VAN BAEL & BELLIS

VOLUME 2016,
Nº 11

November 2016

Van Bael & Bellis on Belgian Business Law

HIGHLIGHTS

COMMERCIAL LAW: According to Advocate General Wathelet, French Courts Have Power to Block Sales on Foreign Websites

COMPETITION LAW: Belgian Competition Authority Rejects Request for Suspension of Merger in Brewing Sector

CONSUMER LAW: ECJ Expands Concept of "Seller" under Consumer Sales Directive

DATA PROTECTION: Belgian Court of First Instance Fines Skype EUR 30,000 for Refusal to Cooperate with Law Enforcement Authorities

INTELLECTUAL PROPERTY: Bill Modifying Provisions of Book XI of Code of Economic Law as Regards Reproduction Rights and Teaching Exceptions

LABOUR LAW: Guiding Principles for Employers regarding Holidays

LITIGATION: Federal Minister of Justice Koen Geens Publishes Policy Note on Justice

MARKET PRACTICES: ECJ Dismisses Request for Preliminary Ruling in Proceedings against Uber

PUBLIC PROCUREMENT: Bill on Legal Protection in Matters of Public Procurement Submitted to Federal Parliament

TOPICS COVERED IN THIS ISSUE

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

VAN BAEL & BELLIS

VOLUME 2016,
Nº 11

November 2016

Van Bael & Bellis on Belgian Business Law

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

VBB on Belgian Business Law | Volume 2016, Nº 11

| COMMERCIAL LAW

According to Advocate General Wathelet, French Courts Have Power to Block Sales on Foreign Websites

Advocate General Wathelet issued a remarkable non-binding opinion on 9 November 2016 in response to a question referred for a preliminary ruling by the French Supreme Court to the Court of Justice of the European Union (the "ECJ") in *Concurrence SARL v. Samsung Electronics France SAS and Amazon Services Europe SARL* (Case C-618/15). Concurrence, one of Samsung's French dealers, had complained that other Samsung dealers were selling products on Amazon websites with French, German, Italian, UK and Spanish domain names. These sales allegedly happened in breach of a contractual clause prohibiting online sales.

Samsung operates for its high-end products a selective distribution system and prohibits its dealers from selling outside the network, including over the Internet. Under French law, a party assisting directly or indirectly in breaching the ban on sales outside the network may be held liable. Concurrence therefore requested a French court to require Amazon to withdraw these products from its various websites. After that court and an appeal court had both dismissed the action on the grounds 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.

Contrary to the judgments of the French courts, Advocate General Wathelet asserted that these courts do have jurisdiction and have the power to order Amazon to withdraw offending products from its websites.

The opinion considered the jurisdiction of the French courts on the basis of Article 5(3) of Regulation 44 /2011 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation"), building on previous case law regarding the infringement of intellectual property rights. According to Advocate General Wathelet, if the applicant can demonstrate that adverse effects in the form of reduced sales and loss of profit are suffered in France and that activities of foreign Amazon websites contributed to such damage, French courts have jurisdiction over the case and the applicant should be able to obtain an injunction relating to these websites.

As this opinion is not binding on the ECJ, it is still uncertain whether the ECJ will follow its Advocate General. If it does, this could constitute a ground-breaking development and a further step towards a generalised cross-border jurisdiction of Member State courts in the EU.

Policy Note on Economic Affairs

On 27 October 2016, the Federal Minister for Economic and Consumer Affairs, Kris Peeters (the "Minister"), published his policy note on economic affairs (the "Note"). The Note describes the current state of play and the Minister's envisaged actions across a wide array of fields, including commercial law. The Note contains the following noteworthy initiatives:

› The Code of Economic Law will be amended in several respects. First, the Law of 8 August 1997 on bankruptcies (*Faillissementswet van 8 augustus 1997/Loi du 8 août 1997 sur les faillites*) and the Law of 31 January 2009 on the Continuity of Enterprises (*Wet van 31 januari 2009 betreffende de continuïteit van de ondernemingen/Loi du 31 janvier 2009 relative à la continuité des entreprises*) will be incorporated in the Code of Economic Law. A draft bill, which the Minister will prepare together with the Minister of Justice, will be submitted to the Federal Parliament in 2017. Second, the Minister will review the notion of "enterprise" (*onderneming/entreprise*) as used in the Code of Economic Law. A draft bill will be submitted to the Federal Parliament in 2017. Third, together with the Minister of Justice, the Minister will assess whether Book XIV of the Code of Economic Law on market practices and consumer protection with respect to practitioners of liberal professions should be integrated in the general Book VI of the Code of Economic Law on market practices and consumer protection.

› The Central Commercial Register (*Kruispuntbank van Ondernemingen/Banque-Carrefour des Entreprises*) will be expanded and improved to become the sole authentic source of information about companies (*See also, this Newsletter, Volume 2015, No. 11, p. 4*).

› The Note stresses the need to tackle imbalances in business-to-business relationships. Whilst confirming that codes of conduct are a good solution to solve problems, the Minister now clearly states that such codes are not sufficient. Elaborating upon the Minister's previous policy note (*See, this Newsletter, Volume 2015, No. 11, p. 10-11*), the Note argues that a statutory framework is needed. The Minister intends to submit a draft bill to the Federal Parliament in 2017.

› The Minister will assess to what extent the current statutory framework, in particular as regards liability, can also supply to the economic model of the expanding sharing economy.

