

Van Bael & Bellis on Belgian Business Law

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COMMERCIAL LAW

New Commercial Code: Recent Developments and Publications

New commercial code – overview on 23 June 2014 (new developments in red)

Book	Status	Entry into force	Newsletter reference
Book I – Definitions	Published	12 December 2013 (partially)	Volume 2013, No. 5, p. 3, No. 8, p. 4 and No. 10, p. 3
Book II – General principles	Published	12 December 2013	
Book III – Freedom of establishment, freedom to provide services and general obligations of companies	Published	9 May 2014 (partially)	Volume 2013, No. 4, p. 2, No. 5, p. 2 and No. 8, p. 4
Book IV – Competition law	Published	Partially 6 September 2013, partially 28 May 2013	Volume 2013, No. 1, p. 2, No. 2, p. 3, No. 5, p. 2 and No. 8, p. 4
Book V – Price control	Published	12 December 2013, with the exception of title 2.	Volume 2013, No. 1, p. 2, No. 5, p. 2 and No. 8, p. 4
Book VI – Market practices and consumer protection	Published	31 May 2014	Volume 2013, No. 1, p. 3, No. 3, p. 17, No. 7, p. 16; No. 8, p. 4, No. 9, p. 3 and No. 10, p. 16
Book VII – Protection of the consumer in the financial sector	Published	1 July 2015 (partially)	N/A
Book VIII – Quality of products and services	Published	12 December 2013	Volume 2012, No. 4, p. 3 and No. 12, p. 2
Book IX – Safety of products and services	Published	12 December 2013	Volume 2012, No. 5, p. 2 and No. 9, p. 3
Book X – Economic agreements	Published	31 May 2014	Volume 2013, No. 10, p. 3; Volume 2014, No.1, p. 3; No. 4, p. 3
Book XI – Intellectual property	Published	1 January 2015	Volume 2013, No. 8, p. 4; Volume 2014, No.3, p. 9; this Newsletter, p. 9
Book XII – Electronic economy	Published	31 May 2014	Volume 2013, No. 4, p. 2, No. 8, p. 2 and No. 9, p. 3 Volume 2014, No.1, p. 2
Book XIII – Consultation mechanisms	Published	30 April 2014	Volume 2013, No. 5, p. 2 and No. 9, p. 2 Volume 2014, No.1, p. 2
Book XIV – Liberal professions	Published	31 May 2014 (partially)	Volume 2013, No. 7, p. 16 and No. 8, p. 4.
Book XV – Enforcement	Published	12 December 2013	Volume 2013, No. 5, p. 3 and No. 8, p. 4
Book XVI – Extrajudicial resolution of consumer disputes	Published	1 January 2015 (partially)	Volume 2014, No.2, p. 3
Book XVII – Special legal procedures	Published	1 September 2014 (partially)	Volume 2013, No. 9, p. 2 and No. 10, p. 3 Volume 2014, No.1, p. 2 and p. 4; No.4, p. 7
Book XVIII – Measures for crisis Management	Published	30 April 2014	Volume 2014, No.1, p. 3
Note: Book I (definitions), Book II (general principles) and Book XV (enforcement) are inserted piecemeal with the Books dealing with specific topics			

COMPETITION LAW

Clearance of Acquisition of Club NV by ZuidNederlandse Uitgeverij NV and Standaard Boekhandel NV

On 10 June 2014, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la concurrence*) (BCA) approved the acquisition of Club NV by ZuidNederlandse Uitgeverij NV together with its subsidiary Standaard Boekhandel NV. This acquisition, which was notified to the BCA on 18 April 2014, was cleared without conditions.

DATA PROTECTION

Privacy Commission Publishes Annual Report 2013

The Belgian Privacy Commission (*Commissie voor de Bescherming van de Persoonlijke Levenssfeer/Commission de la Protection de la Vie Privée*) recently published its annual report for 2013 (the "Annual Report").

The Annual Report discusses the most important changes to data protection law in 2013 and provides an overview of the functioning and activities of the Privacy Commission and its sector-specific committees as well as its involvement in various international bodies and seminars.

In particular, the Annual Report looks back at the important events that took place in 2013 (including Prism, Edward Snowden and the data breach that occurred at the national railway company (NMBS/SNCB)).

According to the Privacy Commission, these events led to an increase in the number of complaints and questions submitted to the Privacy Commission. Overall, while in previous years the Privacy Commission had only registered a small increase in the number of cases opened (a few dozen), the Privacy Commission saw this number grow by 636

cases in 2013. Most of the complaints and questions raised before the Privacy Commission concerned general principles of data protection, video surveillance or direct marketing.

