

# Van Bael & Bellis on Belgian Business Law

February 2014

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## COMMERCIAL LAW

### *New Commercial Code: Current Status*

The below table offers an overview of the current status of the various books of the New Commercial Code as of 24 February 2014. The developments that have taken place since the publication of our previous table, which summarized the situation as of 31 December 2013 (See, *this Newsletter, Volume 2013, No. 12, p. 3*), are marked in red.

| Book  | Status   | Entry into force                                  | Newsletter reference  |
|---|--|---|---|
| Book I – Definitions  | Published  | 12 December 2013 (partially)                      | Volume 2013, No. 5, p. 3, No. 8, p. 4 and No. 10, p. 3  |
| Book II – General principles  | Published  | 12 December 2013                                  |   |
| Book III – Freedom of establishment, freedom to provide services and general obligations of companies   | Published  | To be determined                                  | Volume 2013, No. 4, p. 2, No. 5, p. 2 and No. 8, p. 4   |
| Book IV – Competition law   | Published  | Partially 6 September 2013, partially 28 May 2013 | Volume 2013, No. 1, p. 2, No. 2, p. 3, No. 5, p. 2 and No. 8, p. 4  |
| Book V – Price control  | Published  | 12 December 2013, with the exception of title 2.  | Volume 2013, No. 1, p. 2, No. 5, p. 2 and No. 8, p. 4   |
| Book VI – Market practices and consumer protection  | Published  | To be determined                                  | Volume 2013, No. 1, p. 3, No. 3, p. 17, No. 7, p. 16; No. 8, p. 4, No. 9, p. 3 and No. 10, p. 16  |
| Book VII – Protection of the consumer in the financial sector   | Council of Ministers                               | N/A   |   |
| Book VIII – Quality of products and services  | Published  | 12 December 2013                                  | Volume 2012, No. 4, p. 3 and No. 12, p. 2   |
| Book IX – Safety of products and services   | Published  | 12 December 2013                                  | Volume 2012, No. 5, p. 2 and No. 9, p. 3  |
| Book X – Economic agreements  | Parliament   | N/A   | Volume 2013, No. 10, p. 3; <b>Volume 2014, No.1, p. 3</b>   |
| Book XI – Intellectual property   | Parliament   | N/A   | Volume 2013, No. 8, p. 4  |
| Book XII – Electronic economy   | Published  | To be determined                                  | Volume 2013, No. 4, p. 2, No. 8, p. 2 and No. 9, p. 3<br><b>Volume 2014, No.1, p. 2</b>   |
| Book XIII – Consultation mechanisms   | Published  | To be determined                                  | Volume 2013, No. 5, p. 2 and No. 9, p. 2<br><b>Volume 2014, No.1, p. 2</b>  |
| Book XIV – Liberal professions  | Council of Ministers – Adopted on 14 February 2014 | N/A   | Volume 2013, No. 7, p. 16 and No. 8, p. 4<br><b>See also, Market Practices section of this issue</b>  |
| Book XV – Enforcement   | Published  | 12 December 2013                                  | Volume 2013, No. 5, p. 3 and No. 8, p. 4  |
| Book XVI – Extrajudicial resolution of consumer disputes  | Parliament   | N/A   | <b>See also, Consumer Law section of this issue</b>   |
| Book XVII – Special legal procedures  | Parliament; partially published                    | To be determined                                  | Volume 2013, No. 9, p. 2 and No. 10, p. 3<br><b>Volume 2014, No.1, p. 2 and p. 4</b><br><b>See also, Market Practices section of this issue</b> |
| Book XVIII – Measures for crisis Management   | Parliament   | N/A   | <b>Volume 2014, No.1, p. 3</b>  |
| Note: Book I (definitions), Book II (general principles) and Book XV (enforcement) are inserted piecemeal along with the Books dealing with specific topics |  |   |   |

## CONSUMER LAW

### ***Bill to Insert Book on Extrajudicial Resolution of Consumer Disputes in New Commercial Code***

On 13 February 2014, the government submitted to the Chamber of Representatives the Bill to insert a Book XVI entitled “Extrajudicial resolution of consumer disputes” in the New Commercial Code (*Wetsontwerp houdende de invoeging van Boek XVI, “Buitengerechtelijke regeling van consumentengeschillen” in het Wetboek van economisch recht/Projet de loi portant insertion du Livre XVI, “Règlement extrajudiciaire des litiges de consommation” dans le Code de droit économique – “Bill Book XVI”*).

