VAN BAEL & BELLIS

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Van Bael & Bellis on Belgian Business Law

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| CAPITAL MARKETS

FSMA Orders Mandatory Takeover Bid

On 31 May 2016, the Financial Services and Markets Authority ("FSMA"), the Belgian supervisory authority for financial markets, ordered Value8, a Dutch financial holding, to launch a takeover bid on all outstanding voting securities in Sucraf, a Belgian listed company active in the Congolese sugar cane industry.

In accordance with Articles 49 and following of the Takeover Decree (*Koninklijk Besluit van 27 April 2007 op de openbare overnamebiedingen / Arrêté royal de 27 avril 2007 relatif aux offres publiques d'acquisition*) Value8 triggered this obligation when its stake in Sucraf surpassed the threshold of 30 per cent of the outstanding voting securities.

Under specific conditions, the Takeover Decree allows for a temporary transgression of the 30 per cent threshold for a maximum period of 12 months. However, in this particular case, FSMA specified that the fact that Value8 had in the meantime reduced its stake once again below the 30 per cent threshold did not exempt it from the obligation to issue a public takeover bid. It is not entirely clear why FSMA was of the opinion that this exemption did not apply.

FSMA further determined that the bid should be issued at the highest price paid (per class of securities) by Value8 for securities in Sucraf in the 12 twelve months preceding the date when Value8 became legally required to issue its bid and has to be initiated within 40 business days after notification of the decision of FSMA.

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| COMMERCIAL LAW

European Commission Proposes E-Commerce Package

On 25 May 2016, the European Commission (the "Commission") presented a package designed to stimulate e-commerce across the EU. The package consists of three proposed Regulations (the "Proposed Regulations") that aim to advance three goals of the digital economy:

› limiting discriminatory practices like geo-blocking (*Proposal for a Regulation addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market* – the "Proposed Regulation on Geo-blocking and Other Forms of Discrimination");

› making cross-border parcel delivery more affordable, transparent and efficient (*Proposal for a Regulation on cross-border parcel delivery services* – the "Proposed Regulation on Cross-border Parcel Delivery Services"); and

› promoting customer trust through better protection and enforcement mechanisms (*Proposal for a Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws* – the "Proposed Regulation on Consumer Protection Cooperation").

The Proposed Regulations implement, in part, the Digital Single Market Strategy which the Commission adopted on 6 May 2015. They also follow the 2015 edition of the Commission's annual Consumer Conditions Scoreboard published on 21 September 2015 which focused on the Digital Single Market and consumer experience in cross-border e-commerce (*See, this Newsletter, Volume 2015, No. 9, p. 9*).

The overall objective of the Proposed Regulations is to allow consumers and companies to buy and sell products and services online more easily and confidently across the EU, thereby boosting e-commerce.

The principal features of the Proposed Regulations are as follows.

Proposed Regulation on Geo-blocking and Other Forms of Discrimination

The Proposed Regulation on Geo-blocking and Other Forms of Discrimination seeks to ensure that consumers purchasing products and services in another EU Member State, be it online or in person, are not discriminated against in terms of access to prices or sales or payment conditions, unless a distinction is objectively justified for reasons such as the application of VAT or specific public interests. It further defines situations where customers cannot be denied access to products and services *solely* for reasons relating to nationality, place of residence or place of establishment.

Geo-blocking refers to discriminatory practices denying access to websites or products or services on websites because of a customer's nationality or country of residence. The Proposed Regulation on Geo-blocking and Other Forms of Discrimination prohibits "re-routing" (*i.e.*, the practice of redirecting customers to a country-specific version of a website) without the consumer's prior consent. However, the Regulation does not impose an obligation on companies to do business across the EU.

Proposed Regulation on Cross-border Parcel Delivery Services

The Proposed Regulation on Cross-border Parcel Delivery Services aims to increase price transparency and regulatory oversight of cross-border parcel delivery services so that consumers and retailers can benefit from affordable deliveries and convenient return options in cross-border parcel deliveries. According to the Commission, greater price transparency will foster competition.

Parcel delivery providers with 50 or more employees or active in more than one EU Member State would be required to send national postal regulators basic information about their operations (*e.g.*, name, address) and annual updates on volumes, turnover and number of employees. This additional obligation applies only to those parcel delivery providers that do not already submit similar information to national postal regulators.

There is no cap on delivery prices. Price regulation would only be a means of last resort, should competition not bring satisfactory results. The Commission will assess progress made in 2019 and then decide if further measures are necessary.

Proposed Regulation on Consumer Protection Cooperation

The Proposed Regulation on Consumer Protection Cooperation amends Regulation 2006/2004 of 27 October 2004 "*on cooperation between national authorities responsible for the enforcement of consumer protection laws*" so as to strengthen national authorities' powers to enforce consumer rights. For example, the Commission, in cooperation with national authorities, will be able to verify if websites geo-block consumers or offer after-sales conditions not respecting EU law (*e.g.*, the consumer's right to withdraw from a contract). Authorities will also be able to order the immediate take-down of websites hosting scams. Furthermore, authorities will be entitled to request information from domain registrars and banks to detect the identity of the responsible trader.

The Proposed Regulation on Consumer Protection Cooperation streamlines administrative systems for the enforcement of existing consumer laws and simplifies the business environment, especially in the EU's Digital Single Market. Companies operating in all or a large majority of EU Member States will benefit from a one-stop-shop approach. The Commission hopes that the possibility to negotiate commitments at EU level will make it simpler, faster and cheaper for companies to resolve consumer issues.

Lastly, the Commission also published updated guidance on the application of Directive 2005/29/EC "*concerning unfair business-to-consumer commercial practices in the internal market*" in the digital world.

Bill on Trust Services for Electronic Transactions Submitted to Chamber of Representatives

On 14 June 2016, the Council of Ministers submitted a Bill to the Chamber of Representatives which (i) implements and complements Regulation (EU) 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (the "eIDAS Regulation"); and (ii) supplements the eIDAS Regulation to create legal equivalence between electronic and non-electronic legal transactions (*Wetsontwerp van 14 juni 2016 tot uitvoering en aanvulling van de Verordening (EU) nr. 910/2014 van het Europees Parlement en de Raad van 23 juli 2014 betreffende de elektronische identificatie en vertrouwensdiensten voor elektronische transacties in de interne markt en tot intrekking van Richtlijn 1999/93/EG, houdende invoeging van titel 2 in boek XII "Recht van de elektronische economie" van het Wetboek van economisch recht, en houdende invoeging van de definities eigen aan titel 2 van boek XII en van de rechtshandhavingsbepalingen eigen aan titel 2 van boek XII, in de boeken I, XV en XVII van het Wetboek van economisch recht / Projet de loi du 14 juin 2016 mettant en œuvre et complétant le règlement (UE) n° 910/2014 du Parlement européen et du Conseil du 23 juillet 2014 sur l'identification électronique et les services de confiance pour les transactions électroniques au sein du marché intérieur et abrogeant la Directive 1999/93/CE, portant insertion du titre 2 dans le livre XII "Droit de l'économie électronique" du Code de droit économique et portant insertion des définitions propres au titre 2 du livre XII et des dispositions d'application de la loi propres au titre 2 du livre XII, dans les livres I, XV et XVII du Code de droit économique* – the "Bill").

