VAN BAEL & BELLIS

VOLUME 2016,
Nº 3

March 2016

Van Bael & Bellis on Belgian Business Law

HIGHLIGHTS

COMPETITION LAW:

Belgian Competition Authority Conditionally Approves Acquisition of Delhaize Group by Ahold

Constitutional Court Hands Down Judgment on Limitation Period Applicable to Civil Damages Claim for Competition Law Infringement

CORPORATE LAW: Final Step Abolition Bearer Shares

INTELLECTUAL PROPERTY: Bill Aimed at Ratification of Council of Europe Medicrime Convention

LABOUR LAW: Social Elections 2016: Clock Is Ticking (Part 3)

LITIGATION: Constitutional Court Declares Prior Recognition Requirement for Class Action Group Representatives Unlawful

MARKET PRACTICES: Antwerp Court of Appeal Requests ECJ to Clarify Definition of Pyramid Promotional Schemes under Unfair Commercial Practices Directive

PUBLIC PROCUREMENT: Bill on Concession Contracts

STATE AID: Commission Decision Opening In-Depth Investigation into Alleged Aid to Container Terminal Operators in Port of Antwerp Published

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 3

March 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 3

| COMPETITION LAW

Belgian Competition Authority Conditionally Approves Acquisition of Delhaize Group by Ahold

On 15 March 2016, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority ("BCA") approved the acquisition of Delhaize Group by Ahold, subject to a number of conditions. Delhaize (Belgium) and Ahold (The Netherlands) are two major food retailers active in their home countries as well as in the U.S. and in a number of other countries around the world.

The transaction had initially been notified to the European Commission since the European merger notification thresholds were met. However, at the request of the parties, the Commission referred the case to the BCA, based on the fact that the only significant overlap in the parties' activities in Europe is in Belgium (*See, this Newsletter, Volume 2016, No. 1, p. 5*). Following the Commission's referral, the parties submitted a formal notification of the proposed transaction to the BCA on 13 January 2016.

The Competition College approved the transaction but made its approval conditional on the disposal of 8 Albert Heijn outlets (Ahold), 5 Delhaize franchised outlets, and a number of outlets which have not yet been opened. These divestments had been proposed by the parties in order to address potential competition concerns. The Competition College stresses that, in order to comply with the remedies imposed, these shops must be sold to a purchaser with sufficient financial resources, proven relevant expertise, as well as the ability to maintain and develop the divested business as a viable and effective competitive force.

Until the conditions imposed by the BCA are met, the Albert Heijn and Delhaize shops will continue to operate independently in Belgium.

The US competition authorities are still scrutinizing the impact of the transaction on the US market, where both parties carry out a significant part of their activities, and are expected to impose divestments as well.

New Leniency Guidelines Enter into Force

On 22 March 2016, the new guidelines concerning the leniency regime under Belgian competition law have been published in the Belgian Official Journal (Belgisch Staatsblad / Moniteur belge), and entered into force on that same day. The new guidelines were adopted by the board of the Belgian Competition Authority on 1 March 2016 (See, this Newsletter, Volume 2016, No. 2, p. 5). The Dutch version of the new guidelines can be found here; the French version can be found here.

Constitutional Court Hands Down Judgment on Limitation Period Applicable to Civil Damages Claim for Competition Law Infringement

On 10 March 2016, the Constitutional Court (*Grondwettelijk Hof/Cour constitutionnelle*) held that a non-contractual civil damages claim based on an infringement of competition law cannot become time-barred before there is a final decision with *res judicata* character on the existence of a competition law infringement. Another interpretation of Article 2262bis, §1, second paragraph of the Belgian Civil Code (*i.e.*, the general statute of limitations for a tort-based civil damage claim) would be in contradiction with the principle of equal treatment.

The Constitutional Court explained that in a civil procedure the plaintiff carries the burden of proof and that the existence of a competition law infringement is essential for the establishment of a tort-based fault under civil law. According to the Court, the fact that a competition law infringement usually requires a complex factual and economic analysis of the available evidence makes this burden very heavy. The Court went on to say that since the limitation period for bringing a damages claim already starts to run before there is a final decision on the existence of a competition law infringement, the plaintiff is compelled to initiate civil proceedings without being able to rely on a final decision as evidence of a tort-based fault. According to the Court, this hampers the plaintiff's ability to bring an action for damages. The Court stressed that its judgment is line with the new European Directive 2014/104/EU on antitrust damages actions (see, Article 10 of the Directive),

even though the Directive has not yet been implemented in Belgium and does not even have to be implemented until 27 December 2016.