Bill Book XVI implements Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes in Belgian law. It encourages consumer complaints to be treated in the first place by the firm targeted by the complaint. Businesses should ensure that the contact details of their complaint service, such as telephone number and e-mail address, are easily accessible to consumers. Once a business receives a consumer complaint, it should take sufficient action to find an adequate solution to the complaint. In case of a continuing disagreement between the business and a consumer, the business will be obliged to inform the consumer that he or she can appeal to an extrajudicial body, called “Qualified Entity” (*gekwalificeerde entiteit/entité qualifiée*). Businesses which fail to provide this information may be penalised with a criminal sanction of level 2 (as defined in Book XV of the New Commercial Code), *i.e.*, a fine of between EUR 26 and EUR 10,000. If the business is in bad faith, it faces a more severe level 3 sanction, *i.e.*, a fine of between EUR 26 and EUR 25,000.

Businesses which are bound to resort to extrajudicial resolution of consumer disputes, whether it be on the basis of a law or regulation, signed code of conduct, membership of a professional body or the businesses’ terms and conditions of sale, are obliged to inform consumers thereof in a clear, understandable and easily accessible manner.

In addition, Bill Book XVI provides for the creation of an autonomous public service, the Consumer Ombudsman Service (*Consumentenombudsdienst/Service de médiation pour le consommateur – the “Ombudsman”*). The Ombudsman will be responsible for informing consumers and businesses of their rights and duties and of the possibility to settle disputes out of court. Moreover, the Ombudsman will be an overarching entity, coordinating all other existing ombudsman services. As such, it will act as a one-stop shop for all requests for extrajudicial settlement of consumer disputes. These requests can be submitted in person at the premises of the Ombudsman or by letter, fax, e-mail or telephone. The Ombudsman will either forward these requests to the competent Qualified Entity, or, if there is no competent Qualified Entity, deal with these consumer disputes itself. The Ombudsman does not replace other, existing ombudsman services.

The filing of a request with the Ombudsman will suspend the prescription period of the underlying claim (provided that the request is complete).

The Ombudsman will be governed and represented by a management committee, composed of members of the existing ombudsman services established by law for the postal, telecommunications, railway and energy sectors and the ombudsmen for the financial services and insurance sectors.

As with the other Books, the date of entry into force of Book XVI of the New Commercial Code is to be determined by Royal Decree.

## CORPORATE LAW

### ***Indexation of Publication Costs for Companies’ Deeds***

As from 1 March 2014, the costs for the publication in the Annexes to the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*) of the deeds of companies, non-profit associations, international non-profit associations, foundations and other legal entities will be indexed. The cost

for the publication of the companies' deeds will be as follows:

▪ For enterprises

| Amount in EUR                              | Until 28 February 2014 |                  | As from 1 March 2014 |                  |
|--|------------------------|------------------|----------------------|------------------|
|  | Exclusive of VAT       | Inclusive of VAT | Exclusive of VAT     | Inclusive of VAT |
| Deed of incorporation filed in paper form  | 201.60                 | 243.94           | 216.50               | 261.965          |
| Deed of incorporation filed electronically | /                      | /                | 174.90               | 211.629          |
| Modification acts                          | 126                    | 152.46           | 127                  | 153.67           |

▪ For associations

| Amount in EUR                              | Until 28 February 2014 |                  | As from 1 March 2014 |                  |
|--|------------------------|------------------|----------------------|------------------|
|  | Exclusive of VAT       | Inclusive of VAT | Exclusive of VAT     | Inclusive of VAT |
| Deed of incorporation filed in paper form  | 133.60                 | 161.66           | 149.90               | 181.379          |
| Deed of incorporation filed electronically | /                      | /                | 108.30               | 131.043          |
| Modification acts                          | 100.80                 | 121.97           | 101.60               | 122.936          |