The Bill aims to ensure legal equivalence of electronic and non-electronic legal transactions, by introducing rules into the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*) governing electronic archiving, electronic registered mail, electronic seals (companies), electronic signatures (natural persons), website authentication, trust service providers and electronic identification schemes. For an overview of the Bill's main novelties, we refer to the December 2015 edition of this Newsletter discussing the Draft Bill which was adopted by the Council of Ministers on 11 December 2015 (*See, this Newsletter, Volume 2015, No. 12, p. 4-5*).

As regards electronic archiving, the Bill provides that providers of electronic archiving services can either provide a "qualified service" (*gekwalificeerde dienst / service qualifié*) or a "non-qualified service" (*niet-gekwalificeerde dienst / service non qualifié*). Qualified services must satisfy all the requirements of the new Title 2 of the Code of Economic Law and Annex I to Book XII of that Code. Qualified services benefit from specific presumptions, including a presumption of conformity with any legal and regulatory obligations for

the archiving of documents and a presumption of integrity of the contents of the electronic document and the conformity between the original and the digital copy.

By contrast, non-qualified services do not comply with all the requirements of Title 2 of the Code of Economic Law and Annex I to Book XII of that Code and therefore do not enjoy the same presumptions. While such services may still be legally recognised and relied upon before the courts, the users of non-qualified services must provide evidence that these services meet all functional requirements to ensure their validity or probative value.

Following its adoption in Parliament, the Bill will be published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*). The new law is currently expected to enter into force in July 2016.

Court of Justice Holds that Flemish Language Decree Violates EU Law on Free Movement of Goods

On 21 June 2016, the Grand Chamber of the Court of Justice of the European Union (the "ECJ") handed down a judgment in response to a request for a preliminary ruling from the Ghent Commercial Court (the "Commercial Court") regarding the compatibility with European law of the Flemish Decree of 19 July 1973 on the use of languages in relations between employers and employees, as well as in company acts and documents required by law and by regulations (*Decreet van 19 juli 1973 tot regeling van het gebruik van de talen voor de sociale betrekkingen tussen de werkgevers en de werknemers, alsmede van de door de wet en de verordeningen voorgeschreven akten en bescheiden van de ondernemingen* – the "Decree") (ECJ, Case C-15/15, *New Valmar BVBA v. Global Pharmacies Partner Health Srl*).

In parallel with the Laws of 18 July 1966 on the use of languages in administrative matters (*Wetten van 18 juli 1966 op het gebruik van de talen in bestuurszaken / Lois du 18 juillet 1966 sur l'emploi des langues en matière administrative*), the Decree provides that legal persons having a place of business in Flanders must use Dutch for all "company acts and documents", such as cross-border invoices. Failure to use the prescribed language results in such documents being legally null and void.

The reference for a preliminary ruling was made in proceedings between New Valmar BVBA ("New Valmar"), a company established in Flanders, and Global Pharmacies Partner Health Srl ("GPPH"), an Italian company which had been acting as New Valmar's exclusive concession-holder in Italy. In accordance with the contract between the two parties, which was governed by Italian law, New Valmar had drafted its invoices to GPPH in Italian. After New Valmar had terminated the concession agreement prematurely, it brought an action before the Commercial Court seeking payment by GPPH of outstanding invoices. GPPH defended itself by (i) lodging a counterclaim to obtain compensation for the allegedly wrongful termination of the concession agreement; and (ii) contending that New Valmar's invoices were null and void on the ground that they were not in Dutch. While New Valmar conceded that its invoices violated the Decree, it claimed that the Flemish legislation is contrary to the EU rules governing the free movement of goods. The Commercial Court decided to stay the proceedings and refer a preliminary question to the ECJ.

Slightly reframing the originally referred question, the ECJ examined whether Article 35 of the Treaty on the Functioning of the European Union ("TFEU"), which prohibits measures having equivalent effect to quantitative restrictions on exports, must be interpreted as precluding language legislation such as the Decree in the case at hand.

In its judgment of 21 June 2016, the ECJ held that language legislation such as the Decree deprives traders of the possibility to choose freely a language for drawing up their invoices which they are both able to understand, thus increasing the risk of disputes as to the validity of invoices and the non-payment of invoices. The potential nullity would, moreover, result in loss of default interest for the issuer of the invoice, as the newly issued invoice in Dutch would not include the interest that would have accrued from the original null invoice. Furthermore, the ECJ considered that the impact of the Belgian legislation is not too indirect or uncertain to warrant preclusion by Article 35 TFEU. Invoices, it stated, are often the only concrete manifestation of contractual relations and language legislation such as the Decree in question are therefore likely to have an impact on those relations.

As for the presence of legitimate objectives in the public interest, the ECJ acknowledged two possible objectives justifying the language restriction, namely (i) the promotion of the use of one of the official languages of an EU Member State; and (ii) the need to protect the effectiveness of fiscal supervision. However, the ECJ found that the language legislation in the case at hand was not proportionate since an altered version of the Decree would be less prejudicial to the free movement of goods while retaining public interest goals. In its altered form, the Decree would require invoices to be drawn up in Dutch, but would permit the drawing-up of an additional authentic version of such invoices in a language known to both parties.

For these reasons, the ECJ concluded that in its current form the Decree constitutes a disproportionate restriction of the principle of free movement of goods laid down in Article 35 TFEU.

In the light of this judgment, the Flemish legislator will now have to review the Decree.

Publication of Law Allowing English Extracts from Central Commercial Register

On 21 June 2016, the Law of 6 June 2016 amending the Code of Economic Law as regards extracts from the Central Commercial Register was published in the Belgian Official Journal (*Wet van 6 juni 2016 tot wijziging van het Wetboek van Economisch Recht wat uittreksels uit de Kruispuntbank van Ondernemingen betreft / Loi modifiant le Code de droit économique, en ce qui concerne les extraits de la Banque-Carrefour des Entreprises* – the "Law").

The Law amends Article III.35 of the Code of Economic Law to enable companies to obtain extracts from the Central Commercial Register not only in one of Belgium's official languages, *i.e.*, in Dutch, French or German, but also in English. A company must ask specifically for the English extract. Contrary to the Bill which was submitted to the Chamber of Representatives (*See, this Newsletter, Volume 2016, No. 1, p. 3*), the Law no longer requires that the English extract must be attached to an extract in one of the official languages. English extracts can therefore be obtained independently from any extract in one of the official languages.

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| COMPETITION LAW

Belgian Competition Authority Fines Market Sharing Agreements Between SMEs in River Cruise Sector

On 27 May 2016, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la concurrence*) ("BCA") adopted a settlement decision against two SMEs active in the river cruise services sector, Group M and Group P (their full names were not disclosed to protect the anonymity of their owners).

The BCA had started its investigation following a leniency application filed in 2014 by two companies part of Group M (Les Sarcelles SPRL and Les Bateaux Mouche Belgique SPRL), and by an (unnamed) individual. After having received a request for information from the BCA in 2015, three companies of Group P (Dinant Evasion SA, Dinant Croisières SPRL and Compagnie des Bateaux de Dinant SPRL), as well as a further individual, also applied for leniency. All the parties later agreed to settle, which implies that they acknowledged the existence of the infringement of competition law and accepted to be fined in return for swift proceedings and a 10% fine reduction.

The BCA found that Group M and Group P had concluded two anticompetitive market-sharing agreements. The first agreement, in force from 18 December 1983 to 31 December 2013, provided for a systematic coordination on prices, hiring and remuneration of staff, maintenance works, advertisement and commercial and accountancy policy. This agreement also included the pooling and sharing of means of production and revenues. The second agreement, in force from 1 January 2014 to 31 December 2014, allocated the markets between the parties through provisions granting exclusive use of reaches and sharing boats.