In addition, the Privacy Commission initiated 211 new control and inspection cases directed against companies and institutions.

The Annual Report can be consulted [here](#) (Dutch) and [here](#) (French).

Privacy Commission launches Electronic Notification Form for Data Breaches

Pursuant to Article 114/1 of the Electronic Communications Law (*Wet van 13 juni 2005 betreffende elektronische communicatie / Loi du 13 juin 2005 relative aux communications électroniques*), telecommunications operators, internet service providers and other providers of publicly available electronic communication services must notify to the Privacy Commission and to the Belgian Institute for Postal Services and Telecommunications (*Belgisch Instituut voor Postdiensten en Telecommunicatie / Institut belge des services postaux et des télécommunications*) all personal data breaches no later than 24 hours following the detection of the breach (See, *this Newsletter, Volume 2013, No. 9, p. 5*).

The telecommunications operators must inform these authorities of specific information, including the identity of the data controller, the time and date of the breach as well as the circumstances, the nature and the content of the breach or the number of individuals concerned. In addition, information concerning the security measures that were put in place before the breach and those taken in its aftermath must also be provided.

In order to facilitate such notification, the Belgian Privacy Commission (*Commissie voor de Bescherming van de Persoonlijke Levenssfeer/Commission de la Protection de la Vie Privée*) issued an electronic notification form dedicated to telecommunications operators.

The obligation of notifying data breaches under the Electronic Communications Law only applies to the telecommunications sector. Nevertheless,

in its recommendations on the subject, the Privacy Commission also indicated that, under specific circumstances, it may also require the notification of data breaches in other sectors. This is why the Privacy Commission also published a general notification form that is addressed to all data controllers. In principle, the notification other than for telecommunications operators must be made within 48 hours of the detection of the breach.

These notification forms can be accessed on the website of the Privacy Commission: www.privacycommission.be. The Privacy Commission also published a user guide at the same address.

FINANCIAL LAW

Transposition of AIFM Directive into Belgian Law

On 17 June 2014, the Law of 19 April 2014 on alternative investment funds and their managers (*Wet betreffende de alternatieve instellingen voor collectieve belegging en hun beheerders/Loi relative aux organismes de placement collectif alternatifs et à leurs gestionnaires*; the “AIFM Law”) was published in the Belgian Official Journal. The AIFM Law implements the Alternative Investment Funds Managers Directive 2011/61/EU.

The AIFM Law applies to alternative investment fund managers (“AIFMs”) managing alternative investment funds (“AIFs”), *i.e.* collective investment undertakings, including investment compartments thereof, which raise capital from investors with a view to investing it in accordance with a defined investment policy. Undertakings requiring authorisation pursuant to Directive 2009/62/EC on Undertakings for Collective Investment in Transferable Securities are excluded from the scope of application of the AIFM Law. This also applies to holding companies, institutions for occupational retirement, supranational institutions and national central banks.

The AIFM Law provides for rules regarding, *inter alia*, authorisation, conflicts of interest, remuneration and transparency requirements

such as disclosure to investors and reporting obligations to the competent authorities.

The AIFM Law also lays down specific obligations for AIFMs managing AIFs that acquire a controlling shareholding in a listed or non-listed company, including notification and disclosure requirements, obligations regarding the annual report and rules on asset stripping. Furthermore, the AIFM Law implements the EU passport system allowing AIFMs registered in one of the Member States of the European Economic Area (“EEA”) to manage or to market AIFs in Belgium on the sole basis of a notification to the Belgian Financial Services and Markets Authority.

A specific regime applies to smaller AIFMs, *i.e.* AIFMs managing portfolios with total assets below EUR 100 million, or below EUR 500 million if the portfolio consists of AIFs that are unleveraged and have no redemption rights exercisable during a period of five years following the date of the initial investment in each AIF. Most Belgian private equity fund managers will fall under this category. These AIFMs have to satisfy limited registration and transparency requirements only, but they can choose to opt in (*e.g.* in order to benefit from the EU passport).

The AIFM Law will apply to real estate investment trusts, except if they convert into Regulated Real Estate Companies (See, *this Newsletter, Volume 2014, No. 4, p. 20*).

Updated Legislative Framework for Markets in Financial Instruments (MiFID II)

Directive 2014/65/EU on Markets in Financial Instruments repealing Directive 2004/39/EC (“MiFID I”) and Regulation (EU) 600/2014 on Markets in Financial Instruments (both “MiFID II”) have been published in the European Official Journal on 12 June 2014. The new rules will enter into force thirty months later, meaning that all European firms engaged in investment business or providing investment services to clients should comply with MiFID II by 2 January 2017. The updated rules for markets in financial instruments are available [here](#).