### **Entry into Force of Amendments to Start-Up Limited Liability Company**

The Law of 15 January 2014 containing various rules governing small and medium-sized companies (*Wet houdende diverse bepalingen inzake K.M.O.'s/Loi portant dispositions diverses en matière de P.M.E.*), which, amongst other matters, modifies the rules governing the start-up limited liability companies, entered into force on 13 February 2014 (See, *this Newsletter*, Volume 2013, No. 12, p. 5).

### **Update on Dematerialisation of Securities**

The Law of 21 December 2013, which implements the last step in the process of dematerialising bearer securities (*effecten aan*

*toonder/titres au porteur*) and regulates bearer securities held in dormant safe deposit boxes and sealed envelopes, entered into force on 10 January 2014 (*Wet tot wijziging van de wet van 24 juli 1921 op de ongewilde buitenbezitstelling van de titels aan toonder, van de wet van 14 december 2005 houdende afschaffing van de effecten aan toonder en van hoofdstuk V van de wet van 24 juli 2008 houdende diverse bepalingen (i), voor wat betreft de slapende safes/Loi modifiant la loi du 24 juillet 1921 relative à la dépossession involontaire des titres au porteur, la loi du 14 décembre 2005 relative à la suppression des titres au porteur et le chapitre V de la loi du 24 juillet 2008 portant des dispositions diverses (i), en ce qui concerne les coffres dormants; "the Law"*).

In principle, all bearer securities should have been converted by the person holding them (the "Holder") into registered or dematerialised securities by 31 December 2013. As a result, the Law abolished with effect on 1 January 2014 the possibility contained in the Law of 24 July 1921 to notify an opposition for stolen, destroyed or lost bearer securities to the National Office of Securities (*Nationaal Kantoor voor Roerende Waarden/Office National des Valeurs Mobilières*).

Furthermore, the Law provides that, as from 1 January 2015, the company that issued unconverted bearer securities (the "Issuer") will be entitled to sell such bearer securities and transfer the proceeds resulting from the sale to the Deposit and Consignation Office (*Deposito-en Consignatiekas/Caisse des Dépôts et Consignations*). A notice inviting the Holder to enforce its rights in the securities is to be published in the Belgian Official Journal. The sale cannot take place until the expiry of a one month-period from the date of publication of the notice and such a sale is to be initiated within three months following the publication.

The unconverted bearer securities that will not have been sold by 30 November 2015 will have to be sent by the Issuer to the Deposit and Consignation Office. If a Holder later claims the proceeds resulting from the sale of the securities or the actual bearer securities that were not sold, a fine amounting to 10% of the proceeds or

the value of the securities for each year starting from 1 January 2016 will apply.

In the course of 2015, the Issuer has to send to the Deposit and Consignation Office a confirmation, signed by its statutory auditor or by an external accountant, that it has taken all necessary steps in the dematerialisation process of the bearer securities. This confirmation also has to be mentioned in the annexes to the Issuer's 2015 annual accounts.

Issuers that do not comply with the above rules may face a fine ranging between EUR 200 and EUR 100,000.

On 1 January 2026, the unclaimed proceeds from the sale of the bearer securities that have been deposited with the Deposit and Consignation Office will be attributed to the Belgian state. The unsold bearer securities deposited with the Deposit and Consignation Office which have not been claimed by 31 December 2025 may be purchased by the Issuer.

## INTELLECTUAL PROPERTY

### ***ECJ on IP Infringement Resulting from Online Sales Outside EU***

On 6 February 2014, the Court of Justice of the European Union ("ECJ") handed down an interesting judgment interpreting the notion of infringement of copyright and trade mark law in the context of Regulation 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights ("Regulation 1383/2003") (Case C-98/13).