Policy Note on Digital Agenda

On 28 October 2016, the Federal Minister for Development Cooperation, Digital Agenda, Telecommunications and Post, Alexander De Croo (the "Minister"), published his policy note on the Digital Agenda (the "Note"). Most importantly, the Note sets out the Minister's envisaged actions regarding trust services:

› Together with the Federal Minister for Economic and Consumer Affairs, the Minister will adopt measures to promote the benefits of the Law of 21 July 2016 which (i) implements and complements Regulation (EU) 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (the "eIDAS Regulation"); and (ii) supplements the eIDAS Regulation to create legal equivalence between electronic and non-electronic legal transactions (the "Law"). The Law was published in the Belgian Official Journal on 28 September 2016. Most of its provisions entered into force on the same date (*See, this Newsletter, Volume 2016, No. 10, p. 3*).

› The Federal Public Service Economy, SMEs, Self-Employed and Energy is currently finalising a legal study on electronic signatures and the use of the term "*durable medium*" (*duurzame drager/support durable*) in statutory and regulatory texts. On the basis of this study, the Minister will propose statutory changes in view of ensuring a harmonised approach in this field.

› The Minister intends to take the necessary measures to ensure the equivalence of online agreements and conventional paper contracts. In order to do so, a study is currently being conducted with the aim of identifying the key functions of paper contracts. If necessary, the current statutes will be amended so as to ensure that online agreements accomplish these functions.

Constitutional Court Rules on Jurisdiction of Justice of the Peace in Proceedings Regarding Consumer Utilities Debts

On 10 November 2016, the Constitutional Court delivered a judgment regarding the jurisdiction of the Justice of the Peace (*Vredegerecht/Justice de paix*) in proceedings regarding the recovery of gas and electricity consumer debts. The judgment was given in response to requests for a preliminary ruling from the Justices of the Peace of the Enghien-Lens canton and the District Court (*Arrondissementsrechtbank/Tribunal d'arrondissement*) of Hainaut.

The case concerns the application of Article 591, 25° of the Judicial Code. According to this provision, regardless of the amount of the claim, the Justice of the Peace is competent for all proceedings regarding the recovery of consumer debts involving utilities insofar as such proceedings are initiated by, *inter alia*, electricity and gas suppliers. By contrast, proceedings commenced by a third party to which such a claim was assigned, *e.g.* a debt collection agency, will not be heard by the Justice of the Peace (except if the claim has a value of less than EUR 2,500, *i.e.*, the general maximum monetary threshold for proceedings brought before the Justice of the Peace).

The Constitutional Court considered that this difference in treatment cannot be justified. Therefore, the Constitutional Court held that Article 591, 25° of the Judicial Code violates Articles 10 and 11 of the Constitution, *i.e.*, the principles of equality and non-discrimination, in so far as the jurisdiction of the Justice of the Peace does not extend to proceedings initiated by third parties to which claims against consumers regarding unpaid electricity and gas invoices were assigned.

Following the judgment of the Constitutional Court, Article 591, 25° of the Judicial Code is unconstitutional, but continues to exist. According to the underlying interpretation of the Constitutional Court, all proceedings regarding the recovery of consumer debts concerning utilities, whether

introduced by an energy supplier or by a debt collection agency, should be heard by the Justice of the Peace. However, for the sake of legal certainty, the Parliament should rectify the situation as soon as possible.

VBB on Belgian Business Law | Volume 2016, Nº 11

| COMPETITION LAW

Belgian Competition Authority Conditionally Approves Acquisition of AMP and LS Distribution Benelux by bpost

On 8 November 2016, the Competition College (*Mededingingscollege/Collège de la Concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit/ Autorité belge de la Concurrence*) ("BCA") approved the acquisition of AMP NV and LS Distribution Benelux NV by bpost, the Belgian incumbent postal services provider. AMP and LS Distribution Benelux are active in the distribution of newspapers and magazines to press outlets, the delivery of small parcels and the operation of the retail store chains "Press Shop" and "Relay".

The Competition College approved the transaction after bpost had presented 10 commitments to address the competition concerns raised by the BCA. Broadly, these commitments seek to:

- prevent bpost from restricting competition between unaddressed and addressed distribution by rendering less attractive those services that are not governed by the concession agreement between bpost and the Belgian State on the distribution of newspapers, compared to those services currently provided by bpost, namely the subsidised dispatching of addressed newspapers;
- guarantee the same level of quality for press distribution services; and
- provide safeguards against the privileged treatment of the new entity's retail outlets at the expense of competing outlets in the distribution of press services.

The commitments accepted by the BCA will be monitored by a trustee.

The non-confidential version of the decision of the Competition College, along with the commitments, can be found here.

Belgian Competition Authority Rejects Request for Suspension of Merger in Brewing Sector

On 21 November 2016, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit/ Autorité belge de la Concurrence*) ("BCA") rejected the request of Brouwerijen Alken-Maes NV ("Alken-Maes") to suspend the acquisition of Brouwerij Bosteels ("Bosteels") by Anheuser-Busch InBev NV ("AB InBev").

AB InBev's takeover of Bosteels was not subject to prior notification to, and approval by, the BCA since Bosteels is a small independent brewery with a turnover in Belgium well below the notification threshold of EUR 40 million.

Alken-Maes still requested the suspension of the acquisition and argued before the BCA that even if this acquisition was not caught by merger control rules, it had to be reviewed under Article IV.2 of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*) and Article 102 of the Treaty on the Functioning of the European Union (TFEU), which both prohibit the abuse of a dominant position. Alken-Maes contended that the acquisition constituted an abuse of AB InBev's dominant position as it would enable AB InBev to acquire the brand Triple Karmeliet, thus significantly strengthening its dominant position. Therefore, Alken-Maes requested the BCA to adopt interim measures suspending the implementation of the concentration.

The BCA noted that Belgian competition law does not explicitly provide that antitrust rules do not apply to concentrations.

