, and contacting officers with a wide range of specific questions. The targeted sectors included education, travel, retail, health, social media, gaming/gambling and finance/banking.

It emerged that most privacy communications are easy to locate on the website and fairly transparent as to which categories of information were collected. On the other hand, such communications are generally very high-level and lack precision and essential information. In particular, half of the organisations fail to specify the recipients of users' personal data and it is unclear, for the vast majority of them, where data are stored. Similarly, a number of organisations do not refer to security measures or safeguards in place to protect users' personal data. Finally, users are generally not sufficiently informed on what happens to their data once collected. As such, users are unable to exercise their rights easily.

The Sweep also identified several recurring issues with privacy communications. For instance, some websites make no reference to the use of cookies despite relying on such tools in practice. Moreover, the collecting of data is often based on implied consent, *i.e.*, on an 'opt-out' basis. The report also noted that some organisations still refer to outdated legislation or are unclear about applicable legislation or jurisdiction in an international context.

As a positive example, GPEN found a number of privacy policies that use a 'layered' approach, thereby making them clearer and easier for users to understand. In addition, some websites contain an explanatory video.

In conclusion, GPEN noted room for improvement with regard to online privacy communications. In general, such communications should be more precise and contain all necessary information for the users to be fully aware of the use made of their personal data and of their right to control such data.

Article 29 Working Party Updates Guidance on Binding Corporate Rules

On 6 December 2017, the Article 29 Working Party (the "WP29") published Working Papers 256 and 257, two sets of guidelines on Binding Corporate Rules ("BCR"). Working Paper 256 sets out a table of elements and principles to be found in BCR for organisations acting as controllers of personal data. Working Paper 257 does the same for BCR for processors. These guidelines update and replace earlier WP29 guidance contained in Working Papers 153 and 195.

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 provides guidance on the implementation of the EU General Data Protection Regulation 2016/679 (the "GDPR").

BCR are defined in the GDPR as "[…] *personal data protection policies which are adhered to by a controller or processor established on the territory of a Member State for transfers or a set of transfers of personal data to a controller or processor in one or more third countries within a group of undertakings, or group of enterprises engaged in a joint economic activity*". BCR are thus an internal policy for a group of companies, which are binding on the companies in the group and set out the protection of personal data. Based on the approval of a company's BCR by a competent Supervisory Authority, a company can transfer personal data to group entities located outside the EU.

The requirements for such an approval by a competent Supervisory Authority are set out in Article 47 of the GDPR. The Working Papers explain that the GDPR imposes some new requirements for BCR, such as the requirement to specify the scope of application; third party beneficiary rights; or the right to lodge a complaint to the Supervisory Authority.

In addition, the Working Papers indicate that BCR that have been approved prior to the application of the GDPR will remain valid until they are amended, replaced or repealed by a Supervisory Authority. In addition, the WP29 recommends organisations with approved BCR to bring these in line with the GDPR.

Finally, both working Papers set out a table of all elements that must be contained in BCR.

Any comments on the Working Papers can be submitted until 17 January 2018. The full text of the documents can be found here (Working Paper 256 – clicking the link will download the pdf document) and here (Working Paper 257 – clicking the link will download the pdf document).

INTELLECTUAL PROPERTY

Court of Justice of European Union Clarifies Exhaustion of Trade Mark Principles and Broadens Test for Economic Links between Trade Mark Owners

On 20 December 2017, the Court of Justice of the European Union (the "ECJ") handed down its judgment in Case C-291/16 *Schweppes v Red Paralela and Others*. It held that the owner of a trade mark may not oppose the parallel importation of goods bearing an identical trade mark but originating in another Member State in circumstances where the owner has assigned the parallel trade mark to a third party but is responsible for maintaining the image and impression of a unified global trade mark.

In his non-binding opinion, Advocate General Mengozzi (the "AG") had earlier proposed to develop the case-law on the exhaustion of trade mark rights in the case of a voluntary fragmentation of parallel rights by significantly broadening the interpretation of 'economic links' between the parallel rights owners.