Group M and the individuals were granted immunity from fines pursuant to their leniency applications. Although the BCA made it clear that the infringement is "by definition, a very serious restriction of competition", it imposed on Group P a fine of € 64,100 only. Seven factors led to this moderate level of fine.

First, for the calculation of the fine, the duration of the infringement was limited to the period from 2007 to 2014. The BCA considered that, although the first anticompetitive agreement was effective from 1983, it was only in October 2006 that Belgian law made it possible to prosecute and sanction SMEs for competition law infringements. As a result, the BCA did not take into account the period prior to 2006. In addition, since the tourist season for river cruises only lasts from April to October, the BCA did not include 2006 in its calculation of the duration of the infringement.

Second, the gravity factor was limited to 15% on account of the "limited geographic scope" of the agreements (the upper section of the river Meuse and the navigable part of the river Lesse).

Third, the BCA limited the increase for deterrence to the minimum amount (15%).

Fourth, Group P's fine was capped in order not to exceed the 10% statutory ceiling set out in Article IV.74 of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*).

Fifth, the fine was then reduced by 45% as the BCA accepted Group P's leniency application and considered that Group P applied for leniency early in the process and provided additional explanations on the anticompetitive behaviour.

Sixth, Group P's fine was further reduced by an undisclosed percentage on account of proportionality. Interestingly, the BCA considered that the calculated amount of the fine was disproportionate "since these undertakings are SMEs and do not belong to a large group". Lastly, Group P's fine was reduced by 10% as it agreed to settle the case.

As the BCA adopted its decision following the settlement procedure, it cannot be appealed.

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Belgian Competition Authority Publishes 2015 Annual Report

On 24 June 2016, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la concurrence*) ("BCA") published its annual report for the year 2015.

The annual report summarises the BCA's activity over the last year with respect to antitrust enforcement, merger control, *amicus curiae* interventions as well as informal policy opinions and advocacy actions. Interestingly, the report mentions that, further to the Notice on informal opinions published in January 2015 (*See, this Newsletter, Volume 2015, No. 1, p. 3*), the President of the BCA treated no less than eight issues informally, mainly in the agricultural sector.

The President of the BCA notably provided guidance on the application of competition law rules to a draft agreement granting allowances to farmers in order to alleviate the effects of the crisis in the dairy products sector. A similar emergency plan was also considered in view of the crisis affecting the hog farming sector. The President of the BCA gave specific guidance for this emergency plan, as he considered that the crisis affecting hog farming was different from the dairy products crisis. The President considered that his opinion regarding dairy products could not apply as such to hog farming.

The President of the BCA also provided an informal opinion on whether the retail sector is allowed to share pricing information in the context of negotiations with the agricultural food chain. The President indicated that the transmission of individualised information on recent prices could create competition law concerns.

Finally, the President of the BCA provided informal guidance on the functioning of iChoosr, a platform for the collective purchase of gas and electricity in the residential sector.

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| CORPORATE LAW

Maximum Term Statutory Auditor of Public-Interest Entities

On 16 June 2016, the federal Chamber of Representatives adopted a proposed bill containing miscellaneous provisions in economic matters (*Wetsontwerp houdende diverse bepalingen inzake economie / Projet de loi portant dispositions diverses en matière d'économie*; the "Bill") which amends a series of statutes, including the Belgian Companies Code (*Wetboek van vennootschappen / Code des sociétés*; the "BCC").

The Bill introduces a new chapter I/1 in the BCC dealing with the maximum term of the mandate of the statutory auditor (*commissaris / commissaire*) for public interest entities (*organisatie van openbaar belang / entité d'intérêt public*). This category includes listed entities, credit institutions and insurance firms. The statutory auditor is currently appointed for a renewable term of three years. In accordance with EU Regulation No. 537/2014 of 16 April 2014 on specific requirements regarding the statutory audit of public interest entities, the hiring of the statutory auditor of public interest entities should be limited to 3 consecutive terms with a maximum of 9 years in total.

However, the public interest entity may derogate from this maximum and decide to renew the mandate of the statutory auditor in the following cases:

› if a single auditor was appointed, maximum 3 additional mandates are allowed (which gives rise to a maximum of 18 years in total). In that case the entity has to launch a public tendering process when deciding to renew the statutory auditor's mandate;

› if there is a board of auditors, maximum 5 additional mandates are allowed (which gives rise to a maximum of 24 years in total).

The Bill will turn these possibilities into law.

Constitutional Court Rules on Creditors' Guarantees in Case of Capital Reorganisations

On 9 June 2016, the Constitutional Court ruled on the constitutionality of the Law of 22 November 2013 (*Wet van 22 november 2013 tot wijziging van het Wetboek van vennootschappen, wat de waarborgen van de schuldeisers bij een kapitaalherschikking betreft / Loi du 22 novembre 2013 modifiant le Code des Sociétés, concernant les garanties des créanciers en cas de réorganisation du capital*; the "Law"; *See, this Newsletter, Volume 2013, No. 12, p. 4*) amending Articles 613, 684 and 766 of the Belgian Companies Code (*Wetboek van vennootschappen / Code des sociétés*; the "BCC") relating to creditors' guarantees in case of capital reorganisation.

In the case of a capital reorganisation (e.g. capital decrease, merger, de-merger or contribution of a branch of activities or universality), the Law explicitly provides for the right to obtain security for claims against a public limited liability company (*naamloze vennootschap / société anonyme*; an "NV/SA") in case these claims were disputed in court or in arbitral proceedings before the date on which the general assembly took a decision on the capital reorganisation. However, this possibility (*i.e.*, the explicit inclusion for disputed claims) is unavailable for claims against a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid / société à responsabilité limitée*; a "BVBA/SPRL").

In its judgment, the Constitutional Court held that the fact that specific rules apply to different company forms does not rule out a comparison of the creditors' situation in case of a capital reorganisation of such different companies. The Constitutional Court considered that the situations may be comparable in the light of the principles of equality and non-discrimination.

The Law only broadened the scope of protection for the creditors in case of a capital reorganisation in an NV/SA and limited partnerships (*commanditaire vennootschappen / sociétés en commandite*). Based on the consideration that prior to the implementation of the Law the creditors of an NV/SA and a BVBA/SPRL enjoyed equal protection, the

Constitutional Court held that there is no reasonable explanation for the fact that the new and broader protection only applies to the NV/SA and not the BVBA/SPRL. The Constitutional Court confirmed that the rights of both sets of creditors may be threatened by such a rearrangement since their security will decrease and the chances of repayment may be in jeopardy. Taking into account the legislator's stated aim to protect creditors generally, the Constitutional Court held that the different treatment is not based on objective criteria.

As a result, the Constitutional Court held that there is a violation of Articles 10 and 11 of the Constitution, in that the creditors of an BVBA/SPRL (as referred to under Article 317, first indent BCC) were not given the right to obtain a guarantee for their claims in case these claims are disputed in court or arbitration proceedings prior to the general assembly that will decide on the capital reorganisation.

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DATA PROTECTION

EU and US Sign Data Protection Umbrella Agreement

On 2 June 2016, the European Union and the United States signed the so-called Data Protection Umbrella Agreement (the "Agreement") which puts in place a comprehensive set of data protection safeguards that will apply to all transatlantic exchanges between the relevant authorities in the area of criminal law enforcement.

Negotiations on this Agreement were initialled by both parties on 8 September 2015. However, the actual signing of the Agreement was conditional upon the adoption of the Judicial Redress Act by the U.S. Congress to provide, for the first time, equal treatment of EU citizens with US citizens under the 1974 U.S. Privacy Act.