The case will now return to the Commercial Court of Dendermonde, which had referred a question for a preliminary ruling to the Constitutional Court (*See, this Newsletter, Volume 2014, No. 11, p. 6*).

Belgian Competition Authority Conditionally Approves Acquisition of Two Out of Four Utopolis Cinema Complexes by Kinepolis

On 25 March 2016, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority ("BCA") approved the acquisition of two out of four Utopolis cinema complexes, subject to structural and behavioural remedies.

Kinepolis notified the BCA of the proposed acquisition of all four Utopolis cinema complexes on 12 October 2015. During the initial phase I investigation, Kinepolis offered no remedies. However, the Competition College had serious doubts as to the admissibility of the transaction and opened an in-depth (phase II) investigation (*See, this Newsletter, Volume 2015, No. 12, p. 7*). During phase II of the investigation, Kinepolis offered both structural and behavioural commitments, in order to address the competition concerns which had been identified.

The structural commitments consist of the divestment of two out of the four Utopolis cinema complexes, namely the Utopolis complexes in Aarschot and in Mechelen. According to the Competition College, the purchaser should have the necessary financial resources, as well as relevant expertise, or alternatively, be a professional financial investor. The Competition College added that the purchaser should intend to operate the cinemas as a viable and active competitor of Kinepolis.

The behavioural commitments concern the two cinema complexes that will not be divested, namely the cinemas in Lommel and in Turnhout. In operating those cinemas, Kinepolis agreed: (i) not to close them; (ii) to accept vouchers sold by other cinemas in the context of existing cooperation agreements; and, (iii) to monitor the degree of satisfaction of the customers of those cinemas with regard to the price/quality ratio. These commitments will apply for a period of three years and will be monitored by the BCA.

VBB on Belgian Business Law | Volume 2016, Nº 3

| CORPORATE LAW

Final Step Abolition Bearer Shares

On 26 February 2016, a notice was published in the Annexes to the *Belgian Official Journal* indicating that the Deposit and Consignment Office (*Deposito- en Consignatiekas / Caisse des Dépôts et Consignations*) had, as of 1 February 2016, commenced paying out the consigned amounts pursuant to the sale of bearer securities and returning unsold securities. This is the final step in the process of the abolition of bearer securities (*see, this Newsletter, Volume 2014, no. 2, p. 4; and Volume 2013, No. 12, p. 5*).

In particular, companies that issued unconverted bearer securities were under an obligation to sell such bearer securities on a regulated market and transfer the proceeds resulting from such a sale to the Deposit and Consignation Office as of 1 January 2015. Further, bearer securities that had not been sold by 30 November 2015 had to be converted into registered securities and transferred to the Deposit and Consignation Office.

The initial holder of such securities may now claim the proceeds resulting from the sale of the securities or the actual securities, as the case may be, from the Deposit and Consignation Office. However, the Deposit and Consignation Office will impose a fine of 10% of the proceeds or the value of the securities for each year starting as from 1 January 2016. Securities will only be returned after these fines have been paid.

VBB on Belgian Business Law | Volume 2016, Nº 3

| INTELLECTUAL PROPERTY

Bill Aimed at Ratification of Council of Europe Medicrime Convention

On 7 March 2016, the Government submitted to the Chamber of Representatives a bill on the counterfeiting of medical products and similar crimes involving threats to public health *(Wetsontwerp houdende instemming met het Verdrag van de Raad van Europa over de namaak van medische producten en soortgelijke misdrijven die een bedreiging vormen voor de volksgezondheid, gedaan te Moskou op 28 oktober 2011/Projet de loi portant assentiment à la Convention du Conseil de l'Europe sur la contrefaçon des produits médicaux et les infractions similaires menaçant la sécurité publique, fait à Moscou le 28 octobre 2011*, the "Bill").

The Bill, when adopted, will ratify the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (the "Medicrime Convention"). The Medicrime Convention is the first international criminal law instrument to oblige States to penalise the following offences:

- the manufacturing of counterfeit medical products (this term includes both medicinal products and medical devices);
- the supplying, offering to supply and trafficking in counterfeit medical products;
- the falsification of documents;
- the unauthorised manufacturing or supplying of medicinal products and the placing on the market of medical devices which do not comply with conformity requirements.