The ECJ now largely follows the AG's views. It concludes (i) that the trade mark owner's rights are exhausted if the owner promotes, independently or in coordination with a parallel trade mark holder, the appearance of a single global trade mark; and (ii) that economic links will exist between parallel rights holders if they coordinate their commercial policies in such a way as makes it possible for them to determine, directly or indirectly, the goods to which the trade mark applies and to control the quality of those goods.

Facts

The Coca-Cola Company ("TCCC") owns the Schweppes® brand in the United Kingdom and in ten other EU Member States, while Orangina Schweppes Holding BV ("OSHBV") owns the brand in Spain and in 16 other EU Member States. Schweppes SA ("Schweppes") is the exclusive licensee of the Schweppes® brand in Spain. This fragmented situation arose in the late 1990s as a result of the Commission's objection to the transfer of the Schweppes® trade marks in all Member States to TCCC alone.

Schweppes took issue with parallel imports of UK (and therefore TCCC-originating) products into Spain and commenced proceedings in Spain against Red Paralela, the main parallel importer, as well as OSHBV. In the main proceedings, Red Paralela counterclaimed that Schweppes had committed acts of unfair competition and acted in breach of Article 101 TFEU by making agreements with suppliers to restrict parallel imports of Schweppes®-branded products.

This counterclaim was withdrawn when the Spanish Competition Authority began an investigation into Schweppes's behaviour. That investigation concluded without a finding of infringement after Schweppes agreed to a number of amendments to the agreements. These were: first, that the restriction of parallel imports would concern only products originating in the UK and manufactured by TCCC; second, that the scope of any future agreements would be similarly restricted to UK products; and third, that, in relation to on-going judicial proceedings in which Schweppes was challenging specific distributors, Schweppes would similarly limit its arguments and urge the court to rule in a manner consistent with this commitment. While this appeared to be consistent with the settled case law of the ECJ on the principle of exhaustion, the ECJ's judgment appears to extend the principle more broadly.

Judgment

The referring Spanish court sought guidance as to the scope of the principle of exhaustion provided for by Article 7(1) of Directive 2008/95/EC and Article 15(1) of Directive 2015/2436. These articles are identical and provide that a trade mark does not give its proprietor the right to prohibit its use in relation to goods which have been put on the market in the Union under that trade mark, whether by the proprietor itself or with its consent. The case law has established that the proprietor's consent includes situations in which the trade marks have a common origin (Case 192/73 *Van Zuylen*, but reversed in Case C-10/89 *HAG GF*), or are held by 'economically linked' entities (Case C-9/93 *IHT Internationale Heiztechnik*). Conversely, if a trade mark is no longer under 'unitary control' (*e.g.* as a result of an assignment limited to specific territories), the original proprietor of the mark loses the ability to regulate the quality

of products manufactured in territories controlled by the new proprietor and therefore cannot be considered to have given its consent to their commercialisation (*Ibid.*)

In essence, the ECJ develops the principle of exhaustion to cover branded products whose trade marks do not have common ownership but are nonetheless considered to be 'economically linked' in substance if not in form.

1. Principle of exhaustion and 'essential function' test

The ECJ reiterates that the essential function of a trade mark is to guarantee the identity of the origin of the trade marked product to the end user. The end user may thereby distinguish that product from goods which originate elsewhere. If, however, a trade mark owner has assigned some parallel national trade marks to a third party but continues to promote the trade mark as a single global trade mark, there will be increased confusion on the part of the consumer as to the commercial origin of the products. This confusion is inconsistent with the essential function of the trade mark. If the trade mark can no longer fulfil its essential function for this reason, then the trade mark owner is deemed to have itself compromised or distorted that essential function and its trade mark rights are exhausted. The ECJ clarifies that merely evoking the common historical geographical origin of the parallel trade marks does not, however, deprive the trade mark of its essential function.

