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COMMERCIAL LAW

New Commercial Code: Recent Developments and Publications

Publication of Book XIII – Consultation Mechanisms

On 9 January 2014, the Law of 15 December 2013 inserting Book XIII entitled "Consultation Mechanisms" in the New Commercial Code was published in the Belgian Official Journal (*Wet van 15 december 2013 houdende invoeging van Boek XIII "Overleg", in het Wetboek van economisch recht/Loi du 15 décembre 2013 portant insertion du Livre XIII « Concertation », dans le Code de droit économique* – "Book XIII"). Book XIII provides for a general legislative framework applicable to the multitude of advisory committees in Belgium, including the Central Economic Council (*Centrale Raad voor het Bedrijfsleven/Conseil central de l'économie*) (*See, this Newsletter Volume 2013, No. 5, p. 2; and No. 9, p. 2*).

The date of entry into force of Book XIII is to be determined by Royal Decree.

Publication of Book XII – Law of the Electronic Economy

On 14 January 2014, the Law of 15 December 2013 inserting a Book XII entitled "Law of the electronic economy" in the New Commercial Code and inserting the definitions and the enforcement provisions that are specific to this new Book XII in Books I and XV of the New Commercial Code was published in the Belgian Official Journal (*Wet van 15 december 2013 houdende invoeging van Boek XII, "Recht van de elektronische economie", in het Wetboek van economisch recht, en houdende invoeging van de definities eigen aan Boek XII en van de rechtshandhavingsbepalingen eigen aan Boek XII, in de Boeken I en XV van het Wetboek van economisch recht/Loi du 15 décembre 2013 portant insertion du Livre XII, « Droit de l'économie électronique » dans le Code de droit économique, portant insertion des définitions propres au Livre XII et des dispositions d'application de la loi propres au Livre XII, dans les Livres I et XV du Code de droit économique* – "Book XII") *(See, this Newsletter, Volume 2013, No. 8, p. 2; No. 9, p. 3; and No. 10, p. 3*).

On the same day, the Law of 26 December 2013 inserting an Article XII.5 in Book XII of the New Commercial Code was also published in the Belgian Official Journal (*Wet houdende invoeging van artikel XII.5 in het Boek XII, "Recht van de elektronische economie" van het Wetboek van economisch recht/Loi portant insertion de l'article XII.5 dans le Livre XII, « Droit de l'économie électronique » du Code de droit économique*). Article XII.5 provides for possible restrictions to the free movement of information society services supplied by service providers established in other EU Member States (*See, this Newsletter, Volume 2013, No. 8, p. 3 and No. 9, p. 3*).

The date of entry into force of Book XII is to be determined by Royal Decree.

Publication of Book XVII – Special Legal Procedures

On 28 January 2014, the Law of 26 December 2013 inserting Book XVII entitled "Special legal procedures" in the New Commercial Code and inserting the definitions and enforcement provisions specific to Book XVII was published in the Belgian Official Journal (*Wet van 26 december 2013 houdende invoeging van boek XVII "Bijzondere rechtsprocedures" in het Wetboek van economisch recht, en houdende invoeging van een aan boek XVII eigen definitie en sanctiebepalingen in hetzelfde wetboek/Loi du 24 septembre 2013 portant insertion du livre XVII "Procédures juridictionnelles particulières" dans le Code de droit économique, et portant insertion d'une définition et d'un régime de sanctions propres au livre XVII dans ce même code)*.

On that same date, the Law of 26 December 2013 inserting provisions dealing with matters subject to Article 77 of the Constitution in Book XVII "Special legal procedures" of the New Commercial Code was also published in the Belgian Official Journal (*Wet van 26 december 2013 houdende invoeging van de bepalingen die een aangelegenheid regelen als bedoeld in artikel 77 van de Grondwet, in Boek XVII*

"Bijzondere rechtsprocedures" van het Wetboek van economisch recht/Loi du 26 décembre 2013 portant insertion des dispositions réglant des matières visées à l'article 77 de la Constitution dans le Livre XVII "Procédures juridictionnelles particulières" du Code de droit économique).

Both Laws lay down rules concerning special legal proceedings, such as injunction proceedings (*vorderingen tot staking/actions en cessation*) and collective recovery proceedings (*See, this Newsletter, Volume 2013, No. 8, p. 4; No. 9, p. 4; No. 10, p. 3; and No. 12, p. 13*). As is the case for the other Books, the date of entry into force of Book XVII is to be determined by Royal Decree.

Bill Book X Submitted to Chamber of Representatives – Distribution Agreements

On 9 January 2014, the government submitted to the Chamber of Representatives a Bill to insert a Book X concerning specific distribution agreements in the New Commercial Code and to insert the definitions that are specific to this Book X in Book I of the New Commercial Code (*Wetsontwerp houdende invoeging van Boek X "Handelsagentuurovereenkomsten, commerciële samenwerkingsovereenkomsten en verkoopconcessies", in het Wetboek van economisch recht, en houdende invoeging van de definities eigen aan Boek X in Boek I van het Wetboek van economisch recht/Projet de loi portant insertion du Livre X "Contrats d'agence commerciale, contrats de coopération commerciale et concessions de vente" dans le Code de droit économique, et portant insertion des définitions propres au Livre X, dans le Livre I du Code de droit économique* – "Bill Book X").