The BCA added that an acquisition that is not subject to merger control, can only be assessed *prima facie* under the rules prohibiting the abuse of a dominant position if there are possible restrictions on competition that can be distinguished from the mere effect of the concentration and might by themselves qualify *prima facie* as an abuse of a dominant position.

The BCA found that Alken-Maes had not sufficiently proven that the concentration restricted competition in a way that was distinguishable from the mere effect of the concentration. Therefore, there was no behaviour which, as such, could amount to a *prima facie* abuse of AB InBev's dominant position justifying the adoption of interim measures. The BCA concluded that, if such restrictions were to take place, the BCA would then tackle them as appropriate.

The decision of the BCA can be found **here**.

| CONSUMER LAW

Policy Note on Economic Affairs

On 27 October 2016, the Federal Minister for Economic and Consumer Affairs, Kris Peeters (the "Minister"), published his policy note on economic affairs (the "Note"). The Note describes the current state of play and the Minister's envisaged actions across a wide array of fields, including consumer and market practices law. The Note puts forward the following noteworthy initiatives:

› The Minister continues his review of the implementing decrees of the various former laws on market practices and consumer protection to determine whether they are still up-to-date and compatible with the current rules on market practices and consumer protection as laid down in Book VI of the Code of Economic Law (*See also, this Newsletter, Volume 2015, No. 11, p. 4*). According to the Note, priority will be given to the decrees affecting the highest number of companies, including (i) the Royal Decree of 30 June 1996 on the indication of prices of products and services (*Koninklijk Besluit van 30 juni 1996 betreffende de prijsaanduiding van producten en diensten/Arrêté royal du 30 juin 1996 relatif à l'indication du prix des produits et des services*); and (ii) decrees governing the indication of quantities.

› The Minister is systematically reviewing the various sectoral codes of conduct. A revised version of the consumer agreement in the energy sector (*Akkoord "De consument in de vrijgemaakte elektriciteits- en gasmarkt"/Accord "Le consommateur dans le marché libéralisé de l'électricité et du gaz"*) is currently being reviewed by the energy suppliers. The Minister intends to finalise the revised agreement this year. Other codes of conduct will be examined next year.

› The Minister is evaluating different extrajudicial consumer dispute settlement systems. The Consumer mediation service (*Consumentenombudsdienst/Service de médiation pour le consommateur*) (*See, this Newsletter, Volume 2014, No. 2, p. 3 and Volume 2014, No. 11, p. 8*) will be assessed in 2017, with particular attention for questions relating to governance. The Minister will propose changes to the current legislation, if needed.

In 2017, the Minister will finalise the implementation of the second Payment Service Directive (Directive 2015/2366 on payment services in the internal market). Stakeholders will be consulted.

ECJ Expands Concept of "Seller" under Consumer Sales Directive

On 9 November 2016, the Court of Justice of the European Union ("ECJ") handed down a judgment in response to a request for a preliminary ruling from the Liège Court of Appeal (the "Court") regarding the interpretation of the concept of "seller" for the purposes of Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (the "Consumer Sales Directive"). The ECJ held that the concept of a "seller" within the meaning of the Consumer Sales Directive also covers traders acting as intermediaries on behalf of a private individual who fail to inform the consumer that the owner of the goods sold is a private individual (ECJ, 9 November 2016, Case C-149/15, *Sabrina Wathelet v. Garage Bietheres & Fils SPRL*).

The reference for a preliminary ruling was made in proceedings between Garage Bietheres & Fils SPRL (the "Car Dealer") and Sabrina Wathelet, who had bought a second-hand car from the Car Dealer for EUR 4,000. The car broke down even before Ms. Wathelet had received a receipt, proof of payment or sales invoice. When Ms. Wathelet sought to recover her repaired vehicle from the Car Dealer, she was issued with an invoice relating to the costs of repair for an amount of EUR 2,000. Ms. Wathelet refused to pay on the ground that those costs should be borne by the seller of the vehicle. The Car Dealer disagreed, arguing that it had never owned the vehicle and had simply acted in the capacity of intermediary on behalf of another private individual, Ms. Donckels. Therefore, the Car Dealer initiated proceedings against Ms. Wathelet for payment of the repair services.

After the Verviers Court of First Instance had sided with the Car Dealer, Ms. Wathelet lodged an appeal with the Court. Finding that there was strong, specific and consistent circumstantial evidence indicating that Ms. Wathelet had not been informed that there was a private sale, the Court decided to stay the proceedings and ask the ECJ whether

the Car Dealer should be regarded as a "seller" within the meaning of Article 1(2)(c) of the Consumer Sales Directive. Article 1(2)(c) defines the term "seller" as "*any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession*".

The ECJ started its analysis by emphasising that the term "seller", as used in the Consumer Sales Directive, must be interpreted in the light of (i) the aims of the Consumer Sales Directive; and (ii) the particular function of the "seller" in the context of the Consumer Sales Directive.

Although noting that the concept of a "seller" does not cover intermediaries, the ECJ concluded that that concept "*can be interpreted as covering a trader who acts on behalf of a private individual where, from the point of view of the consumer, he presents himself as the seller of consumer goods under a contract in the course of his trade, business or profession*". It explained that "*[t]hat trader could create confusion in the mind of the consumer by giving him the false impression that he is acting as the seller-owner of the goods*".

According to the ECJ, nothing in the wording of Article 1(2)(c) of the Consumer Sales Directive precludes such an interpretation. Moreover, this interpretation is in line with the objective underpinning the Consumer Sales Directive, which is to ensure a high level of protection to consumers who are considered to be in a weak position vis-à-vis professional sellers. The opposite interpretation would deprive consumers from the protection granted by the Consumer Sales Directive.