2. Principle of exhaustion and 'economic links' test

Even if the trade mark owner has not promoted the image of a single global trade mark, the principle of exhaustion may still apply if there are 'economic links' between the trade mark owner and the parallel trade mark holder.

In *IHT Internationale Heiztechnik*, the ECJ held that the principle of exhaustion applies, '*where the owner of the trade mark in the importing State and the owner of the trade mark in the exporting State are the same or where, even if they are separate persons, they are economically linked. A number of situations are covered: products put into circulation by the same undertaking, by a licensee, by a parent company, by a subsidiary of the same group, or by an exclusive distributor.*' The ECJ confirms that the "*concept of 'economic links* […] *refers to a substantive, rather than formal, criterion*". What matters is not the form of the parties' relationship but rather the effects of their relationship. In the case at hand, for instance, Schweppes and TCCC were legally distinct businesses and independent of each other.

For the ECJ, the decisive factor is the possibility to determine, directly or indirectly, the goods to which a trade mark is affixed and to control the quality of the goods in question. This, it held, may arise in the case where, following the division of national parallel trade marks resulting from a territorially limited assignment, the owners of those trade marks coordinate their commercial policies or reach an agreement to exercise joint control over those goods. It is not necessary that such control is in fact exercised: the mere possibility is sufficient. This appears to be a development of the principle in *IHT Internationale Heiztechnik* in a direction which points to an increased erosion of trade mark rights.

National Courts to Decide: Does Sorbet Taste Like Champagne?

On 20 December 2017, the Court of Justice of the European Union ("ECJ") handed down a preliminary ruling on the question whether Champagner Sorbet would infringe protected designations of origin ("PDOs") for Champagne.

At the end of 2012, Aldi started selling a frozen product distributed under the name 'Champagner Sorbet', which contained 12% champagne. An association of champagne producers initiated proceedings in Germany, claiming that the frozen dessert did not correspond to the product specifications for wines protected by the PDO 'Champagne' and therefore could not use the designation "Champagne".

The ECJ was asked to interpret Article 118m(2)(a) of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products and the equivalent Article 103(2)(a) of the subsequent Regulation 1308/2013. These state that: "*A protected designation of origin and a protected geographical indication, as well as the wine using that protected name in conformity with the product specifications, shall be protected against: any direct or indirect commercial use of that protected name: (i) by comparable products not complying with the product specification of the protected name; or (ii) in so far as such use exploits the reputation of a designation*". The ECJ held that these provisions apply to foodstuffs containing ingre-

dients that correspond to the product specifications of the PDO, such as 'Champagner Sorbet'. While the ECJ held that it is likely the sorbet in question would take advantage of the reputation of the PDO 'Champagne', it is up to national courts to determine whether the advantage derived from such use would be unfair.

In its determination, the national court should not take into account the name by which the relevant public usually refers to the foodstuff concerned, but should rely on other factors such as the quantity of the ingredient concerned and the taste of the product as a whole. In any case, when a product contains an ingredient which corresponds to the product specifications of the PDO, the use of that PDO as part of the name under which the product is sold cannot, in itself, be regarded as an unfair use.

General Court Refuses Trade Mark Protection for Red Bull's Colour Mark

On 30 November 2017, the General Court of the European Union decided a case concerning two EU trade marks consisting of a combination of the colours blue and silver which had previously been invalidated by the Cancellation Division of the European Union Intellectual Property Office ("EUIPO").

On 15 January 2002 , Red Bull GmbH ("Red Bull") filed an application for registration of an EU trade mark with EUIPO consisting of a combination of two colours per se, namely blue (RAL 5002) and silver (RAL 9006) (the "First Contested Mark").

Later, on 1 October 2010, Red Bull filed a second application for registration of an EU trade mark with EUIPO for the combination of two colours per se, namely blue (Pantone 2747C) and silver (Pantone 877C) (the "Second Contested Mark", together with the First Contested Mark the "Contested Marks").