Bill Book X aims to codify the following laws (*See, this Newsletter, Volume 2013, No. 10, p. 3*):

- the Law of 13 April 1995 on commercial agency agreements (*Wet van 13 april 1995 betreffende de handelsagentuurovereenkomst/Loi du 13 avril 1995 relative au contrat d'agence commerciale*);
- the Law of 19 December 2005 concerning the supply of pre-contractual information in the framework of specific commercial partnership agreements (*Wet van 19 december 2005 betreffende de precontractuele informatie bij commerciële samenwerkingsovereenkomsten/Loi du 19 décembre 2005 relative à l'information précontractuelle dans le cadre d'accords de partenariat commercial*); and
- the Law of 27 July 1961 on the unilateral termination of exclusive distribution agreements of indefinite duration (*Wet van 27 juli 1961 betreffende eenzijdige beëindiging van de voor onbepaalde tijd verleende concessies van alleenverkoop/Loi du 27 juillet 1961 relative à la résiliation unilatérale des concessions de vente exclusive à durée indéterminée*).

Apart from codifying, Bill Book X also introduces some changes to the Law of 19 December 2005. In particular, Bill Book X aims to settle controversies that have arisen in legal theory regarding the scope of the Law of 19 December 2005 by extending the scope of the Law. Moreover, as the Law of 19 December 2005 inadvertently seemed to prohibit the conclusion of non-disclosure agreements in the pre-contractual phase, Bill Book X now expressly allows for such non-disclosure agreements.

Bill Book XVIII Submitted to Chamber of Representatives – Measures for Crisis Management

On 15 January 2014, the government submitted to the Chamber of Representatives a Bill to insert Book XVIII entitled "Measures for crisis management" in the New Commercial Code and to insert the enforcement provisions that are specific to this Book XVIII in Book XV of the New Commercial Code (*Wetsontwerp houdende invoeging van Boek XVIII, "Maatregelen voor crisisbeheer" in het Wetboek van economisch recht en houdende invoeging van de rechtshandhavingsbepalingen eigen aan Boek XVIII, in Boek XV van het Wetboek van economisch recht/Projet de loi portant insertion du Livre XVIII, "Instruments de gestion de crise" dans le Code de droit économique et portant insertion des dispositions d'application de la loi*

propres au Livre XVIII, dans le Livre XV du Code de droit économique).

The term "measures for crisis management" comprises all measures which the Minister of Economic Affairs can take in case of "*exceptional circumstances or events which endanger or could endanger all or part of the functioning of the economy*". These measures range from price regulation to control over resources or restrictions on the manner in which goods are produced or sold (display, preparation, transportation etc.). Penalties for infringements will be included in Book XV (enforcement) of the New Commercial Code.

Bill Book XVII, Title II Submitted to Chamber of Representatives – Collective Redress

On 17 January 2014, the government submitted to the Chamber of Representatives the Bill to insert a Title 2 concerning collective redress in Book XVII entitled "Special Legal Procedures" of the New Commercial Code and to insert the definitions that are specific to this Book XVII in Book I of the New Commercial Code (*Wetsontwerp tot invoeging van Titel 2 "Rechtsvordering tot collectief herstel" in Boek XVII "Bijzondere gerechtelijke procedures" van het Wetboek van economisch recht en houdende invoeging van de definities eigen aan Boek XVII in Boek I van het Wetboek van economisch recht/Projet de loi portant insertion d'un Titre 2 "De l'action en réparation collective" au Livre XVII "Procédures juridictionnelles particulières" du Code de droit économique et portant insertion des définitions propres au Livre XVII dans le Livre I du Code de droit économique*).

The Bill was adopted by the Council of Ministers on 13 December 2013 (*See, this Newsletter, Volume 2013, No. 12, p. 13*) and, subject to specific conditions, will allow consumers to pursue collective redress proceedings. For a discussion of the Bill, we refer to the litigation section of this month's Newsletter.

COMPETITION LAW

Belgian Competition Authority Issues Preliminary Opinion on Pro League-Telenet JV With Regard to Broadcasting of Live Football Games

On 31 January 2014, the College of Prosecutors (*Auditoraat / Auditorat*) of the Belgian Competition Authority ("BCA") published a press release containing its preliminary views on a proposed joint venture between the Jupiler Pro League and Telenet.

Under the proposed joint venture ("JV"), the broadcasting rights of the Jupiler Pro League, the Belgian first division of professional football, would be transferred by the first division football clubs (which collectively own Pro League) to the JV through an exclusive licensing contract valid for a (renewable) period of 6 years. The JV would then create one or several sports channels which would be offered to any interested broadcasting platform on a non-exclusive basis.

The College of Prosecutors reached the tentative conclusion that the proposed JV amounts to a concentration which exceeds the notification thresholds and therefore should be notified to the BCA under the merger control rules. The press release did not specify the turnover figures or any other factual element relied on by the BCA to come to this conclusion.