The new framework aims to make financial markets more efficient, resilient and transparent and will have a significant impact on the governance and business organisation of investment firms and banks providing investment services or engaging in investment activities. Building on the rules already in place, MiFID II extends the scope of products and activities covered, and:

- introduces a **market structure framework** which ensures that trading, wherever appropriate, takes place on regulated platforms. In order to capture “dark pool” operators and other similar trading systems, in addition to regulated markets or Multilateral trading Facilities (“MFTs”), MiFID II introduces a new multilateral trading venue, the organised trading facility (“OTF”) for non-equity instruments (e.g. bonds, derivatives and structured products). Strict requirements are imposed on operators of OTFs (e.g. client orders on an OTF cannot be executed against proprietary capital) and OTF operators should meet ‘best execution’ obligations towards their clients as order execution on an OTF takes place on a discretionary basis;
- introduces **trading control for algorithmic trading activities**. Dealers on own account applying high-frequency algorithmic trading techniques will no longer be exempted from licence requirements and supervision. Internal control, business conduct rules, obligations to provide information to supervisors – including data on algorithms and strategies used – administrative requirements and compliance monitoring will apply. Additional conditions are imposed on investment firms providing their clients with direct electronic access to trading platforms;
- increases equity and derivatives market **transparency** by introducing extensive transaction reporting requirements. The scope of existing pre-trade and post-trade transparency obligations is also extended to ‘equity-like’ instruments and to non-equity capital instruments such as bonds and derivatives. The use of pre-trade transparency waivers is limited and mandatory reporting to supervisors of executed transactions is further detailed and extended to instruments traded on any trading platform or the underlying value of which is such instrument or an index or basket composed of such financial instruments. These rules are accompanied by the establishment of approved reporting mechanism (ARM) and authorised publication arrangement (APA) for trade reporting and publication;
- strengthens **investor protection** by introducing robust organisational and conduct requirements and by strengthening the role of management bodies (new requirements for corporate governance are introduced). MiFID II also reinforces the duty to provide fair, clear and not misleading information to clients. It requires that investment services or financial instruments should clearly indicate the risks involved and introduces an obligation to inform clients about all costs connected with an investment service or ancillary service, including the cost of advice and the cost of a financial instrument that is recommended or marketed. Further, if investment advice is provided on an independent basis, the financial instruments included in the advice must not be limited to instruments of entities that have close links with the investment firm. In this case, even if the client is a professional investor, providers of independent investment advice or asset management must not be paid or receive any commission. Finally, advisory and portfolio management clients will receive a detailed suitability assessment in a periodic performance report and the scope of appropriateness test is extended;
- improves conditions for **competition in the trading and clearing of financial instruments** and establishes a harmonised European regime for non-discriminatory access to trading venues and central counterparties;
- addresses the issue of excessive price volatility in **commodity derivatives markets**. Parties that are active in commodities markets and trade in commodity derivatives fall more easily under the licence and supervision regime for investment firms;

- increases the role and **supervisory powers** of regulators and establishes powers to prohibit or restrict the marketing and distribution of specific products in defined circumstances;
- strengthens the existing regime to ensure effective and stricter **harmonised administrative sanctions**; and
- introduces a harmonised regime for granting access to European professional markets for **firms from third countries** based on an equivalence assessment of third country jurisdictions by the European Commission.

MiFID II sets out the high level rules and consists of 'Level 1' texts. Detailed 'Level 2' rules will be developed over the next 18 months by the European Securities and Markets Authority and the European Commission.

INSOLVENCY

Supreme Court Allows Distinction Between Strategic and Non-strategic Creditors For Reorganisation Plan

Since 2009, companies in financial distress have been able to request to be admitted to one of the reorganisation procedures under the Law of 31 January 2009 on the Continuity of Enterprises (*Wet van 31 januari 2009 op de continuïteit van de ondernemingen/Loi de 31 janvier 2009 sur la continuité des entreprises*; the "Law"). The most common reorganisation procedure takes the form of a judicial reorganisation by collective agreement (*gerechtelijke reorganisatie door een collectief akkoord/réorganisation judiciaire par accord collectif*). Under this scheme, the company must prepare a reorganisation plan, which is then presented to the creditors and the court for approval.