The Agreement aims to facilitate criminal law enforcement cooperation while, at the same time, providing for safeguards and guarantees of lawfulness for data transfers. The Agreement contains the following types of protection for citizens' data when exchanged between police and criminal justice authorities:

› *Clear limitations on data use*: personal data may only be exchanged for the purpose of preventing, investigating, detecting or prosecuting criminal offences, and must not be processed further for other, incompatible purposes.

› *Onward transfer*: any onward transfer to a non-US, non-EU country or to an international organisation must be subject to the prior consent of the competent authority of the country which had originally transferred personal data.

› *Retention periods*: individuals' personal data must not be retained for longer than necessary or appropriate. These retention periods will have to be published or otherwise made publicly available. The decision on what is an acceptable duration must take into account the impact on people's rights and interests.

› *Right to access and rectification*: subject to specific conditions, any individual will be entitled to access their personal data and request for the data to be corrected if inaccurate.

› *Information in case of data security breaches*: a mechanism will be put in place to ensure the notification of data security breaches to the competent authority and, where appropriate, the data subject.

› *Judicial redress and enforceability of rights*: EU citizens will have the right to enforce data protection rights in U.S. courts, regardless of whether they reside in the U.S.

The Agreement does not in itself authorise data transfers, nor does it constitute an adequacy decision. Rather, it supplements, where necessary, data protection safeguards in existing and future EU-US and member state-US data transfer agreements or national provisions authorising such transfers.

The decision sanctioning the Agreement will be adopted by the Council after obtaining the consent of the European Parliament.

New Secretary of State Presents Privacy Policy for Upcoming Year

On 2 June 2016, the Belgian Secretary of State responsible for privacy matters, Philippe De Backer (the "Secretary of State"), presented a policy note which sets out his plans in the area of privacy / data protection (the "Note"). Mr. De Backer replaces Bart Tommelein as Secretary of State after the latter was appointed to become Minister of Budget, Finance and Energy in the Flemish government. The Note builds on the policy note presented by Bart Tommelein in 2015 (*See, this Newsletter, Volume 2015, No. 11, p. 9*).

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

Reform of Belgian Data Protection Rules

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

In order to achieve the objectives of transparency and accountability set forth in the GDPR, the Secretary of State intends to take concrete initiatives such as the creation of a 'passport for privacy'. The aim of such a passport would be to enable citizens to know in which databases their data is stored and how their data is being processed.

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

Personal Data and Public Security

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

Personal Data Held by Public Authorities

Third, as regards personal data held by public authorities, the Note underlines that transparency towards citizens concerning the use of their data by public authorities will be a policy priority in the upcoming year. An emphasis will be put on the anonymisation of data and the granting of authorisations by the Privacy Commission. While reforming the latter, the Secretary of State will examine the possibility of moving from the current *ad hoc* approach requiring, for each application, an authorisation from the competent sectorial committee of the Privacy Commission, to a more systematic approach.

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

Open Data and Big Data

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

By way of example, the Note indicates that public data in the health care field could contribute to pharmaceutical innovations, whilst private R&D data could bolster healthcare and prevention policies. Again, the Secretary of State will try and exploit these opportunities while ensuring a high level of data protection. This should be achieved through the use of anonymised data and by "privacy by design" which refers to the integration of privacy safeguards into software systems and organisational structures during their development.

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

New Media

Fifth, the Note mentions that the involvement of today's youth in digital media and their active participation in the information society is an opportunity to hold a discussion on privacy at several levels. One key question is how to maximise the potential and benefits of technological developments, both for the individual and for governments and

enterprises. At the same time, the risks of abuse should be minimised. The case-law of the European Court of Human Rights and the Court of Justice of the EU must offer guidance.

Security of Personal Data

Finally, as previously announced, in order to increase the security of personal data, a Bill on preventive and protective measures against data breaches will be introduced in 2016. The Secretary of State also intends to consult stakeholders on the possibilities of creating a certification mechanism for data protection compliance. Such a certificate is promoted under the GDPR as a means to demonstrate that a specific company has implemented, and complies with, specified privacy practices.

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

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

Belgian Privacy Commission Publishes its Annual Report for 2015

On 9 June 2016, the Belgian Privacy Commission (*Commissie voor de bescherming van de persoonlijke levenssfeer / Commission de la protection de la vie privée*) (the "Privacy Commission") published its annual activity report for the year 2015.

In its report, the Privacy Commission highlights specific numbers and statistics and summarises the most important cases and projects which it handled in 2015.

Facebook

Among the highlights of 2015 were the measures taken by the Privacy Commission regarding Facebook's use of personal data. The analysis of Facebook's terms of use early 2015 resulted in a hearing and a recommendation (No. 04/2015) for Facebook, for websites using Facebook plugins and for Internet users in general regarding the use of social plug-ins (such as "Like" and "Share" buttons)(*See, this Newsletter, Volume 2015, No. 5, p.8*).

In May 2015, the Facebook group was put on notice for violation of the Belgian Law of 8 December 1992 on the protection of privacy in relation to the processing of personal data (*Wet voor de bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens / Loi relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel*) and Article 129 of the Law of 13 June 2005 on electronic communications (*Wet betreffende de elektronische communicatie / Loi relative aux communications électroniques*). Failing a sufficient response, the Privacy Commission initiated summary proceedings resulting in an order imposed on Facebook to cease these violations (*See, this Newsletter, Volume 2015, No 11, p. 11*). In particular, the President of the Brussels Court of First Instance sided with the Privacy Commission and ordered Facebook to stop tracking, through cookies and social plug-ins, non-users of Facebook in Belgium. Following this judgment, Facebook decided to block access to its public pages to Belgian residents who are not members of the social network.

Important files and projects of 2015

In its report, the Privacy Commission identifies the following main files/projects of 2015:

› *Cookies:* Following the growing importance of cookies and the number of questions addressed to the Privacy Commission in this respect, the Privacy Commission issued a formal recommendation on the use of cookies (Recommendation 1/2015 of 4 February 2015).

› *Drones*: The Privacy Commission advised the Belgian government on its draft drones rules which entered into force on 25 April 2016.

› *Anti-terrorism*: The Privacy Commission advised the Belgian government on draft legislation relating to the processing of passenger data, the adoption of a common database for foreign terrorist fighters, and on the identification of users of prepaid cards.

› *Privacy in the workplace*: Following the increasing number of questions relating to the right to privacy in the workplace, the Privacy Commission published a thematic file on this topic. This file aims to provide answers to questions posed by both employees and employers regarding the manner in which personal data should be processed

in the workplace. It focuses on topics such as geo-localisation in company cars, whistleblowing, surveillance cameras, and monitoring of employee's email account and use of Internet.

› *Data breaches:* Under the present rules, notifying data breaches is only required in the telecommunications sector. However, the Privacy Commission issued a recommendation for all breaches of personal data to be notified to it. The report explains that the Privacy Commission only received a small number of such voluntary notifications. The breaches that were reported resulted from technical or human errors, fraud by authorised users, loss of PCs or storage media and external hacking.

Numbers and statistics

In 2015, the Privacy Commission handled 4,192 files of information, mediation and control (increase of 366 files compared to 2014). 3,561 requests for information were submitted to the Privacy Commission (an increase of 10.6% compared to 2014). Most requests for information concerned surveillance cameras, privacy in the workplace, the right to a person's image, direct marketing and Internet. In total, 6,240 video-camera surveillance notifications were filed (an increase of 886 compared to 2014).