The judgment stems from proceedings between Mr. Blomqvist, a Danish citizen, and Manufacture des Montres Rolex SA ("Rolex") before a Danish court. The facts are as follows: Mr. Blomqvist had ordered a watch from an online seller based in Hong Kong. After the watch had been shipped to Mr. Blomqvist, it was detained by Danish customs under Regulation 1383/2003 (now repealed and replaced by Regulation 608/2013). The shipment was

reported to Rolex for a suspected violation of its copyright and trade mark rights. Rolex confirmed that the watch was counterfeit and wrote to Mr. Blomqvist asking him to abandon the offending good for destruction.

Mr. Blomqvist refused to abandon the goods for destruction and Rolex therefore sought an order from a Danish court to oblige Mr. Blomqvist to abandon the good for destruction. In his defence, Mr. Blomqvist argued that he had legitimately bought the watch for his own personal use and that it did not breach Danish law on copyright and trade marks.

The Danish court stayed the proceedings to seek guidance from the ECJ to determine whether the Hong Kong based seller had infringed copyright or trade mark law in Denmark. In particular, the referring court requested clarification on the right of "distribution to the public" under EU Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society and the right to use trade marks "in the course of trade" under EU Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks and EU Regulation 207/2009 on the Community trade mark. The referring court asked whether it was sufficient for finding an infringement of those rights if goods had been sold online and dispatched to a private purchaser with an address in the Member State where the goods are protected. Alternatively, if this is not sufficient, the Danish court questioned whether there is an additional requirement that there should be, prior to the sale, an offer for sale or an advertisement targeted at or shown on a website intended for consumers in the Member State where the goods are delivered.

As regards the infringement of the distribution right, the ECJ held that: "[d]istribution to the public is characterised by a series of acts going, at the very least, from the conclusion of a contract of sale to the performance thereof by delivery to a member of the public. A trader in such circumstances bears responsibility for any act carried out by him or on his behalf giving rise to a 'distribution to the public' in a Member State where the goods distributed are protected by copyright". The ECJ thus concluded that the



online sale would constitute a “distribution to the public”. In addition, the ECJ held that online sales also constitute “use in the course of trade” since these are liable to affect the functions of the trade mark (with reference to Joined Cases C-236/08 to C-238/08 *Google France and Google*, paragraph 49).

The ECJ furthermore considered that the mere fact that a website can be consulted from the territory of a Member State where trade marks are protected is not sufficient to conclude that the website targets consumers in that territory (with reference to Case C-324/09 *L'Oréal and Others*). Nevertheless, the ECJ added that such intention to sell into the territory is deemed to be proven, *inter alia*, “where it turns out that the goods have been sold to a customer in the European Union or offered for sale or advertised to consumers in the European Union” (with reference to Joined Cases C-446/09 and C-495/09 *Philips*).

The ECJ thus concluded that the holder of an intellectual property right covering goods imported into a territory where the goods are protected, enjoys protection against counterfeit goods sold through online sales “at the time when those goods enter the territory” of the Member State “merely by virtue of the acquisition of those goods”. It is therefore not necessary, the ECJ confirms, for the goods to have been the subject of an offer for sale or advertising targeting consumers of that Member State.

This judgment is a relief to right holders. It confirms that customs are permitted to seize and destroy counterfeit goods sold online to EU citizens for private use.

To read the full judgment of the ECJ: click [here](#).

### ***ECJ on Linking to Copyright Protected Articles***

On 13 February 2014, the Court of Justice of the European Union (“ECJ”) gave what is already considered to be a landmark judgment with regard to copyright on the Internet. In case C-466/12 *Svensson*, the ECJ was asked to clarify whether, under EU Directive 2001/29/EC on the harmonisation of certain aspects of copyright

and related rights in the information society, providing a link to an article published on a third party’s website is tantamount to a ‘communication to the public’ for which an authorisation is required from the copyright holder.