The Bill considers that Belgian law, and in particular the Medicines Law of 25 March 1964 (*Wet op de geneesmiddelen/Loi sur les médicaments*) and the Criminal Code, already contain provisions implementing the Medicrime Convention.

Article 16 of the Medicines Law penalises the counterfeiting and falsification of medicinal products and the intentional supply of counterfeit medicinal products. However, this provision does not apply to investigational medicinal products for human use or to medical devices. The explanatory note of the Bill indicates that this gap will have to be filled by making the relevant offences under Article 16 also applicable to investigational medicinal products for human use and to medical devices.

The Medicrime Convention further encourages national and international co-operation in order to combat the above offences. In this regard, the Bill considers that Belgium established a General Drugs Policy Cell (*Cel Algemeen Drugsbeleid/Cellule générale de Politique Drogues*) serving as a platform for cooperation among public services in the fight against counterfeiting and falsification of medicinal products. This cell has the task of centralising and updating information as well as providing advice and recommendations on policy harmonisation. With regard to international co-operation, the Special Investigation Unit attached to the Federal Agency of Medicines and Health Products (*Federaal Agentschap voor Geneesmiddelen en Gezondheidsproducten/Agence fédérale des médicaments et des produits de santé*) will act as a national contact point to receive requests of information and/or co-operation.

The Medicrime Convention also calls on the parties to take precautionary measures in the fight against the counterfeiting of medical products and similar offences. Such measures are foreseen at European level by harmonising national rules relating to medicines and medical devices. The EU rules are either directly applicable or were implemented into Belgian law. The requirements set out in the Medicrime Convention have thus been met.

Given the potentially serious consequences of counterfeiting of medical products and similar offences for victims, the Medicrime Convention requires Parties to guarantee the protection of the rights and interests of the victims through the implementation of specific measures such as compensation for victims. Belgian law does not provide for a special compensation fund for victims of offences covered by the Convention. However, the Law of 31 March 2010 relating to the compensation for damages resulting from healthcare (*Wet betreffende de vergoeding van schade als gevolg van gezondheidszorg/Loi relative à l'indemnisation des dommages résultant de soins de santé*) establishes

a general medical accidents fund. The Bill notes that this law could apply if the intervention of a health care professional or a health care institution contributed to the injury of the victim.

The Bill is expected to be voted upon and then signed into law in the coming months.

EU Adopts New Community Trade Mark Regulation

On 23 March 2016, Regulation (EU) No 2015/2424 of the European Parliament and the Council amending the Community Trade Mark Regulation entered into force (the "Amending Regulation"). The Amending Regulation forms part of the EU trade mark reform package adopted by the European Parliament on 15 December 2015. This package also includes a new Trade Mark Directive which Member States are required to implement into their national laws by 15 January 2019 (*See, this Newsletter, Volume 2015, No. 12, p. 16*).

Under the Amending Regulation, the Office for Harmonisation in the Internal Market ("OHIM") changes its name to the European Union Intellectual Property Office ("EUIPO"), while the Community Trade Mark ("CTM") will be called the European Union Trade Mark ("EUTM").

With regard to trade mark fees, the Amending Regulation introduces a 'one fee per class of goods or services' system whereby applicants will pay a lower fee if they only apply for one class, the same fee if they apply for two classes, and a higher fee if they apply for three or more classes. Renewal fees are substantially reduced in all instances and set at the same level as application fees.

The Amending Regulation also abolishes the possibility of filing EU trade mark applications through national offices. It furthermore provides for a number of changes with respect to absolute grounds of refusal of an EU trade mark application and introduces a new relative ground of refusal. Finally, the Amending Regulation brings about changes as regards opposition, cancellation and appeal proceedings.

VBB on Belgian Business Law | Volume 2016, Nº 3

| LABOUR LAW

Social Elections 2016: Clock Is Ticking (Part 3)

The procedure involving social elections to designate the members of the Works Council (WC) and/or Committee for the Prevention and Protection on the Work Floor (CPPW) are under way (*See, this Newsletter, Volume 2015, No 10, p. 16; and No 11, p. 16*).

The elections (day Y or day X+90) will take place between 9 May and 22 May 2016, depending on the choice of the employer. The lists of candidates were filed (day X+35), between 15 March and 28 March 2016 (depending on the actual election day) and the candidates are now known to the employer. Between day X+35 and day X+40, the numbers of the lists are determined by the Minister of Labour and ultimately on day X+40 the lists of candidates should be posted. Posting can also involve an electronic publication if all employees are able to access this document during normal working hours.