The College of Prosecutors took a critical stance towards the proposed JV, considering that it might eliminate any competition between platforms or TV channels as regards the Jupiler Pro League and might, as a result, freeze the existing market positions both at the wholesale and the retail levels. According to the BCA, the impossibility of acquiring exclusive rights for content would prevent platforms or TV channels from differentiating from each other on the basis of their content. The BCA also questioned the duration of the exclusivity of the broadcasting rights owned by the JV and the conditions under which the JV's sports channels would be offered to other platforms. Lastly, the BCA doubted that the proposed JV would actually lower the prices offered to the consumer.

Although this preliminary opinion does not bind the BCA or the parties, it seems likely that, if they wish to pursue these plans, Pro League and Telenet will have to notify their proposed JV and that this concentration will be subjected to intense scrutiny by the BCA.

CONSUMER LAW

ECJ Clarifies Assessment of Fairness of Consumer Contract Terms

On 16 January 2014, the Court of Justice of the European Union ("ECJ") responded to a preliminary question from a Spanish court relating to unfair consumer contract terms (Case C-226/12, *Constructora Principado SA v. José Ignacio Menéndez Álvarez*).

Under the property purchase contract at issue, the consumer was responsible for paying various surcharges such as a tax on the increase in the value of urban land and various utilities. After paying these charges, the consumer claimed that they should be reimbursed because of the unfair nature of this contractual term which had created a significant imbalance in the rights and obligations of the parties. Under general Spanish law, the seller has the obligation to pay these charges.

The Spanish Court sought guidance from the ECJ as to the interpretation of the term "significant imbalance", which is one of the general criteria, set out in Article 3(1) of Council Directive 93/13/EEC on unfair terms in consumer contracts (the "Directive"), for defining an unfair term.

The referring court essentially sought to determine whether obliging consumers to pay for expenses that, by law, are to be borne by the seller is, in itself, enough to demonstrate the existence of a significant imbalance when determining the fairness of a contractual term.

The ECJ applied the test for significant imbalance contained in its earlier case law, under which the national court must look at the rules that would apply in the absence of an agreement between the parties. If, based on that analysis, the consumer may be said to have been placed in an unfavourable position, a significant imbalance may exist.

The ECJ held that a national court must not, therefore, limit its assessment to a simple quantitative economic evaluation based on a comparison of the total value of the transaction which is the subject of the contract and the costs charged to the consumer under that clause. Rather, a significant imbalance may occur solely as the result of a sufficiently serious impairment of the legal situation of a consumer through the contractual provision denying him his legal rights or limiting their enforcement.

Reiterating its judgment in *Banif Plus Bank v. Csaba Csipai and Viktória Csipai* (judgment of 21 February 2013 in case C-472/11), the ECJ went on to say that the unfairness of a contractual term is to be determined by taking into account the nature of the goods or services involved, and by referring to all the circumstances attending the contract's conclusion, as well as other contractual clauses (*See, this Newsletter, Volume 2013, No. 2, p. 8*).

The ECJ left it to the national court to decide whether, based on the guidance set out by the ECJ for determining the unfairness of a term, a particular contractual term is actually unfair in the circumstances of the case.

In this regard, the ECJ pointed out that the national court must also check whether, as the seller claimed, the consumer had acquired a discount on the sale price in exchange for taking the responsibility to pay surcharges. Interestingly, the ECJ emphasised that it is not sufficient for the seller simply to point to a contractual term providing for such a reduction which has not been individually negotiated to meet its burden of proof.

The ECJ's ruling is a reminder of how important it is for businesses to ensure that suspected unfair contractual terms are assessed and, if necessary, amended. At the very least, such terms should be individually negotiated with the consumer, rather than drafted in advance or included in a standard contract. This is because the Directive does not apply to individually negotiated terms. However, it is important to recall that the burden of proving that a term has

been individually negotiated rests on the seller or supplier.

DATA PROTECTION

ECJ Rules On Fees Levied For Access to Personal Data

On 12 December 2013, the Court of Justice of the European Union ("ECJ") delivered an interesting judgment concerning the right of data subjects to access their personal data.

In the case at hand, a Dutch resident had requested a transcript of her residence information over a number of years from her municipality. The data subject required this information to demonstrate that a notice letter concerning a traffic fine had been sent to the wrong address. The municipality provided her with a certified transcript of her past and present addresses levying a charge of 12.8 EUR.

The data subject contested the payment request and argued that, in light of Article 12 of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the "Data Protection Directive"), she should have the right to access her personal data free of charge.

Pursuant to Article 12 of the Data Protection Directive, Member States are obliged to guarantee every data subject the right to obtain – in an intelligible form – access to his or her personal data and to information on the recipients or categories of recipients of such data and the logic involved in any automatic processing of such data.

The data subject contested the payment before a local court which denied her claim. On appeal, the Court of Appeal of 's Hertogenbosch requested a preliminary ruling from the ECJ.