The facts underlying the case relate to the Swedish company Retriever Sverige which operates a website providing clickable links to newsletter articles. Importantly, in the case before the ECJ, the website where the articles were first published with the consent of the right holder was freely available to the public. The ECJ held that Retriever Sverige would not require the authorisation from the copyright holder to redirect internet users to protected works. The ECJ added that it is not relevant whether or not it is clear to the Internet user that he is being referred to another website when clicking on the links provided.

The text of the ECJ judgment in this case can be found [here](#).

### ***ECJ Clarifies Meaning of “Due Cause” in Red Bull v. The Bulldog***

On 6 February 2014, the Court of Justice of the European Union (the “ECJ”) handed down a preliminary ruling on the “due cause” which may shield a third party against an alleged illegitimate use of a reputable trade mark. In its judgment, the ECJ largely followed the opinion of the Advocate General Kokott of 21 March 2013 (see, *this Newsletter*, Volume 2013, no. 4, p. 10).

Article 5 (2) of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (the “Trade Mark Directive”), essentially reproducing Article 5 (2) of the former Directive 89/104, provides the following:

*“Any Member State may [...] provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the*

*latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark."*

The dispute in the main proceedings arose between Red Bull and Mr. de Vries in relation to the interpretation of the concept of "due cause". Red Bull has been the owner of a word and figurative trade mark for the sign "Red Bull Krating-Daeng", registered for alcohol-free drinks since 11 July 1983 and enjoying a reputation in the Netherlands. Mr. de Vries owns the word and figurative trade marks "The Bulldog" registered on 14 July 1983 for hotel, restaurant and café services involving the sale of drinks. Mr. de Vries had already been using the "The Bulldog" sign before Red Bull filed its registration. In 1997, Mr. de Vries also started using the trade mark for energy drinks. Red Bull then tried to prevent Mr. de Vries from manufacturing and selling his energy drink with the mark "The Bulldog" because of its similarity with the mark "Red Bull" which could allegedly cause confusion for consumers. The Dutch Supreme Court referred the question for a preliminary ruling to the ECJ asking whether use for "due cause" of the sign by a third party in the meaning of Article 5(2) of the Trade Mark Directive may be demonstrated by the fact that the sign had been used before the trade mark was filed.

According to the ECJ, *"the concept of 'due cause' may not only include objectively overriding reasons but may also relate to the subjective interests of a third party using a sign which is identical or similar to the mark with a reputation"*. The ECJ considered the situation where a third party used a sign (*i.c.*, "The Bulldog") similar to a trade mark (*i.c.*, "Red Bull") in relation to goods which are identical to those for which that mark is registered and the sign had been used by the third party before the trade mark was registered and the later registered trade mark acquired a reputation. In such a situation, the ECJ considered that whether the third party can rely on "due cause" depends on three factors.

First, it should be determined how Bulldog's sign has been accepted by, and what its reputation is with, the relevant public.

Second, the national court should assess the degree of proximity between the goods and services for which "The Bulldog" sign had been originally used and the product for which the "Red Bull" mark with a reputation was registered. In this regard, the ECJ noted that, where a sign has been used prior to the registration of a mark with reputation, the extension of such a use may be a natural extension of the range of services and goods for which that sign already enjoys a certain reputation with the relevant public. In the present case, the ECJ considered that the sale of energy drinks displaying the sign "The Bulldog" does not appear to be an attempt to take advantage of the mark "Red Bull", but rather a genuine extension of the range of goods and services already offered by Mr. de Vries, *i.e.* the sale of drinks.

Third, the national court should take into account the economic and commercial significance of the use for that product of the similar sign (*i.c.*, "The Bulldog").

The ECJ remarked that the greater the repute of "The Bulldog" sign prior the registration of the "Red Bull" mark, the more the use of "The Bulldog" as a sign will be necessary for the marketing of a product identical to that for which the "Red Bull" mark was registered since that product is close to the range of goods and services for which "The Bulldog" sign had been previously used.

### **Trade Mark Package Voted in EU Parliament – Changes Affecting Goods in Transit**

The European Parliament (the "Parliament") voted on 25 February 2014 on the trade mark package. The trade mark package was first proposed by the European Commission on 27 March 2013 (*See, this Newsletter, Volume 2013, No. 3, p. 12 and 13*).