By two decisions of 9 October 2013, the Cancellation Division of EUIPO declared both trade marks to be invalid, finding that the graphic representation of those marks constituted the "*mere juxtaposition of two or more colours, designated in the abstract and without contours*". It did so in accordance with a judgment of the Court of Justice of the European Union ("ECJ") of 24 June 2004 in *Heidelberger Bauchemie* (C 49/02). According to the Cancellation Division, the Contested Marks did not exhibit the qualities of precision and uniformity pursuant to Article 4 of Regulation No 207/2009 (now Article 4 of Regulation 2017/1001 on the European Union trade mark, the "EUTMR").

On 17 October 2013, Red Bull appealed against both decisions. By two decisions of 2 December 2014, the First Board of Appeal of EUIPO dismissed both appeals as unfounded on the basis of the same reasoning.

Upon further appeal, the General Court reached the same conclusion. It referred to Article 4 EUTMR which provides that an EU trade mark may consist of (i) any signs; (ii) capable of being represented graphically; (iii) provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.

The General Court then applied the principles of *Heidelberger Bauchemie*. In this judgment, the ECJ held that, in order to satisfy the conditions of Article 4 EUTMR, a graphic representation of two or more colours, designated in the abstract and without contours, has to be systematically arranged by associating the colours concerned in a predetermined and uniform way in order to rule out numerous different combinations of those colours that would not permit the consumer to perceive and recall a particular combination.

According to the General Court, this reasoning is consistent with (i) the need for the trade mark to be able to fulfil its function as an indication of origin; (ii) the requirement

of legal certainty, in the sense that it allows the competent authorities and economic operators to know with clarity and precision the nature of the signs of which a mark consists and the rights of third parties; and (iii) the requirement that the availability of colours should not be restricted by the creation of a monopoly for the benefit of a single firm.

The General Court found that the Board of Appeal was right in concluding that the graphic representation of the Contested Marks consisted of a mere juxtaposition of two colours without shape or contours, allowing several different combinations of the two colours and that the descriptions accompanying the graphical representations did not provide additional precision with regard to the systematic arrangement associating the colours in a predetermined and uniform way and precluding a number of different combinations of those colours.

Furthermore, the General Court rejected Red Bull's claim that the contested decisions violated the principle of equal treatment and the principle of proportionality. According to the General Court, it follows from the nature of colour per se marks that the subject matter of the protection afforded by such marks should be defined in appropriate detail. Consequently, different treatment is justified. As regards the alleged violation of the proportionality principle, the General Court again pointed to the special nature of marks consisting of a combination of colours and concluded that the requirements of clarity and precision are proportionate to the main objective pursued by Article 4 EUTMR, namely to safeguard the function of an EU trade mark as an indication of origin.

Finally, the General Court considered whether the contested decision infringed the principle of protection of legitimate expectations. Referring to its judgment in *Interkobo v OHIM – XXXLutz Marken (my baby)* (T-523/10) the General Court held that Red Bull could not rely on the acceptance of the description by EUIPO's examiner since "*such assurances did not comply with the applicable provisions*", namely Article 7 EUTMR (*i.e.,* the 'absolute grounds for refusal'). Accordingly, the acceptance by the examiner could not give rise to a legitimate expectation. Furthermore, the General Court referred to Article 52(1) EUTMR according to which an EU trade mark is to be declared invalid on application to EUIPO or on the basis of a counterclaim in infringement proceedings where the EU trade mark has been registered contrary to the provisions of Article 7 EUTMR. Lastly, the General Court decided that Red Bull could not properly rely on previous decisions of EUIPO. According to the General Court, EUIPO must consider with special care whether it should decide in the same way or not, while taking into account the principles of equal treatment and sound administration and the decisions already taken in respect of similar applications. The way in which those principles are applied must be consistent with respect for legality.

As a result, the General Court upheld the invalidation of Red Bull's silver and blue trade marks.