The Privacy Commission explains this significant rise in numbers by an increased awareness of citizens of their own rights and potential risks related to the processing of personal data. The Privacy Commission's increased visibility through its interventions in the media and in public debates also contributed to this rise in numbers.

Dutch and French versions of the annual report published by the Privacy Commission can be found **here** (Dutch) and **here** (French).

Advocate General Issues Opinion on Applicable Data Protection Law

On 2 June 2016, the Advocate General of the Court of Justice of the European Union (the "ECJ") issued an opinion on the applicability of national data protection laws in *Verein für Konsumenteninformation v. Amazon EU Sàrl* (Case C-191/15) (the "Opinion").

Verein für Konsumenteninformation, a consumer protection association established in Austria, brought an action before the Austrian courts seeking an injunction to prohibit the use by Amazon EU Sàrl ("Amazon EU"), an e-commerce company based in Luxembourg, of allegedly unfair terms in its general conditions of sale for its dealing with consumers residing in Austria. One of the clauses provided that in various cases, including payment on invoice, Amazon.de could verify and evaluate the personal data of customers and exchange such data with other companies within the Amazon group, with the office of economic information and, where appropriate, with the company Bürgel Wirtschaftsinformationen GmbH.

The Austrian Supreme Court referred to the ECJ a question on the interpretation of Article 4 (1)(a) of Directive 95/46 of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("the Directive") which provides that:

"*1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:*

(a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;"

The Austrian Supreme Court sought to clarify which national law transposing the Directive should apply to the processing of personal data by an undertaking which concluded contracts with consumers residing in other Member States. The Austrian Supreme Court asked specifically whether the processing of personal data should be governed exclusively by the law of the Member State in whose territory the undertaking processing the data has its establishment, or whether such a firm would also be required to comply with the data protection rules adopted by the Member States to which it directs its business activity.

The Opinion starts by clarifying that Article 4(1)(a) of the Directive must be interpreted as meaning that a personal data processing operation may only be governed by the law

of a single Member State. The Member State whose law should apply is the Member State in which the controller has its establishment within the meaning given in the *Weltimmo* case (C-230/14) (*See, this Newsletter, Volume 2015, No. 11, p. 10*). This is an establishment where a controller exercises a "*real and effective activity through stable arrangements*", in the context of the activities of which the data processing is carried out.

The Opinion notes that the fact that Amazon does business through its website in German does not in itself determine the existence of an establishment in Austria. The mere offer of post-sale services to customers in Austria is equally not decisive.

Moreover, the Advocate General does not support the broad interpretation of establishment adopted in the Google Spain case (C-131/12) (*See, this Newsletter, Volume 2014, No. 5, p. 6*). In that case, the ECJ considered that the activities of the operator of a search engine based in the United States and the activities of promotion and provision of an advertising space in its establishment in Spain were "inextricably linked". It concluded that the Spanish entity was a relevant establishment, as a result of which Spanish data protection law applied. The Advocate General is of the opinion that the *Google Spain* case must be distinguished from the present case. At issue in *Google Spain* was the question whether EU law would apply at all to the processing. By contrast, *Amazon* seeks to establish whether more than one national implementing law may apply cumulatively to the same processing operation.

The Opinion further suggests that the data processing operations provided for in the contractual clauses at hand could be linked to the activities of a potential establishment of Amazon EU in Germany, because Amazon EU creates through a website with a German domain name "www.amazon.de" relations with Austrian customers. Moreover, clause 6 of the general conditions of Amazon EU states that "Amazon.de" verifies, evaluates and exchanges - that is to say processes – customer's personal data. In light of these considerations, the applicability of a single national law, German law, could be considered.

Despite these considerations, it will be for the national court to make a factual assessment on whether Amazon has an establishment in Germany or in Austria.

It remains to be seen whether the ECJ will follow the Advocate General's Opinion.

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| INSOLVENCY

Inter-Institutional Recommendation on Role of External Auditors under Law on Continuity of Enterprises

On 8 June 2016, the approved Inter-Institutional Recommendation containing guidance in relation to the tasks and role of external recognised bookkeepers, accountants, tax consultants and statutory auditors (together "External Accountants") under the Law on the Continuity of Enterprises (*Wet van 31 januari 2009 betreffende de continuïteit van de ondernemingen / Loi du 31 janvier 2009 relative à la continuité des entreprises*; the "LCE") was published in the Belgian Official Journal (*Interinstitutenaanbeveling inzake de opdrachten voor de bedrijfsrevisor, de externe accountant, de externe belastingconsulent, de externe erkende boekhouder of de externe erkende boekhouder-fiscalist in het kader van artikel 10, vijfde lid, artikel 12, § 1, vijfde lid, en artikel 17, § 2, 5° en 6°, van de wet van 31 januari 2009 betreffende de continuïteit van de ondernemingen / Recommandation interinstituts concernant les missions qui incombent au réviseur d'entreprises, à l'expert-comptable externe, au conseil fiscal externe, au comptable agréé externe ou au comptable-fiscaliste agréé externe dans le cadre de l'article 10, alinéa 5, de l'article 12, § 1er, alinéa 5, et de l'article 17, § 2, 5° et 6°, de la loi du 31 janvier 2009 relative à la continuité des entreprises*; the "Inter-Institutional Recommendation").

The Inter-Institutional Recommendation was adopted jointly by the three relevant professional associations: (i) the Institute of Auditors (*Instituut van de Bedrijfsrevisoren / Insitute des Réviseurs d'Entreprises*); (ii) the Institute of Accountants and Tax Consultants (*Instituut van de Accountants en de Belastingsconsulenten / Institut des Experts-comptables et des Conseils fiscaux*); and (iii) the Professional Institute of Recognised Bookkeepers and Tax Specialists (*Beroepsinstituut van Erkende Boekhouders en Fiscalisten / Institut Professionnel des Comptables et Fiscalistes Agréés*).

The role of the External Accountants under the LCE is threefold.

› Pursuant to Article 10, Section 5 of the LCE, the External Accountant is obliged to inform the board of directors, and, if the board does not take appropriate measures within one month of such notice, the competent commercial court, of any facts which may jeopardise the continuity of the company.

› Further, the commercial court may, in accordance with Article 12, §1, Section 5 of the LCE, obtain information from the External Accountant on the recommendations made to the board of directors of the company and the measures taken to guarantee the company's continuity.

› Finally, the External Accountant assists a company requesting judicial reorganisation in relation to the preparation of the statement of assets and liabilities, the profit and loss statement and the financial plan for the period of the reorganisation (Article 17, §2, 5° and 6° of the LCE).

The Inter-Institutional Recommendation provides guidance to External Accountants on how to interpret and perform their various tasks and responsibilities under the LCE. It contains, for instance, recommendations on how to recognise facts and behaviour suggesting jeopardy to the continuity of the company and which information may be provided to the commercial court upon its request. Further, it provides a list of elements to which the External Accountant must pay particular attention to ensure the objectivity of the financial information to be provided by the company when requesting a judicial reorganisation.

The full text of the Inter-Institutional Recommendation is available on the website of the Institute of Auditors in **Dutch** and **French**.

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| INTELLECTUAL PROPERTY

ECJ Clarifies Concept of Communication to Public

On 31 May 2016, the Court of Justice of the European Union (the "ECJ") gave what is already considered to be a landmark decision in the area of communication to the public in case C-117/15 *Reha Training v. GEMA*. Being asked to give yet another preliminary ruling on whether the making available of TV broadcasts should be regarded as an act of communication to the public, the ECJ, deciding as a Grand Chamber, took the opportunity to provide much needed clarity to its previous case law.