The reorganisation plan can provide for a 'haircut' of up to 85 percent on the unsecured outstanding debts. Such a haircut does not necessarily have to be the same for all ordinary creditors. For example, the Law explicitly states that the debtor can make a distinction based on the amounts due. Nevertheless, the

reorganisation plan has to satisfy a double test. First, it needs the majority of the votes of the ordinary creditors (both in volume and number). Second, the plan has to be approved by the court. The court can only refuse its approval if the plan does not comply with applicable legal requirements or in case it infringes a mandatory law provision.

One of the most important such mandatory law provisions is the non-discrimination principle enshrined in Articles 10 and 11 of the Constitution (*Grondwet/Constitution*). For example, there may be an infringement in the distinguishing factor between creditors in the reorganisation plan is not based on an objective criterion or if it provides for an unreasonable difference in treatment between two classes of ordinary creditors without a satisfactory justification for such a difference. One valid criterion could be, as noted, the amount due to the creditors.

In the past, courts have on quite a few occasions refused to approve reorganisation plans on grounds of discrimination. There is much uncertainty regarding the criteria that can be used as a basis for a difference in treatment. In its judgment of 13 March 2014, the Supreme Court (*Hof van Cassatie/Cour de Cassation*) has now confirmed that a distinction between ordinary creditors that are of strategic importance (*i.e.*, creditors with whom the company will continue to do business in the future) and those that are not, can be a valid basis for a difference in treatment.

While this judgment could open a new range of possibilities for debtors to tailor their reorganisation plan, the importance of this judgment should not be overstated. The Supreme Court did not elaborate on the notion of a 'strategic creditor'. Therefore, it will come to the lower courts to refine this concept.

INTELLECTUAL PROPERTY

ECJ: Internet Browsing Does Not Amount To Copyright Infringement

On 5 June 2014, the Court of Justice of the European Union (the "ECJ") held that browsing

websites without first obtaining the authorisation from the copyright holder does not infringe copyright.

The copyright issue was raised by publishers in the United Kingdom regarding temporary copies of websites generated by an end-user on the Internet while browsing.

When viewing a website, users make a copy of the website that is displayed on their computer screen (the “on-screen copies”) and in the Internet cache of the computer’s hard disk (the “cached copies”). The ECJ was asked to decide whether these reproductions could benefit from the exemption from the obligation to obtain authorisation from the copyright holders provided for in Article 5(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the “Copyright Directive”).

Under the Copyright Directive, a reproduction may only benefit from this exemption if it satisfies the following conditions:

- (1) *The copy is temporary.* On-screen copies are deleted when the internet user moves away from the website viewed and cached copies are normally automatically replaced by other content after a certain time. Accordingly, the ECJ decided that on-screen and cached copies satisfy this condition.
- (2) *The copy is either transient or incidental.* A copy is transient if its duration is limited to what is necessary for the technological process used to work properly. Since on-screen copies are automatically deleted when the user closes the browser, they are transient. A copy is incidental if it neither exists independently of, nor has a purpose independent of the technological process from which it forms part. Because the technological process in question works less efficiently without cached copies and because these copies cannot be created outside of that process, they must also be regarded as incidental.

- (3) *The copy is an integral and essential part of a technological process.* Both on-screen copies and cached copies are made entirely in the context of the technological process at issue. As such, they are an integral part of that technological process. Furthermore and as already mentioned, the absence of cached copies renders the process less efficient. Moreover, it is not contested that on-screen copies are necessary for the process to function correctly and efficiently. Consequently, both copies are an essential part of the technological process at issue.
- (4) *The copy’s sole purpose is to enable a transmission.* As stated previously, both copies are required for the technical process to take place. They are the automatic result of browsing the Internet.
- (5) *The copy must not have an independent economic significance.* When browsing the Internet, the user does not set out to make a copy of the image unless he downloads or prints it. His aim is solely to view the content of the website.

All criteria being met, the ECJ found that on-screen copies and cached copies could benefit from the exemption laid down in Article 5 (1) of the Copyright Directive. However, in order to be able to rely on the exemption, these copies must also satisfy the three-step test provided for in Article 5 (5) of the Copyright Directive.

According to the ECJ, both copies fulfil the three-step test as (1) they constitute a special case, being created only for the purpose of viewing websites; (2) they do not conflict with the normal exploitation of the work since the creation of these copies is part of the viewing process of websites and; (3) they do not unreasonably prejudice the legitimate interests of the right holders. Publishers making content available on websites have to obtain the authorisation from the copyright holder. There is thus no justification for requiring Internet users to obtain an additional authorisation.