When examining the questions, the ECJ first noted that, from the wording of the Data Protection Directive, it is not clear whether authorities can claim a fee at all. Indeed, from the English and Dutch versions of the Data Protection Directive, it would seem that the data should be communicated without excessive delay and free of charge. In contrast, other language versions, including the French, German, Italian and Spanish texts, do not seem to allow for a similar interpretation.

The ECJ considered that there is no prohibition on a Member State levying a fee when a data subject requires access to his or her personal data provided this fee is not excessive.

In the second part of its judgment, the ECJ examined the criteria on the basis of which it is possible to ensure that a fee which is levied when the right to access personal data is exercised is not excessive. The ECJ found "*that the level of those fees must not exceed the cost of communicating such data*." It is, however, for national courts to carry out any verification necessary to ascertain whether this requirement was respected.

This judgment provides an interesting clarification on access requests, indicating that data controllers can charge a fee for granting access to personal data as long as the fee does not exceed the actual cost of communicating the data.

INTELLECTUAL PROPERTY

ECJ Attempts (but Largely Fails) to Clarify Scope of Protection for Technical Protection Measures for Gaming Consoles

On 23 January 2014, the Court of Justice of the European Union ("ECJ") handed down its judgment on a preliminary reference from an Italian court (*Tribunale di Milano*), ruling that a manufacturer of game consoles is protected against the circumvention of its technical protection measures only if such measures seek to prevent the use of illegal videogames. The judgment follows the earlier opinion rendered by Advocate General Sharpston *(See, this Newsletter, Volume 2013, No. 9, at page 9)*.

The case pitted Nintendo, one of the world's largest videogame companies, against PC Box Srl ("PC Box"), a company that markets devices circumventing the technological protection measures placed on Nintendo games and consoles. Because these devices enable

videogames other than those manufactured by Nintendo or independent producers licenced by Nintendo - including potential illegal videogame copies - to be used on Nintendo gaming consoles, Nintendo initiated proceedings against PC Box before the Italian court.

The Italian court stayed the proceedings to request a clarification from the ECJ on the extent of the legal protection on which Nintendo may rely on under Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society (the "Copyright Directive") in order to fight the circumvention of technical measures put in place on its gaming consoles and videogames.

The ECJ first specified that videogames are broader than "computer programs" under Directive 2009/24 on the legal protection of computer programs. Indeed, while videogames take their functionality from a computer program, they also constitute complex matter comprising graphic and sound elements which are protected by copyright under the Copyright Directive. Accordingly, circumvention of technological measures protecting videogames is, in principle, prohibited pursuant to Article 6 of the Copyright Directive.

The ECJ considered that the expression "technological measures", as defined by Article 6(3) of the Copyright Directive, covers the specific technological measures implemented by Nintendo. Nintendo's protection measures consisted of the encryption of both the gaming console and the videogames. The ECJ held that such measures fall within the definition of "technological measures" under the Copyright Directive if their objective is to prevent or limit acts adversely affecting Nintendo's protected rights.

The ECJ furthermore held that the legal protection under the Copyright Directive is only granted to technological measures which pursue the objective of preventing or eliminating (i) the reproduction of works; (ii) the communication to the public of works; (iii) making the works available to the public; and (iv) the distribution of the original copies of works that are not authorised by the rightholder of copyright. With regard to these purposes, the ECJ established a proportionality test: the measures must be suitable for achieving the objective and must not go beyond what is necessary.

Based on this ECJ guidance, it is now for the Italian court to determine whether other technical protection measures could cause less interference with the legal activities of third parties while, at the same time, still providing comparable protection of the rightholder's rights. The Italian court may, in its assessment, take into account, inter alia, the relative costs, the effectiveness and the technical and practical aspects of different types of technological measures. The national court should also examine whether PC Box's equipment is, in practice, frequently used in disregard of copyright (for illegal copies of videogames) or if it is used for purposes which do not infringe copyright. For example, PC Box's equipment may be used as independent software which does not constitute an illegal copy of videogames, but which is intended to enable MP3 files, movies and videos to be read on consoles.

European Parliament's Legal Affairs Committee Amends Trade Mark Package

The Committee on Legal Affairs of the European Parliament ("the Committee") voted on 17 December 2013 the trade mark package which the European Commission had tabled on 27 March 2013 (*See, this Newsletter, Volume 2013, No. 3, pages 12 and 13).*

The texts adopted by the Committee differ from the proposals of the European Commission in the following respects:

- It will not be possible to have counterfeit goods in transit detained or their entry suspended if the importer provides evidence that the final destination of the goods is a country outside the EU and the right holder is not able to prove that his trade mark is validly registered in the country of final destination. In case the country of destination has not yet been determined, the right holder will have the right to prevent counterfeit goods from being released unless the importer offers evidence that the final destination is a

country outside the EU and the right holder is not able to demonstrate that his trade mark is validly registered in the country of final destination.

- Right holders may prevent goods delivered in small consignments from being imported into the EU to private consignees. In this scenario, the consignee who ordered the goods will be informed.