The ECJ affirmed in the first place that, given the requirements of unity and coherence in the EU legal order, the concepts used in the legislation must always have the same meaning, unless explicitly provided otherwise. The ECJ confirmed that this applies to the concept of "communication to the public" appearing in the Directive of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the "InfoSoc Directive") and in the Directive 2006/115 of 12 December 2006 on rental rights and lending rights and on certain rights related to copyright in the field of intellectual property.

In the second place, the ECJ recalled that the concept of communication to the public combines two cumulative elements: (i) an act of communication; which is (ii) directed to the public.

The first criterion refers to any transmission of protected works, irrespective of the technical means or process used.

The second criterion requires that the protected works be communicated to a new public.

The ECJ then referred to the SGAE and SCF cases (*See, this Newsletter, Volume 2006, No. 12, pp. 6 and 7 and Volume 2012, No. 3, pp. 5 and 6*), and noted that the term "public" encompasses a certain *de minimis* threshold as it refers to an indeterminate number of potential recipients and implies a fairly large number of persons. The ECJ also observed that this public must not be restricted to specific individuals belonging to a private group but should encompass "persons in general".

Relying on the *SGAE* and *Premier League* cases (*See, this Newsletter, Volume 2006, No. 12, pp. 6 and 7 and Volume 2011, No. 10, pp. 6 to 8*), the ECJ added that the protected works must be transmitted to a "new" public, that is to say an audience which was not taken into account by the right holders when they authorised the initial communication of the works.

In that context, the ECJ emphasised the role of the initial user whose intervention must be vital or indispensable to the making available of protected works. For example, in *Svensson* (*See, this Newsletter, Volume 2014, No. 2, p. 6*), the ECJ had held that it was not sufficient that a hyperlink facilitated or simplified users' access to the works in question to qualify as communication to the public. It is likely that the ECJ will confirm this reasoning in the GS Media case currently pending before it (*See, this Newsletter, Volume 2016, No. 4, pp. 12 and 13*).

The ECJ also recalled that the initial user must provide the access to the protected works in full knowledge of the consequences of its actions. In the *SGAE* and *Premier League* cases, the ECJ had found that operators of a café-restaurant or of a hotel establishment were such users making a communication to the public given that the recipients were not merely caught by chance as in the *Phonographic Performance* case (*i.e.* music played in a dental practice) but were targeted by the operators (*See, this Newsletter, Volume 2006, No. 12, pp. 6 and 7*).

However, this time, the ECJ did not make any reference to the technical means used to retransmit the protected works to assess whether the communication was made to a "new public". This means that, contrary to what the ECJ had previously stated in *TVCatchup* (*See, this Newsletter, Volume 2013, No. 3, pp. 11 and 12*), it is irrelevant in this respect whether the works are transmitted through identical or different technical means.

The ECJ also considered whether the possible profit from the use of protected works has a bearing on its qualification as a "communication to the public". The ECJ explained that the profit-making nature criterion is relevant for the purpose of determining the remuneration due in respect of the

communication to the public but does not determine conclusively whether there is an act of communication to the public. In this regard, the ECJ noted that the "receptivity" of the audience is relevant. The communication to the public will have a profit-making nature if the attractiveness of the protected works transmitted is likely to draw a greater number of clients to the establishment, and therefore, provide an economic benefit to the initial user.

Finally, the ECJ applied the above principles to the case at hand. It held that Reha Training, a rehabilitation centre, intentionally broadcast protected works in its waiting and training rooms and therefore carried out an act of communication. It then stated that the patients of the centre were a large enough group of "persons in general" who would not have enjoyed the works broadcast without the intervention of the centre. As a consequence, they constitute a new public. The ECJ then held that, because the works broadcast created a diversion for the patients, they had an impact on the establishment's standing and attractiveness. The ECJ therefore concluded that the broadcasting of these protected works by the rehabilitation centre had a profit-making nature.

Trade Secrets Directive Published in Official Journal

On 15 June 2016, Directive 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure was published in the Official Journal (the "Trade Secrets Directive") (*See, this Newsletter, Volume 2016, No. 5, pp. 10 and 11*).

The Trade Secrets Directive will come into force on 5 July 2016 and EU Member States will have a maximum of two years to incorporate its provisions into domestic law.

To read the Directive, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0943&from=EN

Freedom of Panorama Introduced in Belgian Law

On 16 June 2016, the federal Chamber of Representatives adopted a bill introducing a new exception to the protection afforded by copyright and related rights. It is contained in Article XI.190 of the Code of Economic Law and is referred to as the freedom of panorama. This exception, which already exists in a range of European countries, allows the reproduction and the communication to the public of works of plastic, graphic or architectural art designed to be placed on a permanent basis in public places. For the exception to apply, the work should be reproduced or communicated as it is found. Moreover, the reproduction or communication should not diminish the "normal exploitation of the work" and should not cause unreasonable harm to the legitimate interests of the author.

The bill will become law and will be published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*). It will enter into force 10 days after its publication.

Simplification of Patent Applications

On 16 June 2016, the federal Chamber of Representatives adopted a Bill containing miscellaneous provisions in economic matters (the "Bill") which, inter alia, abolishes the possibility of filing an application for a European patent with the Belgian Office for Intellectual Property (*Belgische Dienst voor de Intellectuele Eigendom / Office belge de la Propriété Intellectuelle*). This means that all applications for a European patent will now have to be submitted directly to the European Patent Office. The expected result is a faster processing of applications for European patents and an exclusive allocation of Belgian officers to applications for Belgian patents and supplementary protection certificates. Only applications for European patents for inventions that may be of interest to Belgian defence or safety will still have to be filed with the Belgian Office for Intellectual Property.

The Bill also incorporates into Belgian law the Agreement on the application of Article 65 of the Convention of the Grant of European Patents of 17 October 2000 (the "London Agreement"). The London Agreement is an optional agreement aiming at reducing the costs relating to the translation of European patents. By abolishing the translation requirements, the Bill makes applying for a European patent less onerous, which is particularly beneficial to small and medium-sized enterprises.

Fallout from Reprobel Case

On 12 November 2015, the Court of Justice of the European Union ("ECJ") held that Belgium's system of fair compensation for copiers infringes Articles 5(2)(a) and 5(2)(b) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the "InfoSoc Directive") (Case C-572/13, *Hewlett-Packard v. Reprobel*) (*See, this Newsletter, Volume 2015, No. 11, pp. 13 and 14*).

As a consequence, the Belgian legislator is now contemplating how to revise the system of fair compensation. The main changes under review are the following: (i) the removal of the lump-sum remuneration; (ii) the extension of the private copying exception to any reproduction within the family circle; (iii) no compensation for reproductions from unlawful sources; (iv) specific compensation for publishers without prejudice to authors' fair compensation; and (v) a single compensation for all exceptions and limitations to copyright and related rights.

The above changes gave rise to discussions in the federal Chamber of Representatives (*Belgische Kamer van volksvertegenwoordigers / Chambre des représentants de Belgique*) on 15 June 2016. Many members of Parliament fear that the removal of the lump-sum remuneration will considerably reduce the fair compensation that authors receive.

Further talks should take place in September 2016.