The ECJ continued that, as the concept of "seller" limits the circle of persons against whom consumers may take action in order to enforce their rights under the Consumer Sales Directive, traders should duly inform consumers if and when they are acting as intermediaries on behalf of a private individual.

Finally, the ECJ added that the question of whether the trader acting as an intermediary is remunerated or not is not relevant for the purposes of determining whether he must be classified as a "seller" within the meaning of Article 1(2)(c) of the Consumer Sales Directive.

In view of this ruling, traders who act as intermediaries on behalf of private individuals should inform consumers in clear terms of the fact that they are not the owner of the goods sold. Should they fail to do so, they may be held liable under the Consumer Sales Directive if the goods sold are not in conformity with the sale contract.

VBB on Belgian Business Law | Volume 2016, Nº 11

| DATA PROTECTION

Belgian Court of First Instance Fines Skype EUR 30,000 for Refusal to Cooperate with Law Enforcement Authorities

On 27 October 2016, the Court of First Instance of Mechelen (the "Court") ordered Skype Communications SARL ("Skype") to pay a fine of EUR 30,000 following its refusal to cooperate in a judicial investigation.

In 2012, the Investigative judge (*onderzoeksrechter/juge d'instruction*) with the Court sought to monitor conversations of a suspect during an investigation of a criminal organisation. The investigative judge issued a request to Skype to cooperate in applying wiretapping and recording measures with regard to a specific individual's Skype account. In response to the request, Skype merely provided registration details for the account, stating that the provision of information regarding Skype-to-Skype conversations was technically not possible. Additional requests to Skype did not lead to the requested information and Skype was, as a result, accused of failing to comply with Articles 88*bis* and 90*quarter*, §2 of the Criminal Procedure Code (*Wetboek strafvordering/Code d'instruction criminelle*).

Articles 88*bis* and 90*quarter,* §2 of the Criminal Procedure Code stipulate that operators of a telecommunications network or providers of a telecommunications service are obliged to cooperate with the judiciary if it requires specific information in an investigation.

The case ended up with the Court which first examined if Belgian courts had jurisdiction over Skype. Skype argued that its principal office is situated in Luxembourg and that it does not have a separate Belgian branch. Skype maintained that, as a result, it does not fall under the territorial jurisdiction of the Belgian criminal courts. The Court rejected this argument holding that there was an adequate territorial link as the requested data had been received on the Belgian territory.

After establishing jurisdiction, the Court considered the merits of the case. Here, Skype argued that it does not qualify as an operator of a telecommunications network or a provider of a telecommunications service and, therefore, does not have a duty to cooperate.

The Court disagreed and determined that Skype does qualify as a provider of a telecommunications service as it offers software to users which allows them to communicate with other users and exchange information over an electronic network (*i.e.*, the internet). It added that Skype's lack of its own network to transfer the data is not relevant.

Furthermore, the Court rejected Skype's argument that Skype does not have to comply with Belgian legislation, because Skype does not have a Belgian branch. The Court determined that there is an adequate territorial link because Skype intentionally chose to be active on the Belgian market and generate revenue on the basis of that presence. The Court furthermore referred to the Dutch-language website of Skype, the available Dutch-language user manuals and the Dutch-language support service. Finally, the Court specified that Skype's available software is accompanied with targeted advertising on the basis of the place where the user is located, the language preference and the location of the IP address.

The Court also rejected the argument that Skype was technically unable to provide the requested information. The Court held that Skype voluntarily chose to provide a communications service on the Belgian market, and for this reason, Skype should have considered the Belgian rules that require the company to provide technical cooperation in the framework of a judicial investigation. Skype should thus have designed its services in such a manner that it would be able to provide the required technical assistance. The Court added that these restrictions are not unreasonable or incompatible with the freedom of running a business.

Finally, the Court determined that there was no conflict with Luxembourg law. It imposed a financial penalty of EUR 30,000 on Skype.

This decision is still open for appeal.

VBB on Belgian Business Law | Volume 2016, Nº 11

Secretary of State Presents Privacy Policy for Upcoming Year

On 26 October 2016, the Belgian Secretary of State responsible for privacy matters, Philippe De Backer (the "Secretary of State"), presented a policy note which sets out his plans in the area of privacy/data protection for the upcoming year (the "Note"). The Note builds on the Secretary of State's previous note presented on 2 June 2016 (*See, this Newsletter, Volume 2016, No. 6, p. 12*).

The Note's main areas of focus include: (i) the reform of the Belgian data protection rules against the backdrop of the recently adopted European Data Protection Regulation; (ii) personal data and public security; (iii) personal data held by public authorities; (iv) open data and big data; (v) privacy in the new media; and (vi) the security of personal data.

Reform of Belgian Data Protection Rules

The Note starts by discussing the recent adoption of the EU General Data Protection Regulation (the "GDPR"). The Secretary of State intends to make use of the two year transitional period foreseen by the GDPR for its entry into force to guide data controllers and processors in seizing the opportunities that will arise from the GDPR and complying with the new data protection rules. This guidance will be provided through a consultation platform on privacy, which is composed of representatives of the sector federations and civil society.

In order to achieve the objectives of transparency and accountability set forth in the GDPR, the Secretary of State intends to take concrete initiatives such as the creation of a 'passport for privacy'. The aim of such a passport would be to enable citizens to know in which databases their data is stored and how their data is being processed. Furthermore, the Secretary of State intends to facilitate the possibility for victims to denounce abuses by elaborating a procedure for the treatment of complaints by the competent privacy commission.