- A right holder will not have the right to prevent an importer from bringing goods inside the EU based upon similarities, perceived or actual, between the international non-proprietary name (INN) for the active ingredient in the medicines and a registered trade mark. This amendment of the recitals (not an actual provision of the proposals) is intended to permit the smooth transit of generic medicines.

- The Committee proposed to rename the Office for Harmonization in the Internal Market ("OHIM") to the "European Union Intellectual Property Agency". The Intellectual Property Agency should also establish a mediation and arbitration centre competent to help resolve disputes covered by the trade mark package.

- The Committee revised the fees payable to the European Union Intellectual Property Agency and considerably reduced the costs to right holders. Registration fees will be abolished and renewal fees decreased.

The amended proposal is planned to be presented before the European Parliament in plenary session for a first reading on 26 February 2014.

Meta Search Engine Infringes Sui Generis Database Right

On 19 December 2013, the Court of Justice of the European Union (the "ECJ") issued a preliminary ruling after a referral by the Regional Court of The Hague relating to the *sui generis* database right.

Pursuant to Article 7(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (the "Database Directive") the maker of a database may prevent the extraction or re-utilisation of the whole or of a substantial part of the contents of his database. Article 7(5) of the Database Directive also allows the database maker to prevent the re-utilisation or the extraction of insubstantial parts of the contents of his database if such re-utilisation or extraction is repeated and systematic, implying acts which conflict with a normal exploitation of that database or which unreasonably harm the legitimate interests of the database maker. Article 7(2)(b) of the Database Directive defines "re-utilisation" as (i) any form of making available to the public of a database (ii) by the distribution of copies, by renting, by online or other forms of transmission.

The proceedings leading to the preliminary questions concerned the database maker Wegener which provides customers with an online database of second-hand car advertisements, containing approximately 200,000 entries. Another company, Innoweb, ran a meta search engine for second-hand cars. Innoweb's meta search engine contained a search form, which allowed the end users to search on the basis of different criteria of the vehicle. It then "translated" queries from end users into the search engines of different databases, such as the Wegener database. In a next step, the search engine presented the results to the end user using the format of Innoweb's website. The meta search engine thus did not have its own search engine, but instead uses the search engines covered by the services it consults.

Wegener considered that Innoweb's meta search engine compromised its *sui generis* database right. Wegener successfully obtained a preliminary injunction from the Dutch courts. Innoweb appealed against the injunction to the Regional Court of Appeal of The Hague. Innoweb argued that it does not re-utilise the Wegener database, and although 80% of Wegener's database is searched daily by Innoweb, only a very small part of that data is actually displayed to the end user on the basis of the user's search.

The Regional Court of The Hague considered that there was no extraction of Wegener database, but requested the ECJ to issue a preliminary ruling on the meaning of a "re-utilisation" of a database.

The ECJ first distinguished the case at hand from The *British Horseracing Board* case in which it had determined that *"if the database maker makes the contents of [a] database accessible to third parties, even if he does so for a consideration, his sui generis right does not enable him to prevent such third parties from consulting that database for information purposes"* (*The British Horseracing Board and Others* [2004] ECR-10415, paragraph 53). The ECJ held that Innoweb's activity does not constitute a mere consultation of the Wegener database as Innoweb is not at all interested in the information stored on the database, but instead provides the end user with a form of access to that database.

Second, the ECJ considered whether Innoweb's activity re-utilises the Wegener database by making available the contents of the database to the public for the purposes of article 7(2)(b) of the Database Directive. The ECJ took the view that Innoweb's meta search engine "makes available" the Wegener database since *"a search carried out by that meta engine throws up the same list of results as would have been obtained if separate searches had been carried out in each of those databases"*. The database is also made available to "the public", since anyone can use the meta search engine and the number of persons targeted is undetermined. Consequently, Innoweb re-utilises part of the contents of a database.

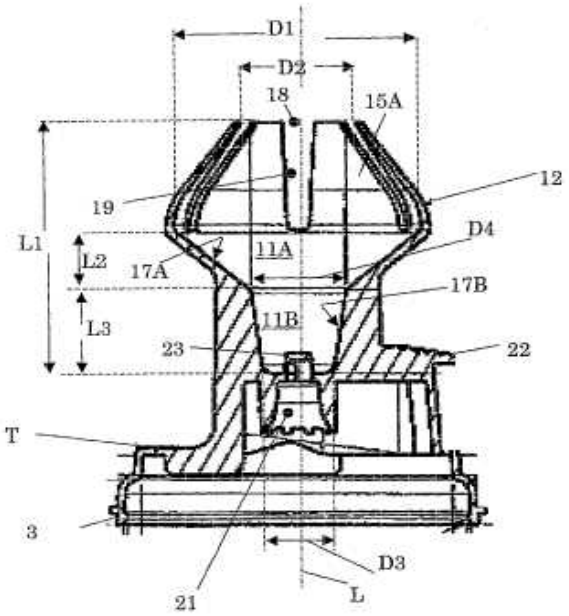
Finally, the ECJ determined that the re-utilisation must involve a substantial part of the contents of the database concerned. The ECJ held that the number of results actually found and displayed for every query is irrelevant. The fact that *"only part of the database is actually consulted and displayed in no way detracts from the fact that the entire database is made available for the end user"*. The ECJ thus seems to have held that the making available relates to the data which are searched and is not limited to possible results that are displayed to the users. Based on the above considerations, the ECJ concluded that Innoweb re-utilises a substantial part of the Wegener database and thus infringes Article 7 (1) of the Database Directive.