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| LABOUR LAW

E-Commerce in Distribution Sector: Possibility of Night Work

In Belgium as elsewhere consumers increasingly purchase products online. Despite this development, Belgian companies have not benefited from the rise of the e-commerce market and hardly conduct any e-commerce activities. The biggest sticking point appears to have been the prohibition of night work which precludes orders placed during the afternoon or at night from being delivered the following day.

This prohibition had its full effect in the distribution sector. An employer could only employ employees at night if he was able to rely on one of the statutory exceptions to the prohibition of night work, namely:

› *The exception for specific activities or particular types of work*. This exception did not exist for distribution activities.

› *The exception provided for by the "regime of high flexibility" (regime van grote flexibiliteit / régime de grande flexibilité)*. Joint Committees 201, 311 and 312 did not apply for the establishment of such a system and, as a result, employers in the distribution sector could not avail themselves of this exception.

› *The exception provided by Royal Decree or for a particular type of work*. There was no such Royal Decree for the distribution sector.

To remedy this situation, the Belgian government and the social stakeholders of the distribution sector decided to provide for the possibility of night work for distribution activities. They agreed on a text which was introduced by a Royal Decree of 16 March 2016 accepting night work for the performance of all activities related to electronic commerce in companies falling under the jurisdiction of Joint Committees ("JCs") 201 (independent retailing), 202 (retailing in foodstuffs), 201.01 (middle-sized food business), 311 (large retail establishments) and 312 (warehouses) (*Koninklijk Besluit van 13 maart 2016 waarbij nachtarbeid wordt toegestaan voor het uitvoeren van alle werkzaamheden verbonden aan de elektronische handel / Arrêté royal du 13 mars 2016 autorisant le travail de nuit pour l'exécution de toutes les activités liées au commerce électronique*) and Collective bargaining agreements ("CBAs") of 14 January 2016 on the introduction of night work for e-commerce activities, concluded in the JCs 201 (independent retailing), 202 (retailing in foodstuffs), 201.01 (middle-sized food business), 311 (large retail establishments) and 312 (warehouses) (*Collectieve arbeidsovereenkomst van 14 januari 2016 betreffende het invoeren van nachtarbeid voor e-commerce activiteiten / Convention collective de travail du 14 janvier 2016 relative à l'introduction de travail de nuit pour des activités e-commerce*).

The Royal Decree of 13 March 2016 creates an exception for employees employed in companies within the distribution sector (JCs 201, 202, 311, 312) for the performance of all activities related to electronic commerce, insofar as this is justified by the nature of the services or activities. The burden of proof falls on the employer.

In addition, employers in the distribution sector (JCs 201, 202, 311, 312) are, subject to procedural conditions, now authorised to introduce a system for employees to work at night. The type of procedure which must be observed depends on the timetable which the employer seeks to use. A distinction is made between two different concepts: "night work" (*nachtarbeid / travail de nuit*) for work performed between 8 pm and 6 am and "work regulation with night performances" (*arbeidsregeling met nachtprestaties / régime de travail comportant des prestations de nuit*) for work performed between midnight and 5 am.

If the employer wishes to introduce a work schedule that includes night work, the work schedule must be included in the work rules using the normal modification procedure as provided for in the Law of 8 April 1965 on work rules (*Wet van 8 april 1965 tot instelling van de arbeidsreglementen / Loi du 8 avril 1965 instituant les règlements de travail*).

If the work is performed between midnight and 5 am, a so-called "work regulation with night performances" and a stricter legal procedure, set out in Article 38 of the Labour Law of 16 March 1971 (*Arbeidswet van 16 maart 1971 / Loi du 16 mars 1971 sur le travail*) and the CBAs of 14 January 2016, should be followed.

Belgian Council of Ministers Adopts Draft Bill concerning Abolition of 48-hour Rule and Use of Electronic Employment Contracts in Temporary Employment Sector

The current Law of 24 July 1987 on temporary work, temporary employment and the posting of workers for the benefit of users (*Wet van 24 juli 1987 betreffende de tijdelijke arbeid, de uitzendarbeid en het ter beschikking stellen van werknemers ten behoeve van gebruikers / Loi du 24 juillet 1987 sur le travail temporaire, le travail intérimaire et la mise de travailleurs à la disposition d'utilisateurs*) provides that an employment contract for temporary agency work must be signed within 2 working days from the date on which the temporary agency worker enters into service.

The Council of Ministers adopted a Draft Bill to amend Article 8 of the Law of 24 July 1987 and abolish the 48 hour-rule. The Draft Bill will also allow the use of electronic employment contracts for temporary agency work (*Voorontwerp van wet tot wijziging van artikel 8 van de wet van 24 juli 1987 betreffende de tijdelijke arbeid, de uitzendarbeid en het ter beschikking stellen van werknemers ten behoeve van gebruikers, met het oog op de afschaffing van de 48-urenregel en de verruiming van de mogelijkheid om een beroep te doen op elektronische arbeidsovereenkomsten voor uitzendarbeid / Avant-projet de loi modifiant l'article 8 de la loi du 24 juillet 1987 sur le travail temporaire, le travail intérimaire et la mise de travailleurs à la disposition d'utilisateurs, aux fins de supprimer la règle des 48 heures et d'élargir la possibilité de recourir à des contrats de travail intérimaire électroniques*).

If the Draft Bill is enacted into law, an employment contract for temporary agency work will have to be signed before the work starts.

While the text of the Draft Bill is not yet publicly available, it is expected to regulate the terms of the temporary employment as follows:

› An electronic notification to determine the start of the temporary agency work through: (i) Dimona Mobile (which would allow the employer to declare the employees to Social Security Services via smartphone); and (ii) the proposed interim@work (which would allow the temporary agency worker to check online which Dimona notifications were made for that worker);

› An electronic employment contract that should: (i) be signed via electronic ID or other forms of electronic signature that satisfy the necessary security measures; and (ii) have the same significance and evidentiary value as a written employment contract.

The Draft Bill will be submitted to the Council of State for advice. The Council of Minister's press release indicates that the Draft Bill is expected to enter into force on 1 October 2016.

Extension of Economic Unemployment for White-Collar Employees

Belgian employers benefit since 2 June 2016 from greater flexibility to seek temporary unemployment for their employees. In particular, the Minister of Employment can now recognise a "company in difficulty" (*onderneming in moeilijkheden / entreprise en difficulté*) on the basis of unforeseen circumstances which resulted in a substantial decline in the sales, production or the number of orders received within a short term.

Currently, companies in difficulty can fully suspend the employment contracts of white-collar employees for a maximum of 16 weeks or partially for 26 weeks (at least 2 working days per week) or can use a combination of both.

During such a period of economic unemployment, the employer must pay additional compensation (between 5 EUR and 12 EUR) above the unemployment allowance for each day of unemployment. This amount is exempted from social security contributions, but is subject to tax.

In order to benefit from the system of economic unemployment, an employer has to prove that the company is "in difficulty". To date, under Article 77/1 of the Law of 3 July 1978 concerning employment contracts (*Wet van 3 juli 1978 betreffende de arbeidsovereenkomsten / Loi du 3 juillet 1978 relative aux contrats de travail*) (as amended), the employer needed to demonstrate the existence of one of the following three alternative situations:

› a substantial reduction of at least 10% of turnover or production in any of the four quarters prior to the commencement of economic unemployment, compared to the same quarter of 2008, or one of the two calendar years preceding the commencement;

› a substantial reduction of at least 10% of orders in any of the four quarters prior to the commencement of economic unemployment, compared to the same quarter of 2008, or one of the two calendar years preceding the commencement; or

› a frequent recourse to temporary unemployment for economic reasons of blue-collar employees.