ECJ Interprets Rules of Jurisdiction for Community Trade Mark Infringements and Unfair Competition Actions

On 5 June 2014, the European Court of Justice (the “ECJ”) ruled on a preliminary reference from the German Supreme Court regarding the interpretation to be given to the rules of international jurisdiction for Community trade mark infringements and unfair competition actions (Case C-360/12).

The questions arose in proceedings between First Note Perfumes (“FNP”), a Belgian perfume wholesaler, and Coty Germany GmbH (“Coty”), a German producer and distributor of perfumes and cosmetic products. Coty claimed that FNP had infringed its trade mark and the law on unfair comparative advertising and unfair imitation by selling perfumes in bottles similar to the bottles falling under Coty’s trade mark to a person in Belgium who resold these bottles in Germany. Both at first instance and on appeal, the German Courts held that they did not have jurisdiction to handle this case. Coty appealed to the German Supreme Court, which referred a number of questions to the ECJ on the interpretation of the rules of jurisdiction contained in Article 97(5) of the Community Trade Mark Regulation 207/2009 (“CTM Regulation”) and Article 5(3) of Regulation 44/2001 (“Brussels I Regulation”).

Article 97(5) of the CTM Regulation provides that trade mark infringement claims may be brought in the courts of the Member State in which the act of infringement was committed or threatened to be committed.

For its part, Article 5(3) of the Brussels I Regulation contains a special rule in favour of the courts of the place where the harmful event occurred (or may occur). Under Article 5(3) of the Brussels I Regulation, these local courts have jurisdiction to hear matters concerning tort, delict or quasi-delict. This rule of jurisdiction derogates from the general principle of the Brussels I Regulation which provides that the courts of the place where the defendant is domiciled have jurisdiction. Under Article 5(3) of the Brussels I Regulation the place where the harmful event occurred or may occur includes both the place of *the event* giving rise to the

damage and the place *where the damage occurred*. The ECJ referred to these two locations as the ‘duality of linking factors’.

Trade mark infringement

In its judgment of 5 June 2014, the ECJ first recalled, with regard to the interpretation of the rule of jurisdiction of Article 97(5) of the CTM Regulation, that the application of Article 5(3) of the Brussels I Regulation has been explicitly excluded from CTM cases. The rule of jurisdiction of Article 97(5) of the CTM Regulation should thus be interpreted independently from the jurisdictional rules of Article 5(3) of the Brussels I Regulation. As a result, the ‘duality of linking factors’ under Article 5(2) of the Brussels I Regulation cannot automatically be applied to Article 97(5) of the CTM Regulation. According to the ECJ, it can be derived from both the wording and the purpose and context that the ‘duality of linking factors’ must not be applied to this rule and that Article 97(5) of the CTM Regulation must be applied independently from Article 5(3) of the Brussels I Regulation.

On this basis, the ECJ went on to hold that the relevant requirement under Article 97(5) of the CTM Regulation, i.e., “*the Member State in which the act of infringement has been committed*”, must be interpreted solely in favour of the courts of the Member State in which the defendant actually committed the unlawful act. As a result, the courts of the Member State in which the harmful effects of the infringement occurred, but where the defendant himself did not act, cannot hear the case.

Unfair competition

Second, the ECJ recalled that notwithstanding the above exclusion of CTM cases, Article 5(3) of the Brussels I Regulation applies to questions regarding jurisdiction for actions brought under national law, such as allegations of unlawful comparative advertising and unfair imitation of a sign, even when this sign concerned is a Community trade mark. According to Article 5(3) of the Brussels I Regulation, the court of the Member State in which “*the place where the harmful event occurred or may occur*” must have jurisdiction to hear the case. The ECJ held that

this concept includes both “*the place of the event giving rise to damage*” and “*the place where the damage occurred or may occur*”.

The ECJ continued by saying that the rule of jurisdiction of Article 5(3) of the Brussels I Regulation constitutes a derogation from the general principle that the courts of the Member State of the defendant’s domicile have jurisdiction. Article 5(3) of the Brussels I Regulation must thus be interpreted restrictively, on the basis of the existence of a close linking factor between the dispute and the court of the Member State in which the harmful event occurred. Whether such a close link exists is then determined on the basis of either the place of the event giving rise to damage or the place where the event occurred.

Commercial Code: Book XI on Intellectual Property Rights Published

On 12 June 2014, the Laws of 10 and 19 April 2014 inserting Book XI “Intellectual Property” in the new Commercial Code and adding definitions that are specific to this Book XI to Book I of the new Commercial Code were published in the Official Journal (*Wetten van 10 en 19 april 2014 houdende invoeging van boek XI, "Intellectuele eigendom" in het Wetboek van economisch recht, en houdende invoeging van bepalingen eigen aan boek XI in de boeken I, XV en XVII van hetzelfde Wetboek/Lois des 10 et 19 avril 2014 portant insertion du livre XI "Propriété intellectuelle" dans le Code de droit économique, et portant insertion des définitions propres au livre XI dans les livres I, XV et XVII du même Code – “Book XI”*).