Finally, as previously announced, the Secretary of State will introduce a bill in 2017 to reform the Commission for the Protection of Privacy (*Commissie voor de bescherming van de persoonlijke levenssfeer / Commission de la protection de la vie privée* – the "Privacy Commission"). The Secretary of State plans to confer the power on the Privacy Commission to impose administrative penalties, strengthen the independence of the Privacy Commission's members and reduce administrative burdens.

Personal Data and Public Security

The Secretary of State will strive for a security policy that respects citizens' privacy and will ensure that the security measures adopted by the government comply with national and international standards of respect for private life.

Personal Data Held by Public Authorities

As regards personal data held by public authorities, the Note indicates that transparency towards citizens concerning the use of their data by public authorities and the re-use of such data will be a policy priority in the upcoming year. In this regard, the Note underlines that criteria clearly defined in a framework law and a data protection officer within each administration will enable public authorities to perform their tasks more efficiently with respect for private life. In addition, emphasis will be put on the anonymisation of data.

Regarding E-health, the Note mentions that the evolution towards a more computerised health care system (electronic medical records, deletion of the medical certificate) will take place in close consultation with the Minister for Social Affairs and Public Health and the Minister responsible for the Digital Agenda.

Open Data and Big Data

Regarding private data, the Note mentions that societal and economic opportunities could result from "open data" and "big data". "Open data" involves the notion that information, including geographical data, meteorological data and data from publicly funded research projects, should be freely available for use and re-use. "Big data" refers to large amounts of data produced at a high pace from a large number of sources.

By way of example, the Note indicates that the results of medicine testing carried out in private R&D could bolster healthcare and prevention policies. Again, the Secretary of State will try and exploit these opportunities while ensuring a high level of data protection. This should be achieved through the use of anonymised data and by "privacy by design" which refers to the integration of privacy safe-

guards into software systems and organisational structures during their development.

Furthermore, in order to help companies respect privacy, good practices will continue to be exchanged through the consultation platform on privacy, and, on that basis, the government will establish a checklist for companies to enhance data protection.

New Media

The Note mentions that the involvement of today's youth in digital media and their active participation in the information society is an opportunity to hold a discussion on privacy at several levels. One key question is how to maximise the potential and benefits of technological developments, both for the individual and for governments and enterprises. At the same time, the risks of abuse should be minimised. The case-law of the European Court of Human Rights and the Court of Justice of the European Union should serve as guidance in this respect.

Security of Personal Data

Finally, as previously announced, in order to increase the security of personal data, the Secretary of State intends to consult stakeholders on the possibilities of creating a certification mechanism for data protection compliance. Such a certificate is promoted under the GDPR as a means to demonstrate that a specific company has implemented, and complies with, specified privacy practices.

In addition, the Secretary of State wishes to launch a pilot project on the use of blockchain technologies in the public sector. Blockchain technologies, the technologies underlying the Bitcoin currency, rely on a network effect to enhance security.

Dutch and French versions of the Note can be found **here**.

VBB on Belgian Business Law | Volume 2016, Nº 11

| INTELLECTUAL PROPERTY

Bill Modifying Provisions of Book XI of Code of Economic Law as Regards Reproduction Rights and Teaching Exceptions

On 26 October 2016, the Government submitted to the Chamber of Representatives a bill 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").

In substance, the Bill pursues two main goals. First, it aims to incorporate in the Code of Economic Law the lessons learned from the judgment handed down on 12 November 2015 by the Court of Justice of the European Union (the "ECJ") in *Hewlett-Packard Belgium SPRL v. Reprobel SCRL* (*See, this Newsletter, Volume 2015, No 11, pp. 13-14*). In this judgment, the ECJ held that Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the "Copyright Directive") is incompatible with specific aspects of Belgian national law as regards reprography and copying exceptions. Consequently, the Bill proposes four changes:

› It suppresses the lump-sum remuneration due by users in the event of a reproduction, for commercial use, from a paper medium (or similar) to a paper medium (or similar). These users will therefore only have to pay a proportional remuneration calculated by reference to the number of copies actually made;

› The remuneration is only directed to compensate reproductions which fall within the scope of the law. Hence, reproductions made from unlawful sources as well as copies of sheet music will not give rise to remuneration;

› Publishers will owe remuneration for reproductions from a paper medium (or similar) to a paper medium (or similar);

› All reproductions made within the family circle will fall under the private copying exception system.

Second, the Bill places in one section all exceptions to copyright that are linked to teaching. Until now, the teaching exceptions were spread out through the law, causing difficulties of application for the educational sector. The application of the teaching exceptions will be made even easier as a single fee will be provided for by the new section.

ECJ Confirms French Out-of-Print Books Law Infringes Copyright Directive

On 16 November 2016, the Court of Justice of the European Union (the "ECJ") ruled on a request for a preliminary ruling involving the compatibility of Decree No 2013-182 of 27 February 2013 (the "French Law") with Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the "Copyright Directive"). At issue was the right granted by the French law to a collecting society to authorise the digital reproduction and communication to the public of 'out-of-print' books.

The ECJ largely sided with Advocate General Melchior Wathelet (the "AG") who had concluded on 7 July 2016 that the French law is incompatible with the Copyright Directive (*See, this Newsletter, Volume 2016, No 7, p. 13*).

The ECJ started its reasoning by restating the principle according to which any use of work by a third party realised without the prior consent of the author amounts to an infringement of copyright. It went on to say that because the Copyright Directive provides no particular rule for consent, such consent must never be considered as implicit. In addition, it must be guaranteed that the authors are informed of the use made of their work, especially in the case of books which are no longer published and distributed.