No Likelihood of Confusion Between Aldi's Buval Beer and Jupiler Trade Marks

On 12 December 2017, the Court of Appeal of Brussels (the "Court of Appeal") annulled a judgment of 13 January 2016 of the President of the Dutch-language Brussels Commercial Court (the "President") in which the President had found Aldi's Buval sign to infringe the Jupiler trade marks of InBev Belgium NV ("InBev"). The Court of Appeal held that there is no likelihood of confusion between both signs (*See, this Newsletter, Volume 2016, No 1, p. 15*).

In August 2015, the supermarket chain Aldi had started selling its private-label Buval beer, which is brewed and packed by brewery "Brouwerij Martens" ("Martens"). In September 2015, InBev brought a cease-and-desist action before the President for infringement of its Jupiler trade marks based on Article 2.20.1.b and/or Article 2.20.1.c of the Benelux Convention on Intellectual Property (Trade Marks and Designs) of 25 February 2005 (the "BCIP").

InBev's trade marks:

Signs used by Aldi:

Unlike the President, the Court of Appeal found no trade mark violation on any of the grounds relied on by InBev. First, the Court of Appeal examined whether Aldi infringed Article 2.20.1.b BCIP. The Court of Appeal held (i) that the relevant public consists of the average consumer of pilsner beer in the Benelux who is expected to be reasonably well-informed and reasonably observant and circumspect and that a normal level of attention can be expected from the relevant public; (ii) that both products are sold in distinct sales channels and that Buval beer is only marketed in Aldi supermarkets while Jupiler beer is not sold in Aldi supermarkets; (iii) that the relevant public is confronted with a multitude of pilsner beers on the Benelux market and that (partly) identical graphical elements are used or a combination thereof; and (iv) that there is no visual, aural and conceptual similarity between the Buval sign and the Jupiler trade mark since the dominant elements of both signs are the words "Buval" and "Jupiler" respectively. With these factors in mind, the Court of Appeal concluded that there is no likelihood of confusion and that Aldi therefore did not infringe Article 2.20.1.b BCIP.

Secondly, the Court of Appeal also rejected InBev's infringement claim under Article 2.20.1.c BCIP which protects reputed trade marks against the use of signs that create a simple association in the mind of the relevant public and that takes unfair advantage of or is detrimental to the distinctive character or the reputation of the trade mark. According to the Court of Appeal, InBev did not establish that the relevant public will associate the Buval sign with the trade marks of InBev based on the considerations mentioned in the previous paragraph.

Finally, the Court of Appeal gave short shrift to InBev's claim that the Buval beer formed parasitic competition for the Jupiler beer and gave rise to misleading and confusing publicity.

Law Implementing Unitary Patent and European Unified Patent Court Adopted and Published

On 28 December 2017, the Law of 19 December 2017 amending various provisions concerning patents in relation to the implementation of the unitary patent and the unitary patent court was published in the Belgian Official Journal (*Wet houdende wijziging van diverse bepalingen betreffende de uitvindingsoctrooien in verband met de implementering van het eenheidsoctrooi en het eengemaakt octrooigerecht/ Loi modifiant diverses dispositions en matière de brevets en relation avec la mise en oeuvre du brevet unitaire et de la juridiction unifiée du brevet*). It had been adopted by the Belgian Chamber of Representatives on 14 December 2017.

For an in-depth analysis of the Bill that gave rise to the Law, *see, this Newsletter, Volume 2017, No 11, p.5*.

LABOUR LAW

Employment Law Reforms in 2018 Following Implementation of Summer Agreement (Part I)

The so-called Summer Agreement (the "Agreement") which includes ambitious reforms to create jobs, increase purchasing power and promote social cohesion has been the subject of heated debates in the Federal Parliament and in the media. It was initially unclear how these measures would be implemented (*see, this Newsletter, Volume 2017, No. 9*). However, the measures contained in the Agreement have now been partially incorporated in the Program Law of 25 December 2017 (the "Program Law"). The Program Law entered into force on 1 January 2018 and contains the following noteworthy rules:

Extension of scope of flexi-job status

A flexi-job is a form of occasional work, enabling persons who meet specific requirements to take up an additional job in the catering industry under favourable conditions. The scope of flexi-jobs has now been expanded from the catering industry to the sectors governed by the following Joint Committees ("JC"): JC No. 118.03, JC No. 119, JC No. 201, JC No. 202, JC No. 202.01, JC No. 302, JC No. 311, JC No. 312 and JC No. 314.00.