The aim of Book XI is to codify national laws applicable to intellectual property and to adapt them where necessary (See, *this Newsletter, Volume 2013, No. 8, p. 4; and Volume 2014, No. 3, p. 9*).

Nevertheless, Book XI also introduces some modifications, in particular in relation to copyright and supplementary protection certificates (the “SPC”).

Copyright

Book XI finally implements Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. The private copying exception contained in Article 22, Section 1, 4° of the Copyright Law (*Wet van 30 juni 1994 betreffende het auteursrecht en de naburige rechten/Loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins*) which focuses on the (graphic or similar) origin of the reproduced work to determine whether the exception is applicable, will be replaced by Article XI.190, 5° of the Commercial Code. The new provision applies based on the destination which must be paper or a similar medium, whereas before, the origin determined whether the exception applied. Following this change, the private copying exception will apply to printing on paper.

Supplementary protection certificates

Book XI implements Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products and Regulation (EC) No. 1901/2006 of the European Parliament and of the Council of 12 December 2006 on medicinal products for paediatric use.

Furthermore, Book XI introduces the restoration procedure for SPC’s. This follows the recent introduction of a new restoration procedure in patent law (See, *this Newsletter, Volume 2014, No. 4, p. 17*).

Book XI enters into force on 1 January 2015.

General Court Clarifies the Conditions of Genuine Use of Trade Mark

On 5 June 2014, the General Court of the European Union (the “General Court”) handed down a judgment in joined cases T-495/12 to T-497/12. The General Court dismissed the appeal lodged by European Drinks SA against the decision of the Fourth Board of Appeal of OHIM (the “Board of Appeal”), which had rejected the opposition filed by the applicant against the registration of trade marks, on the

ground that the evidence brought by European Drinks SA was insufficient to demonstrate genuine use of their earlier trade mark.

On 9 February 2009, SC Alexandrion Grup Romania Srl filed with the OHIM three applications for registration of Community trade marks in Classes 33, 35 and 39 of the Nice Agreement (mainly, alcoholic beverages) for the figurative signs reproduced below:



On 17 February 2010, the applicant, European Drinks SA, filed oppositions to the registration of these trade marks, based on the following earlier national figurative mark, registered for the goods and services in Classes 33 and 35 corresponding to alcoholic beverages (except beers) and advertising:

Dracula

However, both the Opposition Division of OHIM and the Board of Appeal rejected the oppositions in their entirety as the applicant had failed to demonstrate genuine use of its earlier trade mark. The applicant appealed from this decision to the General Court which confirmed the decision of the Board of Appeal while providing useful guidance on the criteria to rely on in the analysis of genuine use.

First, the General Court recalled that, in order to obtain protection of an earlier trade mark, it must be demonstrated that the mark has been put to genuine use in the territory where it is protected during the five years preceding the date of publication of the trade mark application against which opposition was filed.

The General Court added that there is "*genuine use of a trade mark*" if that trade mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in

order to create or preserve an outlet for those goods or services. Moreover, the use must occur publicly and outwardly. In the assessment of whether use of the trade mark is genuine, the General Court explained, all the facts and circumstances relevant to establishing whether the commercial exploitation of the trade mark is real must be taken into consideration.

Lastly, proof of use of the earlier trade mark in a form differing in elements can be taken into account as long as the form does not alter the distinctive character of that mark in the form in which it was registered.

In the case at hand, in order to demonstrate the genuine use of the earlier trade mark, the applicant submitted copies of six invoices for the period from 2 February to 24 April 2009, a copy of the photograph of part of the bottle on which the sign below was visible and a copy of a promotional text relating to "vodka DRACULA" and bearing the verbal element "Dracula" in characters identical to those used in the sign below:



The General Court found that the six invoices show that the marketing period for the products at hand was particularly short (less than three months) and that they relate to a period particularly close to the publication of the contested trade mark applications. Therefore, the General Court held that the period of use that had been established by the applicants barely represented genuine use. The General Court added that the possibility of a purely token use of the earlier trade mark could not be ruled out.

In particular, the General Court considered that it is not a matter of examining whether the earlier trade mark had been put to continuous use during the relevant period, but rather a matter of assessing whether the scale and frequency of the use of that trade mark are able

to demonstrate its presence on the market in an actual and consistent manner over time, with the sign's configuration remaining stable. The General Court is of the opinion that this was not the case here.