If no lists of candidates were filed, if the candidatures are withdrawn or if the candidatures are declared null and void by the labour court, the procedure will be stopped and no social elections will take place. The decision to stop the procedure should be notified to staff and to the authorities. The procedure can also be partially stopped in the above situations for a specific category of employees, while continuing for the other categories of employees to which the above situations do not apply.

On day X+47 any modifications to the list of candidates are made (name of a candidate or withdrawal candidacy). During a period of 7 days after the posting of the lists of candidates, the candidates and the trade unions may file a complaint with the employer related to the candidates. One day after the date of receipt of such a complaint, the employer will inform the trade union that had nominated the candidate. The trade union has until day X+54 to modify the list of candidates, subject to exceptions. The trade unions are exceptionally able to replace candidates until day X+76 in specific situations (death; withdrawal candidacy on day X+47; resignation of candidate as employee; resignation of candidate from the trade union; or change of category of the candidate).

The employer can file an appeal before the labour courts against the lists of candidates during the period between day X+47 and day X+52, if no complaint is made by the candidates and/or the representative trade unions, and during the period between day X+56 and day X+61 against the modified lists of candidates after a complaint of the candidates and/or the trade unions. The courts must hand down a judgment within 14 days following receipt of the appeal.

On day X+77 the candidate lists are finalised and the voting notes are drafted.

In the period between day X+40 and day X+70 the polling stations are established.

On day X+80 the voters receive their polling card for the election day on day X+90 or day Y.

VBB on Belgian Business Law | Volume 2016, Nº 3

| LITIGATION

Constitutional Court Declares Prior Recognition Requirement for Class Action Group Representatives Unlawful

On 17 March 2016, the Belgian Constitutional Court partially annulled Article XVII.39 of the Code of Economic Law (*Wetboek van Economisch Recht/Code de droit économique* – the "CEL") (Constitutional Court, judgment 41/2016 of 17 March 2016). Article XVII.39 CEL contains a closed list of entities that can act as so-called group representatives for consumer-to-business class actions in Belgium. Class actions were introduced in Belgian law in 2014 (*See, this Newsletter, Volume 2014, No. 9, p. 10*).

Pursuant to Article XVII.36, 2° CEL, class actions are only admissible if they are introduced by a group representative meeting the requirements of Article XVII.39 CEL. The list of admitted group representatives in Article XVII.39 CEL includes consumer rights associations with legal personality which (i) are represented in the Consumption Council (*Raad voor het Verbruik/Conseil de la Consommation*); or (ii) have obtained a prior ministerial recognition. In actual fact, only one association, Test Aankoop/Test Achats, is permitted to act as a representative in a class action.

The Constitutional Court held that the prior recognition requirement violates Directive 2006/123/EC on services in the internal market (the "Services Directive") in so far as it prevents specific consumer rights associations from other EU Member States, which did not obtain the required ministerial recognition, from acting as a group representative for class actions before the Belgian courts. According to the Constitutional Court, this violation of the Services Directive amounts to an unjustifiable discrimination of consumer rights associations established in other EU Member States. It therefore partially annulled Article XVII.39 CEL.

In view of this partial annulment, the Belgian legislator is now required to amend Article XVII.39 CEL so as to allow for consumer rights associations established in other EU Member States to act as group representatives in Belgian class action proceedings.

The applicants before the Constitutional Court had also brought claims for the annulment of (i) the transitional provision that excludes the application of the class action regime to damage resulting from facts that precede the entry into force of the class action legislation on 1 September 2014; (ii) the provision containing a limited list of legal grounds on which class actions can be based; and (iii) the provisions requiring victims of mass damages to opt in already at the admissibility stage of the proceedings. However, the Constitutional Court dismissed these claims as unfounded. The Constitutional Court also confirmed that lawyers are not permitted to act as a representative for a class, but that a qualifying association can appoint a lawyer to represent it in court.

VBB on Belgian Business Law | Volume 2016, Nº 3

| MARKET PRACTICES

Antwerp Court of Appeal Requests ECJ to Clarify Definition of Pyramid Promotional Schemes under Unfair Commercial Practices Directive

On 14 December 2015, the Antwerp Court of Appeal made a preliminary reference to the Court of Justice of the European Union (the "ECJ") seeking an interpretation of the term "*pyramid promotional scheme*" under Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the "Directive"). The reference was made in proceedings between the Belgian National Lottery (*Nationale Loterij NV/Loterie Nationale SA*) and Paul Adriaensen, Werner De Kesel and The Right Frequency VZW (Case C-667/15).