Implementation of profit premium (winstpremie/prime bénéficiaire)

Employers may decide to grant their employees a percentage of their profits as a bonus and have to choose between paying an equal amount to all employees (identical profit premium) or a variable amount per category of employees (categorised profit premium). The profit premium must not be granted to replace another component of an employee's remuneration and is subject to a particular social security and tax treatment. Moreover, the total amount of the premium must never exceed 30% of the total yearly remuneration.

Non-recurring performance-based bonus provided by Collective Bargaining Agreement No. 90 ("CBA No. 90")

Companies that initiate the information and consultation procedure in relation to a collective redundancy coupled with a closure of the undertaking will be excluded from the scope of CBA No. 90.

Accountability contribution (responsabiliseringsbijdrage/cotisation de responsabilisation)

Part-time employees who are entitled to a guaranteed income have the right to ask their employer for a full-time job or another part-time job. In case of such a request, the employer is obliged to extend the employment of the part-time employee if there is more work available within the company. An accountability contribution of EUR 25 per month for each part-time employee at issue will be imposed on the employer who fails to respect this obligation.

Simplification of procedure to introduce e-commerce activities at night and on Sundays

Companies can introduce e-commerce activities at night and on Sundays either by concluding a company CBA with only one representative trade union organisation, or by modifying their work rules in accordance with the applicable procedure.

Increase of special social security contribution on supplementary pension ("Wijninckx-contribution")

This social security contribution, which has been increased from 1.5% to 3%, requires employers to pay additional taxes when the supplementary pension payments of the employer for any of its employees exceeds EUR 30,000 (indexed on a yearly basis).

Introduction of "activation contribution" (activatiebijdrage/cotisation d'activation)

The activation contribution was introduced in order to discourage companies from exempting older employees from work while (partly) maintaining their salary. The amount of the activation contribution will depend on the age of the employee at the moment on which he/she becomes exempted from work.

LITIGATION

Court of Justice of European Union Rules on Issues of Lis Pendens and Jurisdiction Under Lugano Convention

On 20 December 2017, the Court of Justice of the European Union (the "ECJ") gave a judgment in which it analysed the jurisdictional and *lis pendens* requirements contained in the *Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (the "Lugano Convention"). The Lugano Convention extends the regime of the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU to Iceland, Norway and Switzerland.

With respect to the *lis pendens* rules, Article 27 of the Lugano Convention provides that "[w]*here proceedings involving the same cause of action and between the same parties are brought in the courts of different States bound by this Convention, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established*".

In the case at hand, the German authorities had initiated legal proceedings in Switzerland against Ms Schlömp, who is domiciled in Switzerland and whose mother was cared for in a German hospice. The proceedings sought to recover specific costs incurred by the German authorities for the treatment of Ms Schlömp's mother.

The German authorities lodged an application before a conciliation authority as Swiss judicial procedural law requires plaintiffs to attempt to settle a civil case through conciliation before initiating a litigation phase. After the conciliation phase failed (but before the start of the litigation phase before the Swiss courts), Ms Schlömp filed an action before a German Court seeking to obtain a negative declaration to be freed from her reimbursement obligation.

However, the German court was uncertain whether the Swiss conciliation authority was a "*court*" for the purpose of Article 27 of the Lugano Convention and whether the initiation of conciliation proceedings in Switzerland pre-empted the German court from exercising jurisdiction. In order to clarify this matter, the German court referred this issue to the ECJ for a preliminary judgment.