Antwerp Commercial Court Invalidates Patents on Tulip-Shaped Nozzles

On 15 October 2013, the Antwerp Commercial Court ruled in a dispute between Friesland Brands BV ("Friesland") and Incopack NV ("Incopack") concerning the alleged violation by Incopack of Friesland's intellectual property rights in an aerosol container and its innovative nozzle.

Friesland, a part of the Friesland-Campina group of companies and holder of the relevant intellectual property rights, owned two registered Community designs and two European patents in the design of a whipped-cream aerosol container and its accompanying tulip-shaped six-blade nozzle. Incopack, on the other hand, is a dairy group and produces several whipped-cream aerosol containers with specific nozzles. According to Friesland, Incopack's containers and nozzles infringe upon Friesland's design rights and its nozzles also violate Friesland's patent rights.

In 2010, Friesland initiated a cease-and-desist procedure before the President of the Brussels Commercial Court against Incopack for infringement of its Community designs covering the design of the aerosol container and accompanying nozzle. The President of the Brussels Commercial Court rejected Friesland's action in a judgment of 17 November 2010 and declared the Community designs invalid for (a) lack of novelty; (b) lack of individual character; and (c) purely having a technical function. Friesland appealed the judgment but no decision has yet been given.



On 28 December 2012, Friesland initiated another cease-and-desist procedure before the Commercial Court of Antwerp for infringement of its two patents describing a tulip-shaped six-blade nozzle for aerosol containers. During the proceedings, Incopack argued that the Belgian branches of the two European patents (no. EP2295339 and EP2218655) were invalid for lack of novelty and for lack of inventive step.

The Antwerp Commercial Court rejected Incopack's claims that the patents lacked a technical nature; contained added matter; and were not novel. Still, it annulled the Belgian branches of the two European patents for lack of inventive step. The Commercial Court held that the person skilled in the art, confronted with the objective technical problem of "*providing an aerosol container with a compact nozzle that provides a better shape when dispensing whipped-cream, is easier to clean and therefore more hygienic*", would combine the tulip-shaped (broadened) nozzle as already used in the prior art on siphon containers with the aerosol containers and their traditional nozzle. Friesland can still appeal from this judgment.

ECJ Again Set for Preliminary Ruling on Possible International Exhaustion of Trade Marks

The Court of Justice of the European Union ("ECJ") was recently requested to rule on possible limitations to the EU-wide exhaustion principle under Article 7 of EU Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks and Article 13 of Regulation 207/2009 on the Community Trade Mark.

The reference for a preliminary ruling was made by the Greek court of Athens (*Monomeles Protodikeio Athinon*) in a case pitting a Greek independent importer of spare parts for motorcycles against Honda Motor Co. of Japan. In the case before the Greek court, Honda sought to rely on its trade mark rights to stop the importation of spare parts from Thailand into Greece.

In essence, the Greek court wants to hear from the ECJ whether, under the circumstances of the case, Honda's intended approach is compatible with the EU competition rules and with a number of provisions of the GATT (General Agreement on Tariffs and Trade) and TRIPS (Agreement on Trade Related Aspects of Intellectual Property Rights) agreements.

The case is known at the ECJ under number C-535/13.

LABOUR LAW

New Rules regarding Outplacement

The Law of 26 December 2013 concerning the introduction of the unified status between blue collar and white collar workers regarding the notice periods, first day of unpaid sick leave and accompanying measures (*Wet betreffende de invoering van een eenheidsstatuut tussen arbeiders en bedienden inzake de opzeggingstermijnen en de carenzdag en begeleidende maatregelen; Loi concernant l'introduction d'un statut unique entre ouvriers et employés en ce qui concerne les délais de préavis et le jour de carence ainsi que de*

mesures d'accompagnement) also broadens the right to outplacement for dismissed employees.

In addition to the existing system of outplacement as from the age of 45, which will become the residual system (only applicable if the employee is not entitled to outplacement under the new outplacement system), outplacement will be extended to all employees who are entitled to a notice period or corresponding notice indemnity of at least 30 weeks (as of 9 years' seniority under the new rules).

An employee is not entitled to outplacement if his/her employment contract is terminated for serious cause (which is also the case for outplacement as of the age of 45).

Termination with notice indemnity

If an employee is terminated with a notice indemnity, the employee will be entitled to a "dismissal package" consisting of (i) 60 hours of outplacement with a value of 1/12th of the annual salary (4 weeks) with a minimum of EUR 1,800 and a maximum of EUR 5,500 (prorated in case of part-time employment) and (ii) a notice indemnity equal to the remainder of the notice period with deduction of the 4 weeks' salary (outplacement).