The text voted by the European Parliament contains a number of important changes to the text that was agreed on by the Committee on Legal Affairs of the European Parliament on 17

December 2013 (See, *this Newsletter, Volume 2014, No. 1, p. 7 and 8*). The changes relate, *inter alia*, to the situation of goods in transit. The new provisions adopted by the European Parliament depart from the current system where Customs may only stop counterfeiting goods transiting through the European Union ("EU") if there is a risk that these goods enter the European market.

The text adopted by the European Parliament will enable Customs to stop counterfeit goods even when destined for a third country outside the EU provided that it does not prejudice the freedom of transit guaranteed by the World Trade Organisation ("WTO"). Goods in transit will therefore be subject to the procedure foreseen in Regulation 608/2013 concerning customs enforcement of intellectual property rights (See, *this Newsletter, Volume 2013, No. 6, p. 5*). Article 1.1 (c) of Regulation 608/2013 authorises customs authorities to inspect shipments in "*suspensive procedures or free zone or free warehouse*". Accordingly, Customs can report such goods to the trade mark holder and the latter can stop the products if they infringe the trade marks. In order to determine whether the products infringe a trade mark, Regulation 608/2013 refers to applicable trade mark rules. The new wording of the trade mark package now clarifies that the trade mark may be infringed even if a third party brings goods into the customs territory without being released for free circulation.

The adoption of the new provisions brought much debate in the European Parliament as many feared that a stricter approach to counterfeit goods would be prejudicial to European ports and airports as well as to manufacturers of generic pharmaceuticals. In response to the latter concern, the new provisions ensure the transit of genuine generic medicines (meaning in compliance with the 'Declaration on the TRIPS agreement and public health' adopted by the Doha WTO Ministerial Conference on 14 November 2001). In particular, trade mark holders will not have the right to oppose the use of International Non-proprietary Names (INN) of medicines on the basis of trade marks.

No date has yet been set for a first reading before the Council. It is expected that no political agreement will be reached before the European elections in May 2014. As a result, the legislative process will continue in the next legislative term and may even be repeated in part.

## LABOUR LAW

### ***Obligation to Provide Reason for Dismissal as of 1 April 2014***

On 12 February 2014, the social stakeholders concluded Collective Bargaining Agreement No 109 regarding the obligation to provide a reason for dismissal (*CAO nr. 109 betreffende de motivering van het ontslag CCT N° 109 concernant la motivation du licenciement*) ("CBA 109").

CBA 109 applies to all dismissals as of 1 April 2014, except for workers who are dismissed:

- during the first six months of their employment (prior and consecutive employment contracts for definite duration or temporary agency work for an identical function with the same employer are taken into account to determine the first six months of employment);
- during an employment contract for temporary agency work;
- during an employment contract for students;
- in the framework of unemployment with company surcharges;
- to terminate an employment contract for indefinite duration as from the first day of the month following the month in which the employee reaches the legal pension age;
- in the framework of a definitive cessation of the activities;
- in the framework of a company closure;
- in the framework of a collective dismissal;
- if a specific dismissal procedure must be respected based on a law or CBA (candidate works council, member works council, etc.);
- in the framework of multiple dismissals as defined on sector level.



The employees are entitled to know the reason for their dismissal.

The employee can request the reason for his/her dismissal by registered letter within two months after the employment contract ended. If the employment contract is terminated with a notice period, the request must be made within 6 months after the notification of the notice (day on which the notification takes effect) and without exceeding the two month period from the end of the employment contract.

As from the third working day after the sending of the registered letter, the employer has two months to provide the reason for dismissal to the employee by registered letter. The registered letter should contain all elements which allow the employee to know the exact reason for his/her dismissal.

However, the employer who already informed the employee of the reason for his/her dismissal (e.g. in the termination letter) is not obliged to reply to the request of the employee, if the information supplied allows the employee to know the exact reason for his/her dismissal.

If the employer does not provide a reason for dismissal, the employee is entitled to two weeks' additional severance pay.