Moreover, the General Court found that the applicant failed to establish that its earlier trade mark had been used publicly and outwardly.

The General Court also observed that the six invoices provided as evidence contain information on the extent of the use of the earlier mark, namely, an overall sales volume of 2.592 units amounting to a sales frequency of 900 units per month. Having regard to the relevant market, the General Court found that use to reflect a small quantity.

Finally, the General Court considered that the other documents submitted by the applicant as further evidence do not substantiate the place, time or the importance of the use of the earlier trade mark.

Therefore, the General Court held that the evidence submitted by the applicant, assessed overall, did not provide sufficient indications of the place, time, extent and nature of use of the earlier mark. As a result, the General Court concluded that the documents submitted by the applicant were not sufficient to demonstrate the genuine nature of the use of the earlier trade mark and dismissed the appeal.

ECJ Guidance on Acquired Distinctiveness of Colour Trade Mark

On 19 June 2014, the Court of Justice of the European Union ("ECJ") handed down a preliminary ruling in joined cases C-217/13 and C-218/13 on the registration (and invalidation) of a colour trade mark.

The procedure giving rise to the preliminary ruling relates to the registration by Deutscher Sparkassen-und Giroverband eV ("DSGV") of a specified shade of the colour red for retail banking services under Class 36 of the Nice Agreement. The trade mark was registered on 11 July 2007 after it had been granted on appeal by the Deutsches Patent- und Markenamt.

Oberbank AG, an Austrian retail bank, and Banco Santander, a Spanish retail bank, each initiated invalidation proceedings against DSGV's colour trade mark. Both banks had used the colour red on their domestic markets before and had recently entered the German market.

In this context, a number of questions were referred to the ECJ. They related to the requirement that a colour trade mark, which is unlikely to be intrinsically distinctive with respect to products or services, must be shown to have acquired distinctiveness through use before the trade mark can be registered. In the absence of such acquired distinctiveness, the trade mark application will be refused or the trade mark can be invalidated (Article 3(1)(b) of EU Directive 2008/95 of 22 October 2008 to approximate the laws of the Member States relating to trade marks – the "Trade Mark Directive").

First, the ECJ was asked whether it was required for the applicant to demonstrate in a consumer survey that at least 70% of the relevant public associated the sign with the trade mark applicant.

On this first question, the ECJ held that the Trade Mark Directive precludes an application of national law which requires that a consumer survey indicates a degree of recognition of at least 70% in order to demonstrate that the sign has acquired a distinctive character through use.

The second and third questions related to Article 3(3) of the Trade Mark Directive which provides that:

A trade mark shall not be refused registration or be declared invalid [...] if, before the date of application for registration and following the use which has been made of it, it has acquired a distinctive character. Any Member State may in addition provide that this provision shall also apply where the distinctive character was acquired after the date of application for registration or after the date of registration.

The ECJ held that the acquired distinctiveness to which the first sentence refers must be acquired before the date of the filing of the application for registration of the mark.

Finally, the ECJ ruled on the situation where national law has not implemented the option provided for in the second sentence of Article 3(3) of the Trade Mark Directive, *i.e.*, that acquired distinctiveness after the application date can be taken into account. The ECJ held that in such a case, it is not impossible that a trade mark is invalidated if the trade mark applicant failed to show that its trade mark had acquired distinctiveness prior to the application date.

LABOUR LAW

New Legislation regarding Psychosocial Risks at Work

A new regulatory framework governing the prevention of psychosocial risks at work will come into force on 1 September 2014. It consists of the following legal instruments:

- Law of 28 February 2014 completing the Law of 4 August 1996 regarding the well-being of employees in the performance of their work, as regards the prevention of psychosocial risks at work, including violence, harassment and sexual harassment at work (*Wet van 28 februari 2014 tot aanvulling van de wet van 4 augustus 1996 betreffende het welzijn van de werknemers bij de uitvoering van hun werk wat de preventie van psychosociale risico's op het werk betreft, waaronder inzonderheid geweld, pesterijen en ongewenst seksueel gedrag op het werk; Loi du 28 février 2014 complétant la loi du 4 août 1996 relative au bien-être des travailleurs lors de l'exécution de leur travail quant à la prévention des risques psychosociaux au travail dont, notamment, la violence et le harcèlement moral ou sexuel au travail*)
- Law of 28 March 2014 modifying the Judicial Code and the Law of 4 August 1996 regarding the well-being of employees in

the performance of their work, as regards the judicial procedures (*Wet van 28 maart 2014 tot wijziging van het Gerechtelijk Wetboek en de wet van 4 augustus 1996 betreffende het welzijn van de werknemers bij de uitvoering van hun werk wat de gerechtelijke procedures betreft; Loi du 28 mars 2014 modifiant le code judiciaire et la loi du 4 août 1996 relative au bien-être des travailleurs lors de l'exécution de leur travail en ce qui concerne les procédures judiciaires*).