The outplacement offer must be made within 15 days after the termination of the employment contract. The employee has 4 weeks to accept the offer. If the employer does not make an outplacement offer, the employee has 39 weeks to give notice of default to the employer by registered letter. The employer should make a valid outplacement offer to the employee within 4 weeks after the letter of default.

If the employer does not make a valid outplacement offer or does not provide the offered outplacement, the employee regains his/her 4 weeks' notice indemnity which was taken into account for outplacement. For employees not accepting the outplacement offer, there will be no sanctions until 31 December 2015 and the employee will regain his/her 4 weeks' notice indemnity that was taken into account for outplacement.

Termination with notice period

If an employee is terminated with a notice period, the employee will be entitled to 60 hours of outplacement which will be taken out of his/her entitlement on solicitation leave. In case the employee is entitled to outplacement, the solicitation leave is always equal to 1 day (or 2 half days) per week during the whole notice period and not only during the last six months of the notice period.

The outplacement offer must be made within 4 weeks after the start of the notice period and the employee has 4 weeks to accept the offer. If the employer does not make an outplacement offer, the employee has 4 weeks to give notice of default to the employer by registered letter. The employer should make a valid outplacement offer to the employee within 4 weeks after the letter of default.

LITIGATION

Updated Statutory Interest Rates for 2014

On 20 January 2014, the statutory interest rate (*wettelijke interestvoet/intérêt legal*) for 2014 was published in the Belgian Official Journal. Amounting to 2.75%, the statutory interest rate is applicable to civil and commercial matters, save for payment as compensation for commercial transactions (*handelstransactie/transaction commerciale*).

For transactions between companies or between companies and public authorities inviting tenders which lead to the supply of goods, the performance of services or the conception and performance of public works and construction and civil engineering works against payment, a specific interest rate applies pursuant to Article 5 of the Law of 2 August 2002 on combatting late payment in commercial transactions. (*Wet betreffende de bestrijding van de betalingsachterstand bij handelstransacties/Loi concernant la lutte contre le retard de paiement dans les transactions commerciales)*. As published in the Belgian Official Journal on 23 January 2013, the statutory interest rate for commercial transactions is fixed at 7.5% for transactions

entered into before 16 March 2013 and at 8.5% for transactions entered into, renewed or prolonged as of 16 March 2013. These interest rates are valid for the first semester of 2014 only.

The statutory interest rates are not mandatory and can thus be deviated from by contract.

Reform of Jurisdiction, Procedural Rules and Internal Organisation of Council of State

The highest administrative court in Belgium, the Council of State (*Raad van State/Conseil d'état*), will be reshaped further to the adoption on 9 January 2014 of a Bill introducing a reform to the jurisdiction, the procedural rules and the organisation of the Council of State (*Wetsontwerp houdende hervorming van de bevoegdheid, de procedureregeling en de organisatie van de Raad van State/Projet de loi portant réforme de la compétence, de la procédure et de l'organisation du Conseil d'Etat* – the "Bill").

The main changes of the Bill are the following:

- The scope of the jurisdiction of the administrative section of the Council of State will be expanded to a number of decisions taken by non-administrative authorities.

- Whilst its competence was curtailed in the past to declaring a decision challenged before it null and void, the administrative section of the Council of State will be granted broader powers. If accepted in advance by the parties, the Council of State will have the power to order the defendant to remedy a defect in the challenged decision. This option is only available when (i) the defect can be remedied within three months (or within a reasonable timeframe); (ii) the own decision-making powers of the defendant are insufficient to remedy the defect; (iii) the defendant agrees to this procedure; and (iv) the remedying of the defect causes the proceedings to end.

- Injunctive measures or the suspension of the decision whose annulment is sought must no longer be requested simultaneously with the petition for annulment but can be applied for at any stage of the proceedings. Moreover, the applicant will have to demonstrate the existence of urgency, replacing the more formalistic and more burdensome criterion of 'harm that is difficult to remedy".

- The system of procedural indemnity (*rechtsplegingsvergoeding/indemnité de procédure*) which is already available in civil and commercial matters will be expanded to litigation before the administrative section of the Council of State. The victorious party will thus be entitled to claim from the losing party a partial reimbursement of its litigation costs, including legal fees. The administrative section of the Council of State will be able to lower or increase the procedural indemnity to, respectively, a minimum or maximum amount (yet to be determined by Royal Decree) taking into consideration the financial means of the losing party, the complexity of the case and the manifestly unreasonable character of the situation.

- Access to mediation is enhanced by ensuring a better alignment between the mediation process and pending proceedings before the Council of State.

The Bill also provides for a number of measures that should contribute to the improvement of the internal organisation and management of the Council of State.

The new law is expected to be published in the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*) shortly.

Bill on Collective Redress Submitted to Chamber of Representatives

The two draft Bills inserting a new chapter on collective redress in the Belgian Commercial Code (*See, this Newsletter, Volume 2013, No. 12, p. 13*) have been presented to the Chamber of Representatives (*Kamer van volksvertegenwoordigers/Chambre des représentants*). They were discussed in the relevant committee of the Chamber on 28 January 2014.