The employee is able to claim unlawful dismissal before a Labour Court. If the Labour Court qualifies the dismissal as unlawful, the employee will be entitled to an additional severance pay equal to between 3 and 17 weeks of remuneration.

A dismissal is considered to be an unlawful dismissal if the reason is not based on the capability or behaviour of the employee or the operational needs of the employer and the dismissal would not have been given by a normal and reasonable employer.

In addition, the employee can also claim actual damages based on the provisions of the Civil Code.

The burden of proof is determined as follows:

- If the employer provided the reason for dismissal in accordance with CBA 109, the party who makes a claim will bear the burden of proof;
- If the employer did not provide the reason for dismissal in accordance with CBA 109, the employer will bear the burden of proving that the reason(s) for dismissal was (were) not unlawful;
- If the employee did not request the reason for his/her dismissal within the framework of CBA 109, the employee will bear the burden of proving that the dismissal was unlawful.

For blue collar workers who are dismissed and for whom the exception of the fixed notice periods applies (*i.e.*, an exception for specific blue collar workers, based on sector-specific regulations, which entitles them to a lower notice period than those provided for in CBA 75 - transitional measure), the old rules regarding the unfair dismissal remain applicable until 31 December 2015 (6 months additional severance pay, burden of proof lies with the employer). However, for these workers a dismissal is, until 31 December 2015, considered to be unlawful if the reason for the dismissal is not based on the capability or behaviour of the employee or the operational needs of the employer.

For blue collar workers without a fixed place of work (excavation work, road work, construction work, demolition, etc.) the above exception is not limited in time. As a result, the old rules regarding the unfair dismissal continue to apply without limitation (6 months additional severance pay, burden of proof lies with the employer). However, for these workers a dismissal is also considered to be unlawful if the reason for the dismissal is not based on the capability or behaviour of the employee or the operational needs of the employer.

## LITIGATION

### ***Law Reforming Council of State Published***

On 3 February 2014, the Law introducing a reform to the jurisdiction, the procedural rules and the organisation of the Council of State and an implementing Royal Decree were published in the Belgian Official Journal (*Wet houdende*

*hervorming van de bevoegdheid, de procedureregeling en de organisatie van de Raad van State/Loi portant réforme de la compétence, de la procédure et de l'organisation du Conseil d'Etat; Koninklijk Besluit tot wijziging van diverse besluiten betreffende de procedure voor de afdeling bestuursrechtspraak van de Raad van State/Arrêté royal modifiant divers arrêtés relatifs à la procédure devant la section du contentieux administrative du Conseil d'Etat).*

The following key changes are introduced in relation to the administrative section of the Council of State: (i) enlarged jurisdiction to hear appeals against a number of decisions from non-administrative authorities; (ii) broader powers to remedy a defect in challenged decisions; (iii) softened conditions for suspension proceedings; and (iv) the possibility to grant a procedural indemnity (*rechtspiegingsvergoeding/indemnité de procédure*) to the prevailing party (See, *this Newsletter, Volume 2014, No. 1, p. 12*).

Some provisions of the new Law entered into force on 3 February 2014, whilst others and the Royal Decree will become applicable as of 1 March 2014.

### **Bill on Collective Redress to be Voted in Chamber of Representatives**

The Committee for economic affairs (*Commissie voor het bedrijfsleven/Commission de l'économie*) of the Chamber of Representatives (*Kamer van volksvertegenwoordigers/Chambre des représentants*) approved on 17 February 2014 two draft Bills inserting a new chapter on collective redress in the Belgian Commercial Code (See, *this Newsletter, Volume 2013, No. 12, p. 13*; and *this Newsletter, Volume 2014, No. 1, p. 12*). The draft Bills will be submitted to a vote in plenary session in the coming weeks.