Ms Schlömp objected to the application of Article 27 of the Lugano Convention on the ground that the Swiss conciliation authority was not a "*court*" under Article 62 of the Lugano Convention which provides that the word "*court*" includes "*any authorities designated by a State bound by* [the Lugano Convention] *as having jurisdiction in the matters falling within [its] scope*".

The ECJ held that a "*court*" is to be defined by the "*functions*" which its carries out rather than by its formal classification under national law. Examining the "*functions*" of the Swiss conciliation authority, the ECJ found (i) that the failure to comply with the obligation to recourse to conciliation prior to initiating a civil action may result in the inadmissibility of the legal proceedings; and (ii) that the conciliation proceedings may result in a binding judgment, a draft judgment (which may become final in the absence of challenge) or the signing of a conciliation agreement. Based on those elements, the ECJ concluded that the Swiss conciliation authority was a "*court*" for the purposes of the Lugano Convention.

Consequently (and since the conciliation proceedings had been initiated prior to the claim brought before the German court), the German court will have to stay the proceedings pending before it.

PUBLIC PROCUREMENT

New EU Public Procurement Thresholds

On 19 December 2017 the Official Journal of the EU published new EU public procurement thresholds that apply to (i) the "classical" sectors, *i.e.,* sectors other than water, energy, transport and postal services (Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts), (ii) the "special" sectors, *i.e.*, the water, energy, transport and postal services sectors (Commission Delegated Regulation (EU) 2017/2364 of 18 December 2017 amending Directive 2014/25/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts), (iii) the fields of defence and security (Commission Regulation (EU) 2017/2367 of 18 December 2017 amending Directive 2009/81/EC of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts); and (iv) concession contracts (Commission Delegated Regulation (EU) 2017/2366 of 18 December 2017 amending Directive 2014/23/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts).

Contracts whose estimated value reaches or exceeds these thresholds must be announced both in the Belgian Public Tender Bulletin (*Bulletin der Aanbestedingen/Bulletin des Adjudications*) and in the Official Journal of the EU (Tenders Electronic Daily or TED).

The new Regulations, which entered into force on 1 January 2018, provide for the following increases (all amounts below are excluding VAT):

Classical sectors

The threshold for works contracts increased from EUR 5,225,000 to EUR 5,548,000. For supply and services contracts awarded by central government authorities, the threshold went up from EUR 135,000 to EUR 144,000. The threshold for supply and services contracts awarded by sub-central contracting authorities rose from EUR 209,000 to EUR 221,000.

Water, energy, transport and postal services sectors

The threshold for supply and service contracts increased from EUR 418,000 to EUR 443,000 and for works contracts from EUR 5,225,000 to EUR 5,548,000.

Defence and security

The threshold for supply and service contracts in the fields of defence and security increased from EUR 418,000 to EUR 443,000 and for works contracts from EUR 5,225,000 to EUR 5,548,000.

Concession contracts

Finally, the threshold for concession contracts went up from EUR 5,225,000 to EUR 5,548,000.

The new thresholds, which apply from 1 January 2018, were implemented in Belgian law by a Ministerial Decree of 21 December 2017 (*Ministerieel Besluit van 21 december 2017 tot wijziging van de Europese bekendmakingsdrempels in meerdere Koninklijke Besluiten tot uitvoering van de Wet van 17 juni 2017 inzake overheidsopdrachten, de Wet van 17 juni 2017 betreffende de concessieovereenkomsten en de Wet van 13 augustus 2011 inzake overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten op defensie- en veiligheidsgebied/Arrêté ministériel du 21 décembre 2017 adaptant les seuils de publicité européens dans plusieurs Arrêtés royaux exécutant la Loi du 17 juin 2016 relative aux marchés publics, la Loi du 17 juin 2016 relative aux contrats de concession et la Loi du 13 août 2011 relative aux marchés publics et à certains marchés de travaux, de fournitures et de services dans les domaines de la défense et de la sécurité*).

In the centre of Europe with a global reach

VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

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

vbb@vbb.com
www.vbb.com