Pursuant to paragraph 14 of Annex I to the Directive, pyramid promotional schemes where "*a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products*" are in all circumstances considered unfair and thus prohibited.

The Antwerp Court of Appeal requested the ECJ to clarify whether, for this provision to apply, the realisation of the financial promise to existing members should depend primarily or mostly on the direct transfer of the contributions of the new members (direct link) or whether it is sufficient that the realisation of the financial promise to existing members depends primarily or mostly on an indirect payment through the contributions of existing members (indirect link).

The ECJ's response is expected within one to two years' time.

VBB on Belgian Business Law | Volume 2016, Nº 3

| PUBLIC PROCUREMENT

Bill on Concession Contracts

On 9 March 2016, the government submitted a Bill on concession contracts to the federal Chamber of Representatives (*Wetsontwerp betreffende concessieovereenkomsten/ Projet de loi relatif aux contrats de concession* – the "Bill"). The Bill aims to transpose Directive 2014/23/EU on the award of concession contracts into Belgian law.

By way of a concession, contracting authorities or contracting entities can entrust either the execution of works or the provision and the management of services to one or more economic operators. The Bill specifies that, for concession contracts to fall within its scope, the consideration for the execution of these works or the provision and management of these services has to consist either solely in the right to exploit the works or services that are the subject of the contract or in that right together with payment. In addition, the award of a works or services concession contract involves the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both.

Presently, the award of concession contracts is only partially regulated. Moreover, the applicable rules are laid down in a variety of legal instruments. For example, works concessions and services concessions have very similar characteristics. Still, the award of works concessions is subject to the provisions of the Law of 15 June 2010 on public procurement (*Wet van 15 juni 2006 betreffende overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten/Loi du 15 juin 2006 relative aux marchés publics et à certains marchés de travaux, de fournitures et de services* – the "Law of 2006"), while the award of services concessions is presently not regulated under Belgian public procurement law.

When enacted into law, the Bill will create a single regulatory framework for concessions governing both works and services concessions. This regulatory framework would be created as a distinct legal instrument in order to reflect the specificity of concessions as compared to public contracts. Significantly, the preparatory works of the Bill also show that the Bill tries to follow as closely as possible the provisions of the recent Bill concerning public procurement (*See, this Newsletter, Volume 2016, No. 1, p. 19*).

VBB on Belgian Business Law | Volume 2016, Nº 3

STATE AID

Commission Decision Opening In-Depth Investigation into Alleged Aid to Container Terminal Operators in Port of Antwerp Published

On 18 March 2016, the *Official Journal of the European Union* published the decision of 15 January 2016 of the European Commission (the "Commission") to open an in-depth investigation into alleged aid to PSA Antwerp NV and Antwerp Gateway NV, two container terminal operators in the port of Antwerp, Belgium (*See, this Newsletter, Volume 2016, No. 1, p. 21*). The alleged aid consists of the reduction of compensation payments, brought about by the retroactive reduction of the minimum tonnage requirements applicable to the operators, that was granted by the port of Antwerp to the two container terminal operators.

In its decision, the Commission summarises the factual background and the views of the complainant (*i.e.*, Katoen Natie NV) and the federal government of Belgium. Most importantly, the decision presents the Commission's preliminary assessment. At this stage, the Commission considers that the reduction in compensation payments constitutes unlawful state aid, since the aid (i) is granted through state resources and imputable to the state; (ii) is selective; (iii) distorts competition and affects trade between Member States; and (iv) confers an economic advantage on the container terminal operators.

As regards the last condition, the Commission has serious doubts whether the port of Antwerp acted in a way comparable to that of a private operator in a similar situation. In other words, the Commission questions whether the port of Antwerp observed the market economy operator principle. In particular, while the Commission agrees that the impact of the economic crisis of 2009 should be taken into account, it notes that there is a significant time gap between the start of the economic crisis and the port of Antwerp's decision to reduce retroactively the compensation payments. Moreover, the Commission has doubts as to whether a reduction of compensation payments of approximately 80% would have been acceptable to a rational private market operator, given that the actual reduction of traffic for the container terminal operators was only 38.6%. The Commission concludes that the alleged unlawful state aid is not compatible with the internal market.

Belgium had to respond within one month of the date of receipt of the decision, whereas other Member States and interested third parties still have until 18 April 2016 to submit their comments.

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