## **MARKET PRACTICES**

### **Council of Ministers Adopts Draft Bills to Insert Rules on Market Practices and Cease-and-desist Actions Involving Practitioners of Liberal Professions in New Commercial Code**

On 14 February 2014, the Council of Ministers adopted the following Draft Bills:

- a Draft Bill to insert a Book XIV on market practices and consumer protection with respect to practitioners of liberal professions in the New Commercial Code and to insert the definitions that are specific to this Book XIV in Books I and XV of the New Commercial Code (*Voorontwerp van wet houdende invoeging van Boek XIV "Marktpraktijken en consumentenbescherming betreffende de beoefenaars van een vrij beroep" in het Wetboek van economisch recht, en houdende invoeging van de definities eigen aan Boek XIV en van de rechtshandhabingsbepalingen eigen aan Boek XIV in de Boeken I en XV van het Wetboek van economisch recht/Avant-projet de loi portant insertion du Livre XIV « Pratiques du marché et protection du consommateur » relatif aux professions libérales dans le Code de droit économique et portant insertion des définitions propres au Livre XIV et des dispositions d'application de la loi propres au Livre XIV, dans les livres I et XV du Code de droit économique – "Bill Book XIV"*);
- two Draft Bills to amend Book XVII concerning the use of cease-and-desist actions with respect to practitioners of liberal professions (*Voorontwerp van wet houdende wijziging van Boek XVII van het Wetboek van economisch recht wat betreft de beoefenaars van een vrij beroep/Avant-projet de loi modifiant le Livre XVII du Code de droit économique en ce qui concerne les personnes exerçant une profession libérale and Voorontwerp van wet houdende invoeging in Boek XVII van het Wetboek van economisch recht, van de bepalingen die een aangelegenheid regelen als bedoeld in artikel 77 van de Grondwet wat betreft de*

*beoefenaars van een vrij beroep/Avant-projet de loi portant insertion dans le Livre XVII du Code de droit économique des dispositions réglant des matières visées à l'article 77 de la Constitution en ce qui concerne les personnes exerçant une profession libérale).*

These three Draft Bills implement Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices and Directive 2011/83/EU of 25 October 2011 on consumer rights in Belgian law with respect to practitioners of liberal professions. Further, they repeal and replace the Law of 2 August 2002 concerning misleading and comparative advertising, unfair terms and distance contracts regarding liberal professions (*Wet van 2 augustus 2002 betreffende de misleidende en vergelijkende reclame, de onrechtmatige bedingen en de op afstand gesloten overeenkomsten inzake de vrije beroepen/Loi du 2 août 2002 relative à la publicité trompeuse et à la publicité comparative, aux clauses abusives et aux contrats à distance en ce qui concerne les professions libérales* – the “Law of 2 August 2002”). In addition, they will implement recent case law of the Constitutional Court.

Interestingly, Bill Book XIV will provide for a “positive” definition of the term “liberal profession” by reference to the essential characteristics of these professions. This is new: the current Law of 2 August 2002 (which, as indicated above, will be repealed) defines the term “liberal profession” in a “negative” manner, by indicating what a liberal profession is not.

## PUBLIC PROCUREMENT

### ***EU Council of Ministers Adopts New Public Procurement Directives and Directive on Award of Concession Contracts***

On 11 February 2014, the EU Council of Ministers adopted the legislative package for the modernisation of public procurement in the EU. Having been proposed by the European Commission in December 2011 (See, *this Newsletter*, Volume 2011, No. 12, p. 14), this package was approved by the European Parliament on 15 January 2014 (See, *this*

*Newsletter*, Volume 2014, No. 1, p. 14). The package consists of:

- a new Directive on public procurement, replacing 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;
- a new Directive on procurement by entities operating in the utilities sectors, replacing Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; and
- a Directive on the award of concession contracts.

For a brief overview of the new Directives' goals, we refer to the previous editions of this Newsletter (See, *this Newsletter*, Volume 2011, No. 12, p. 14 and Volume 2014, No. 1, p. 14).

The new Directives will now be published in the *Official Journal of the EU*. After publication, EU Member States will have 24 months to implement the new Directives into national law. For implementing the mandatory electronic procurement, which is one of the main novelties, they may extend this period by up to 30 months.