The ECJ further held that the Copyright Directive must be interpreted as precluding the French law to the extent that this law only confers the power on authors to put an end to the commercial exploitation of their works in digital format either (i) by mutual agreement with the publishers of the print-version of those works; or (ii) alone if they provide evidence that they hold the sole rights to their works. The ECJ added that such a rule is in contradiction with the

Berne Convention for the Protection of Literary and Artistic Works which establishes that the exercise of copyright cannot be subject to any formality.

Antwerp Court of Appeal Issues Judgment Relating to Use of Verso Word Mark

On 11 April 2016, the Court of Appeal of Antwerp (the "Court") issued a judgment on the use in commerce of a word mark in a dispute between Totex, a company using the Benelux word mark VERSO as a brand and a business name under a trade mark licence, Totex's licensor (the "Trade mark Licensor") and Verso, a company that had registered its company name as a domain name and used it as a business name.

The dispute arose as a result of the alleged infringement by Verso of the Benelux word mark VERSO. In 2010, the Trade mark Licensor sought an injunction against Verso before the Commercial Court of Antwerp to prevent Verso from using the Verso brand and the domain name "**www.verso.be**".

First, the Commercial Court noted that the Trade mark Licensor made no use of the word mark, contrary to its licensee, Totex, which was using it as a business name. As a consequence, the Commercial Court decided that the protection could only be granted to Totex. It then held that it was not proven that Verso had used the word mark VERSO other than as a business name so that such use could not amount to a trade mark infringement. Finally, the Commercial Court held that no genuine use of the word mark had been made by the licensor and consequently declared that the word mark had expired.

On appeal, the Court confirmed the initial judgment.

Totex initiated third-party proceedings against the latter judgment (before the same court) to show genuine use of the word mark VERSO. To that effect, Totex submitted pictures of clothing items with the word mark VERSO on the label and invoices indicating that Totex distributed the VERSO brand. The Court decided that the invoices did not allow for a determination that the use of the brand related to specific goods. Nor did they allow a finding that the VERSO brand had been used to identify the origin of the clothing items. The Court therefore concluded that the submitted evidence constituted insufficient proof of genuine and continuous use of the word mark VERSO by Totex. Hence, the Court confirmed its previous judgement.

ECJ on Digital Lending of E-books

On 10 November 2016, the Court of Justice of the European Union ("ECJ") held that, under comparable lending schemes, public libraries may lend out e-books at the same conditions as those applicable to the lending of physical books (ECJ, 10 November 2016, Case C-174/15, *Vereniging Openbare Bibliotheken v. Stichting Leenrecht*).

The ECJ delivered its judgment in response to a request for a preliminary ruling from the Dutch District Court of the Hague (*Rechtbank Den Haag*) in proceedings between the public library association Vereniging Openbare Bibliotheken ("VOB") and the lending foundation Stichting Leenrecht ("the Stichting").

In the case at hand, a dispute arose between the VOB and the Stichting about the interpretation of Article 15c of the Dutch copyright law which provides that lending of all or part of a copy of a literary, scientific or artistic work, or a reproduction thereof, put into circulation by the right holder or with his consent, does not constitute an infringement of the copyright in that work, provided that fair remuneration is paid by the person who carries out that lending. The question at issue was whether public libraries are allowed to lend out e-books in a way identical to how they lend out physical books, *i.e.* without a dedicated license. The dispute related to the lending of the digital copy of a book, carried out by placing it on the server of the public library and allowing the user concerned to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user.

The right to lend physical books is regulated by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (the "Directive"), and in particular by its articles 1(1), 2(1)(b) and 6(1). Article 1(1) of the Directive, which provides that "*Member States shall provide (...) a right to authorise or prohibit the (...) lending of originals and copies of copyright works, and other subject matter (...)*", does not

specify whether the concept of 'copies of copyright works', within the meaning of that provision, also covers copies which are not fixed on a physical medium, such as digital copies. In addition, Article 2(1)(b) of that directive defines 'lending' as "*making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when that lending is made through establishments which are accessible to the public*". Finally, Article 6(1) provides that "*Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives*".

The case was submitted to the District Court of the Hague, which decided to stay the proceedings and question the ECJ on the scope of these articles.

The ECJ started by analyzing whether there would be grounds to justify the exclusion of the lending of digital copies and intangible objects from the scope of the Directive. In this regard, it noted that neither the World Intellectual Property Organization Copyright Treaty ("WIPO Treaty") nor the original directive on rental right and lending right (Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property), preclude the concept of 'lending' from being interpreted as also including lending carried out digitally. The Court therefore concluded that there is no decisive ground allowing for the exclusion of the lending of digital copies and intangible objects from the scope of the Directive.

The ECJ then went on to address the permissibility of additional conditions laid down in the national legislation for the application of the public lending exception.

It first noted that Member States may require that digital copies of a book made available by public libraries have been put into circulation by a first sale or other transfer of ownership of that copy in the European Union by the holder of the right of distribution to the public or with his consent. This additional condition improves the protection of authors' rights in the implementation of the lending exception and is therefore in accordance with Article 6(1) of the Directive.

The ECJ also held that Article 6(1) of the Directive does not allow the public lending exception to apply to the making available by a public library of a digital copy of a book stemming from an unlawful source.

It follows that the digital lending of an electronic book falls within the scope of the exception foreseen by the Dutch copyright law which provides that lending does not constitute an infringement of the copyright in that work, on condition that fair remuneration be paid by the lender.

The case will now go back to the national court, which must deliver a decision in line with the ECJ's interpretation of the Directive.

VBB on Belgian Business Law | Volume 2016, Nº 11

| LABOUR LAW

Guiding Principles for Employers regarding Holidays

Statutory holidays

Pursuant to Belgian labour law, statutory holidays must be granted by the employer within twelve months following the end of the holiday year of service. This means that the employee must take up his statutory holidays during the holiday year, *i.e.* before 31 December, and that the transfer of statutory holidays to the next year is prohibited by law.