Under the Law of 16 May 2016 containing various provisions in social affairs (*Wet van 16 mei 2016 houdende diverse bepalingen inzake sociale zaken / Loi du 16 mai 2016 portant des dispositions diverses en matière sociale*), a fourth alternative situation is now available. This allows the Minister of Employment to recognise a firm as a company in difficulty if there is a substantial decline in the sales, production or the number of orders received within a short term due to unforeseen circumstances.

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| MARKET PRACTICES

Chamber of Representatives Adopts Bill containing Miscellaneous Provisions in Economic Matters

On 16 June 2016, the federal Chamber of Representatives approved unanimously a Bill containing miscellaneous provisions in economic matters (the "Bill"). The Bill (i) strengthens the enforcement of the market practices rules; and (ii) amends the rules on itinerant trading activities following the judgment of the Court of Justice of the European Union (the "ECJ") of 10 July 2014 finding that Belgium had failed to implement properly Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ("Directive 2005/29/EC").

Increased Enforcement of Market Practices Rules

The Bill amends some provisions of Book XV ("*Enforcement*") of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*). With regard to market practices, the relevant amendments are as follows:

› *Extended investigation powers*: inspection officers are increasingly faced with offences in respect of which they are unable to easily or directly identify the offender, for instance in case of offences in relation to online sales or advertisements in newspapers and magazines. Therefore, for a limited number of infringements (including infringements to the rules on distance sales and on unfair market and professional practices), the Bill entitles inspection officers to obtain all data necessary for the identification of the person being investigated from operators such as internet providers, telecommunications operators and banks.

› *Introduction of "mystery shopping"*: the Bill entitles the King to determine by Royal Decree a series of infringements for which inspection officers can approach a company by presenting themselves as customers or potential customers, without specifying that their observations may be used for enforcement purposes ("*mystery shoppers*").

› *Mandatory laboratory analysis or inspection*: the Bill entitles the Minister of Economic Affairs or its representative to require companies to carry out a mandatory laboratory analysis or inspection of their products if there are indications that the product concerned: (i) does not meet the labelling requirements; (ii) is the subject of a misleading market practice involving false information about its main features or the results and essential characteristics of the tests/inspections that were performed on the product; or (iii) is the subject of a misleading omission.

› *Withdrawal of products from the market*: the Bill entitles the Minister of Economic Affairs or its representative to withdraw a product from the market and order the seller to take it back in view of its modification, reimbursement (in whole or in part) or replacement if it is found that: (i) the seller cannot prove that the factual data which he communicates in the context of a commercial practice are materially correct; (ii) the seller fails to carry out the requested independent laboratory analysis or inspection; or (iii) the independent laboratory analysis or inspection shows that the product does not satisfy the labelling requirements.

Amendments of Rules Governing Itinerant Trading

The Bill also amends the rules on itinerant trading activities in view of complying with the judgment of the ECJ of 10 July 2014 finding that Belgium had failed to implement correctly Directive 2005/29/EC (ECJ, 10 July 2014, case C-421/12, *European Commission v. Kingdom of Belgium – See, this Newsletter, Volume 2014, No. 7, p. 3*). In its judgment, the ECJ observed that Article 4 of the Directive envisages a complete harmonisation and, therefore, precludes the maintenance in force of more restrictive national measures.

In view of the ECJ's judgment, the Bill:

› repeals the prohibition on door-to-door sales at the consumer's home for products or services exceeding the value of EUR 250, as set out in Article 4, §1, indent 3 of the Law of 25 June 1993 on the exercise and organisation of travelling trading and fairground activities (*Wet van 25 juni 1993 betreffende de uitoefening en de organisatie van ambulante en kermisactiviteiten / Loi du 25 juin 1993 sur l'exercice et l'organisation des activités ambulantes et foraines* – the "Law of 25 June 1993");

› amends Article 6, §1 of the Law of 25 June 1993 in view of repealing the King's power to prohibit or regulate the sale of certain categories of products or services during the exercise of travelling trading and fairground activities; and

› repeals Article 5 of the Royal Decree of 24 September 2006 concerning the exercise and organisation of travelling trading activities (*Koninklijk Besluit van 24 september 2006 betreffende de uitoefening en de organisatie van ambulante activiteiten / Arrêté royal du 24 septembre 2006 relatif à l'exercice et à l'organisation des activités ambulantes*), which lists a number of products for which any itinerant trading is prohibited (*e.g.*, precious metals, stones and fine pearls).

All of the above provisions will enter into force 10 days after the Bill's publication in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*).

| PUBLIC PROCUREMENT

Bill on Concession Contracts adopted in Parliament

On 30 May 2016, the federal Chamber of Representatives adopted the Bill on Concession Contracts (*Wetsontwerp betreffende de concessieovereenkomsten / Projet de loi relatif aux contrats de concession*), transposing Directive 2014/23/EU on the award of concession contracts into Belgian law (*See, this Newsletter, Volume 2016, No. 3, p. 11*). Pursuant to Article 69 of the Bill, the Law on Concession Contracts will enter into force on a date defined by Royal Decree.

The entry into force of the Law on Concession Contracts is expected to coincide with the entry into force of the Law concerning public procurement, which will implement Directives 2014/24/EU (on public procurement) and 2014/25/EU (on procurement by entities operating in the water, energy, transport and postal services sectors). The Bill of the Law concerning public procurement was submitted to the Chamber of Representatives on 4 January 2016 (*See, this Newsletter, Volume 2016, No. 1, p. 19*) and adopted by the Chamber of Representatives on 12 May 2016 (*See, this Newsletter, Volume 2016, No. 5, p. 16*).

Draft Bill on Judicial Protection in Procurement Matters Approved in Council of Ministers

The federal Council of Ministers approved on 3 June 2016 a Draft Bill on Judicial Protection in Procurement Matters (the "Draft Bill"). The Draft Bill amends the Law of 17 June 2013 concerning the reasons, the information and the legal remedies with regard to public procurement contracts and certain contracts for works, supplies and services (*Wet van 17 juni 2013 betreffende de motivering, de informatie en de rechtsmiddelen inzake overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten / Loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics et de certains marchés de travaux, de fournitures et de services*) (the "Judicial Protection Law").

The Draft Bill implements in part a package of three public procurement Directives (Directive 2014/23/EU, Directive 2014/24/EU, and Directive 2014/25/EU) which European Member States were required to transpose by 18 April 2016. For example, as is required by Directive 2014/23/EU, the Draft Bill broadens the scope of the Judicial Protection Law. Whereas Article 2, 1° currently limits the application of the Judicial Protection Law to public works concessions, under the Draft Bill, the Judicial Protection Law will also include public services concessions into its scope. In addition, the Draft Bill would implement Article 55, 2, d) of Directive 2014/24/EU, by creating an obligation to inform tenderers who made an admissible tender in procurement procedures involving negotiations and dialogues with tenderers who will have to be advised of the conduct and progress of the procedure.

Importantly, the Draft Bill will provide for a mandatory 10% compensation by the contracting authority of the tenderer who, in an adjudication procedure, submitted the lowest regular offer but was not awarded the contract. Other innovations in the Draft Bill include the alignment of the dates on which the waiting period and the time period for redress start running, the emphasis on e-procurement, the harmonisation of the rules applicable to the communication of selection, award and non-placement decisions and increased flexibility in claiming damages for compensation of illegal actions of contracting authorities in relation to public procurement procedures.

The Draft Bill was submitted to the Council of State for scrutiny.

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