The Bills will enable the launch of collective proceedings in business-to-consumer relations for a specific number of commercial matters. Consumers will be able to bring proceedings through the intermediary of a group representative before the Brussels courts only. The relevant court will decide on the application of an opt-in (which must be applied in case of damage claims for physical or moral harm) or opt-out system. If no agreement is found during the mandatory prior negotiation phase, the court will rule on the merits of the case and appoint a liquidator to execute its judgment.

Electronic Procedure Before Council of State Possible as of February 2014

Approved in October 2013 by the Council of Ministers (*Ministerraad/Conseil des Ministres*) (*See, this Newsletter, Volume 2013, No. 10, p. 15*), the Royal Decree introducing an electronic procedure before the Council of State has been adopted on 13 January 2014 and published in the Belgian Official Journal on 16 January 2014 (*Koninklijk Besluit tot wijziging van het Besluit van de Regent 23 augustus 1948 tot regeling van de rechtspleging voor de afdeling bestuursrechtspraak van de Raad van State, het Koninklijk Besluit van 5 december 1991 tot bepaling van de rechtspleging in kort geding voor de Raad van State, en het Koninklijk Besluit van 30 november 2006 tot vaststelling van de cassatie-procedure bij de Raad van State, met het oog op de invoering van de elektronische rechtspleging/Arrêté royal modifiant l'arrêté du Régent du 23 août 1948 déterminant la procédure devant la section du contentieux administratif du Conseil d'Etat, l'arrêté royal du 5 décembre 1991 déterminant la procédure en référé devant le Conseil d'Etat, et l'arrêté royal du 30 novembre 2006 déterminant la procédure en cassation devant le Conseil d'Etat, en vue d'instaurer la procédure électronique)*.

As of 1 February 2014, parties can opt to have recourse to the electronic procedure before the Council of State in annulment procedures, cassation procedures, summary proceedings as well as for the imposition of penalties. The electronic procedure provides for an online tool for registration and access to file.

Shift in Attribution of Competences of District Courts, Commercial Courts and Magistrates' Courts

On 24 January 2014, the Chamber of Representatives adopted a modified version of the Bill reorganising judicial competences submitted in October 2013 (*See, this Newsletter, Volume 2013, No. 10, p. 14*).

The final version of the Bill (*Wetsontwerp tot wijziging van het Gerechtelijk Wetboek en de wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties, met het oog op de toekenning van bevoegdheid aan de natuurlijke rechter in diverse materies/Projet de loi modifiant le Code judiciaire et la loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales, en vue d'attribuer dans diverses matières la compétence au juge naturel*) does not only provide for a shift in the attribution of competences of the commercial courts (*handelsrechtbanken/tribunaux de commerce*) and magistrates' courts (*politierechtbanken/tribunaux de police*), but also grants additional competences to the county courts (*vredegerechten/justices de paix*).

Magistrates' courts can henceforth upon the referral by criminal courts (*correctionele rechtbanken/tribunaux correctionnels*) rule on the award of damages to civil complainants. Commercial courts are granted jurisdiction for all commercial disputes, regardless of their value. They will hear at last instance level cases in which the amount at stake is less than EUR 1,860. Moreover, civil companies having a commercial form (*burgerlijke vennootschappen met handelsvorm/sociétés civiles à forme commerciale*) and agricultural companies (*landbouwvennootschappen/sociétés agricoles*) will fall under the jurisdiction of the commercial courts. The Bill has further been amended to grant county courts exclusive jurisdiction over all claims relating to the recovery of monies owed by a natural person for the supply of a public utility to a supplier of electricity, gas, water, heating or to a company offering a public communications network, a broadcast transmission or broadcast service.

PUBLIC PROCUREMENT

European Parliament Adopts New Public Procurement Directives and Directive on Award of Concession Contracts

On 15 January 2014, the European Parliament adopted two new public procurement Directives and a Directive on the award of concession contracts.

The new public procurement Directives will replace the currently applicable Directives on the topic, *i.e.*, Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. For its part, the Directive on the award of concession contracts is entirely new in the sense that until now concession contracts had only been partially regulated at the European level.

The newly adopted texts are based on proposals submitted by the European Commission in December 2011 (*See, this Newsletter, Newsletter, Volume 2011, No. 12, p. 14*).

The main objectives of the reform are to make the rules and procedures simpler and more flexible and to increase legal certainty. The reforms to the current public procurement rules include, amongst other things, the following: (i) a relaxation of the conditions for using the competitive procedure with negotiation; (ii) simplified procedures for bidders with reduced documentation requirements; (iii) mandatory use of electronic means of communications; (iv) various measures to encourage participation by small and medium-sized companies in public procurement; and (v) measures to increase the ability of contracting authorities to consider environmental or social issues in procurement.

It is expected that the EU Council of Ministers will approve the three new Directives in the coming weeks in order to allow their entry into force in March 2014. EU Member States will then have 24 months to implement the new Directives into national law. In order to ensure a full implementation of electronic procurement, the EU Member States are allowed to extend this implementation period by up to 30 months.