Bank holidays

Under Belgian law, the bank holidays that fall on a Sunday or an ordinary day of inactivity for the company (usually a Saturday), must be replaced by another working day. This means that in 2017, two bank holidays will have to be replaced by another working day, i.e. New Year (Sunday) and Armistice Day (Saturday).

The Law regarding bank holidays of 4 January 1974 ("Bank Holidays Law") (*Wet van 4 januari 1974 betreffende de feestdagen/ Loi du 4 janvier 1974 relative aux jours fériés*) lays down a set of rules to determine the substitute days.

First, the substitute days for the bank holidays can be determined in a sectoral collective bargaining agreement ("CBA"). This CBA must be concluded before 1 October of the year preceding the year in which the bank holiday will be replaced and must be communicated to the Federal Minister of Work no later than on 1 October.

Second, if no CBA was concluded at sectoral level, the substitute days of the bank holidays must be determined at company level:

› either by the works council;

› or by mutual agreement between the employer and the trade union representatives;

› or by mutual agreement between the employer and the staff;

› or by individual agreement between the employer and the employee.

If no replacement day is determined at one of these levels, the replacement day will take place on the first working day following the bank holiday.

Finally, every employer must draw up at the latest on 15 December a list mentioning the substitute days for the bank holidays of the following year, post the list in the workplace and include them in the work rules.

Collective holidays

If the employer wants to grant a collective leave, this also should be included in the work rules. In contrast to the substitute holidays, there is no legal deadline for the communication of a collective closure period.

VBB on Belgian Business Law | Volume 2016, Nº 11

| LITIGATION

Federal Minister of Justice Koen Geens Publishes Policy Note on Justice

On 8 November 2016, the Federal Minister of Justice, Koen Geens, published his policy note on Justice (the "Note"). The Note addresses 5 main topics which are said to be focal points for the Minister during the third year of his term in office: (i) an efficient, qualitative and accessible justice; (ii) a just and transparent criminal law and policy; (iii) justice at the service of the population; (iv) the modernisation of civil and economic law; and (v) international cooperation, human rights, international humanitarian law, the promotion of the rule of law and the dialogue with recognised religious groups. A number of interesting developments discussed in the Note are described below.

According to the Note, the digitalisation of the Belgian justice system is in full swing. The Note indicates that, by the end of 2017, it will be possible to submit electronic briefs before all Belgian courts and that, within the same time span, all court decisions will be saved in and communicated via a single electronic database. In addition, the Note announces the creation of a digital insolvency register, in which creditors of firms facing bankruptcy will be able to file their claims. Within the realm of criminal law, the Note also lists a number of digitalisation measures, such as an electronic platform for official reports.

The Note further refers to the reform of civil procedure and reiterates the ambitious goal, already recorded in last year's policy note (*See, this Newsletter, Volume 2015, No. 15, p. 17*), of an affordable judicial system that leads to a judgment within one year after the bringing of an action. According to the Note, the Law of 19 October 2015 concerning the amendment of the law on civil procedure, which contains various provisions in relation to justice (*Wet van 19 oktober 2015 houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie/Loi du 19 octobre 2015 modifiant le droit de la procédure civile et portant des dispositions diverses en matière de justice*)(the so-called "Potpourri-I Law") already laid down various measures to reduce the number of procedures brought. A draft bill approved in the Council of Ministers of 20 July 2016, which, if adopted by the Chamber of Representatives, will be known as the "Potpourri-IV Law" is said to complement the Potpourri-I Law in this respect. In addition, the Note announces an in-depth revision of civil procedure, which will focus on stimulating trajectories of alternative dispute resolution. Further details in relation to the upcoming revision of civil procedure are said to follow in a separate note, to be published in the spring of 2017.

A key priority for the third year of the government's term is said to be the modernisation of various codes. The status of this modernisation process will be detailed in a separate document, but the Note already gives some indications as to the main issues at stake. A new Civil Code will contain updated rules on obligations, on assets and on evidence. The Note also foresees an update of company law and bankruptcy law. The Note furthermore refers to the creation of a market court at the Brussels Court of Appeal. As previously reported, a Bill containing a proposal to this end was submitted to the Chamber of Representatives in July of this year (*See, this Newsletter, Volume 2016, No. 9, p. 21*). However, the Bill has been under review ever since, and the Note does not contain an update on the current status of the legislative process.

VBB on Belgian Business Law | Volume 2016, Nº 11

| MARKET PRACTICES

ECJ Dismisses Request for Preliminary Ruling in Proceedings against Uber

On 27 October 2016, the Court of Justice of the European Union (the "ECJ") declared inadmissible the question which the President of the Dutch-speaking Brussels Commercial Court (the "President") had referred for a preliminary ruling on 23 September 2015 in the context of cease-and-desist proceedings against Uber Belgium BVBA and three Dutch Uber entities (together "Uber") regarding the UberPOP ride-sharing service. The ECJ held that the question referred was not sufficiently clear and accurate (ECJ, 27 October 2016, Case C-526/15, *Uber Belgium BVBA*).

The President's question related to the compatibility with EU law of the Ordinance of the Brussels Capital Region of 27 April 1995 on taxi services and vehicle location services with driver (*Ordonnantie van het Brussels Hoofdstedelijk Gewest van 27 april 1995 betreffende de taxidiensten en de diensten voor het verhuren van voertuigen met chauffeur/ Ordonnance de la Région de Bruxelles-Capitale du 27 avril 1995 relative aux services de taxi et aux services de location de voiture avec chauffeur* – the "Ordinance").