- Royal Decree of 10 April 2014 regarding the prevention of psychosocial risks at work (*Koninklijk Besluit van 10 april 2014 betreffende de preventie van psychosociale risico's op het werk; Arrêté royal du 10 avril 2014 relatif à la prévention des risques psychosociaux au travail*).

The new regulatory framework broadens the scope of the current rules. Instead of being limited to violence, harassment and sexual harassment at work, it now covers all psychosocial risks that could lead to stress, burn-out, etc.

The new rules also clarify the role of the employers, the hierarchy, the committee for prevention and protection on the work floor, the person of trust and the prevention advisor and they detail how information should be exchanged between these parties.

The existing procedures were modified on several points. For example, the term "complaint" will be changed to "request"; the definition of harassment is broadened; the prevention advisor can refuse requests if they are clearly not based on violence, harassment or sexual harassment at work; the prevention advisor can take protective measures if circumstances require this; and the information given by the employer to the employees and committee for prevention and protection on the work floor is broadened.

As of 1 September 2014 all employers have 6 months to modify their work rules and include at least the contact details of the prevention advisor "psychosocial aspects" or the service for prevention and protection on the work floor.

Moreover, the contact details of the person of trust must be included, together with the prevention measures that will be applied to deal with psychosocial risks at work. The new rules modified Article 14 of the Law regarding the implementation of work rules. As a result, the specific procedure regarding the modification of the work rules must not be followed.

Finally, as of 1 January 2015 the annual report of the internal service for prevention and protection on the work floor should be adapted in order to comply with the new legislation.

Non-compliance with this new legislation is punishable by a “sanction level 2” (criminal fines between 300 to 3,000 EUR per employee or by an administrative fine of between 150 EUR and 1,500 EUR per employee).

MARKET PRACTICES

Belgian Rules Implementing EU Consumer Rights Directive Entered Into Force on 31 May 2014

On 31 May 2014, Book VI on market practices and consumer protection of the new Commercial Code entered into force. Amongst other matters, Book VI implements Directive 2011/83/EU of 25 October 2011 on consumer rights into Belgian law (the “Directive”).

The Directive was adopted in October 2011. EU Member States had to implement the Directive into national law by 13 December 2013 and to apply the new rules as from 13 June 2014 at the latest. The Directive aims to increase the level of consumer protection in contracts between businesses and consumers, particularly for distance purchases (such as mail order, internet, telephone or fax) and off-premise purchases (See, *this Newsletter, Volume 2008, No. 10, p. 4; and Volume 2011, No. 1, p. 5; No. 3, p. 5; No. 6, p. 3; No. 10, p. 4; and No. 11, p. 2*).

For a general overview of Book VI of the new Commercial Code, we refer to the October 2013 edition of this Newsletter (See, *this Newsletter, Volume 2013, No. 10, p. 16*). Implementing the Directive, Book VI increases consumer

protection by introducing, *inter alia*, the following new rules:

- Companies have to comply with stronger information requirements for all types of contracts. In particular, they have to provide clear and comprehensible information on the total cost of the product or service as well as on any additional fees. As regards distance contracts, the required information does not only have to be provided prior to, but also after the conclusion of the contract.
- The use of default options is prohibited in all types of contracts. If a company fails to obtain the consumer’s express consent to any additional cost that does not constitute compensation for the main contractual obligation of the company, e.g., through the use of pre-ticked boxes, the consumer is entitled to claim back all additional costs paid.
- Companies are prohibited from charging consumers more for paying by credit card (or other means of payment) than what it actually costs the company to offer such means of payment.

The withdrawal period of 14 calendar days for distance and off-premise purchases is extended by an additional 12 months in case the company fails to inform the consumer of his withdrawal right. Companies can use standard instructions (See, Annex I to Book VI) to inform the consumer of his withdrawal right and the consumer can use a standard form (See, Annex II to Book VI) to exercise his/her withdrawal right. During the 14 day-period, the consumer can test the products, but he can be held liable for any depreciation if the company proves that the use of the product went beyond what was necessary to determine the nature, the characteristics and the functioning of the product.