Pursuant to Article 2, 1° of the Ordinance, the existence of a "taxi service" and, hence, the applicability of the Ordinance's licence requirement, is subject to three cumulative conditions: (i) the service should consist of the paid transport of people by a carrier with a vehicle (which should satisfy specific conditions); (ii) the vehicle should be made available to the public either at a specific parking space on the public road or at any place which is not open to public traffic; and (iii) the destination should be determined by the client.

After having found that these three conditions are satisfied and, hence, the Ordinance breached to the extent that the remuneration of UberPop drivers exceeds the actual costs which they incur, the President examined whether the situation would be the same if the remuneration of UberPop drivers only covers their costs. This question brings up the concept of ride-sharing, where private individuals, taking the same route, can share the costs. The President therefore decided to refer the following question for a preliminary ruling to the ECJ:

"*Should the principle of proportionality, laid down in Article 5 [of the Treaty on the European Union] and Article 52(1) of the Charter [of Fundamental Rights of the European Union – the "Charter"], read in conjunction with Articles 15 through 17 of the Charter and with Articles 49 and 56 [of the Treaty on the Functioning of the European Union – "TFEU"], be interpreted as precluding a rule such as that laid down in the [Ordinance], interpreted in such a way that the term 'taxi services' also applies to unpaid individual carriers who are involved in ride sharing (shared transport) by accepting ride requests which they are offered by means of a software application of the companies Uber BV et al established in another Member State?*"

Articles 15, 16 and 17 of the Charter guarantee the freedom to engage in work, freedom to conduct a business and the right to property respectively. Articles 49 and 56 TFEU protect the right of establishment and the freedom to provide services.

In assessing the question referred, the ECJ first reiterated that (i) the preliminary ruling mechanism is not designed to provide a consultative opinion on general or hypothetical questions, but to interpret elements of EU law which are necessary for the resolution of a dispute; and (ii) the referring court should define the legal and factual background accurately and provide a justification for the choice of the EU law provisions to be interpreted.

Applying these principles to the case at hand, the ECJ held that the request for a preliminary ruling was inadmissible. It noted that the question referred is hypothetical as it concerns the situation where the service is provided free of charge, whereas, pursuant to Article 2, 1° of the Ordinance, the Ordinance's licence requirement only applies to services being provided for remuneration.

Further, the ECJ criticised the President's "contradictory" description of the ride sharing activity. It pointed out that the term ride sharing is generally construed as the use of a same car by several persons taking the same route in order to reduce traffic and share costs. The President, in contrast, defined "ride sharing" as rides performed by a driver where the destination is determined by the passen-

ger only. In the absence of additional information regarding the nature and the terms of the service, the ECJ considered that it was unable to determine the activity with sufficient accuracy.

In view of these findings, the ECJ concluded that the question referred was not sufficiently clear and accurate.

Should the President so wish, he is free to refer a revised request for a preliminary ruling to the ECJ.

For a full discussion of the President's judgment of 23 September 2015, we refer to the October 2015 issue of this Newsletter (*See, this Newsletter, Volume 2015, No. 10, p. 18*).

Incidentally, on 25 November 2016, the Official Journal of the EU published an updated version of the EU's "*Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings*". The updated text aims to (i) remind national courts and tribunals of the essential characteristics of the preliminary ruling procedure; and (ii) provide them with all the practical information required in order for the ECJ to be in a position to give a useful reply to the questions referred for a preliminary ruling.

VBB on Belgian Business Law | Volume 2016, Nº 11

| PUBLIC PROCUREMENT

Bill on Legal Protection in Matters of Public Procurement Submitted to Federal Parliament

On 18 November 2016, a Bill amending the Law of 17 June 2013 concerning the reasons, the information and the legal remedies with regard to public procurement contracts and certain contracts for works, supplies and services (*Wet van 17 juni 2013 betreffende de motivering, de informatie en de rechtsmiddelen inzake overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten/Loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics et de certains marchés de travaux, de fournitures et de services*)(the « Bill ») was submitted to the Federal Parliament.

The Bill is part of a broader scheme of Parliament to implement into Belgian law the new EU Directives concerning public procurement and concession agreements, notably (i) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; (ii) Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC; and (iii) Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. It follows the publication, earlier this year, of (i) the Law of 17 June 2016 concerning public procurement (*Wet van 17 juni 2016 inzake overheidsopdrachten/Loi du 17 juin 2016 relative aux marches publics*), and (ii) the Law of 17 June 2016 on concession contracts (*Wet van 17 juni 2016 betreffende de concessieovereenkomsten/Loi du 17 juin 2016 relatif aux contrats de concession*) (Jointly referred to as the "New Laws") (*See, this Newsletter, Volume 2016, No. 7, p. 17*).

The Bill extends the scope of the Law of 17 June 2013 also to include the concession contracts regulated by the Law of 17 June 2016 on concession contracts. In addition, the Bill implements a number of purely formal amendments to the Law of 17 June 2013 which had become necessary as a consequence of the new terminology used in the New Laws. The Bill also aligns the Law of 17 June 2013 to the procedural rules of the Council of State, which were amended in 2014 (*See, this Newsletter, Volume 2014, No. 1, p. 12*) and extends the scope of the rules for the communication of reasoned decisions. Pursuant to the Bill, the latter do no longer apply to award decisions only, but also apply to selection decisions and to decisions not to award a contract. Finally, the Bill lays down a uniform system for calculating the 15 days' time limit for filing a petition for suspension before the Council of State and the 15 days' time limit of the so-called standstill period following the award decision, during which no signing of a contract can take place.

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