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Van Bael & Bellis on Belgian Business Law

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| **COMMERCIAL LAW:** Law Amending Code of Economic Law Published in Belgian Official Journal

| **COMPETITION LAW:** Brussels Court of Appeal Confirms Temporary Suspension of Exclusivity Clause in International Show-Jumping Regulations

| **DATA PROTECTION:** ECJ Invalidates Safe Harbour Regime Governing Transfers of Personal Data from EU to US

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| CAPITAL MARKETS

European Commission Launches Action Plan for Capital Markets Union

On 30 September 2015, the European Commission (the "Commission") presented its action plan (the "Action Plan") to establish a capital markets union ("CMU"). As part of the Commission's larger agenda to stimulate growth, employment, and investment, the Action Plan aims to remove barriers to investment within the EU. Furthermore, the Commission wants to create opportunities for investors, connect investment to the real economy, strengthen the stability of the financial system, and promote deeper financial integration.

The Commission considers that, in addition to traditional bank-financing, alternative sources of funding should play a bigger part in the financing of companies that have limited access to traditional funds (*e.g.*, SMEs and start-ups). Such alternative sources include venture capital, crowdfunding, and capital markets. The Commission believes that the EU is running behind in relying on such types of financing.

According to the Action Plan, the advantages of using more diversified sources of financing are twofold. Not only does such use stimulate business and investment, it also increases financial stability as it limits the risk exposure of traditional financial institutions and, thus, reduces the risk of a banking crisis affecting the real economy. Establishing a CMU would therefore contribute to the achievement of the goals of the European Economic and Monetary Union.

Even though the Action Plan is a medium-term project, the Commission has already undertaken some initiatives. The Commission thus made proposals to revamp the use of securitisations, promote long-term investment in infrastructure by insurers, and amend the Prospectus Directive. These initiatives are addressed below in further detail.

Securitisations

The Commission estimates that an additional EUR 100 to EUR 150 billion would be made available in the EU economy if EU securitisation issuance would reach pre-crisis level. To this end, the Commission made two proposals to revamp securitisation in the EU.

Firstly, the Commission has introduced a proposal for a Regulation which will establish a simple, transparent, and standardised regulatory framework for securitisation (the "Proposed Securities Regulation" can be found **here**). The Proposed Securities Regulation will apply to all securitisations and will include rules on due diligence, risk retention and transparency. It will also list the criteria for Simple, Transparent and Standardised Securitisations ("STS Securitisations").

Secondly, the Commission introduced a proposal to amend Regulation 575/2013 on prudential requirements for credit institutions and investment firms (the "Capital Requirements Regulation"; the proposal can be found **here**), in order to make the capital treatment of securitisations for banks and investment firms more risk-sensitive. In particular, the capital treatment should reflect properly the specific features of STS Securitisations.

Investment in infrastructure

The Commission is convinced that large infrastructure projects are crucial to achieving growth in Europe. However, such projects require substantial long-term financing. In that regard, the Commission believes the insurance and reinsurance industry could play a pivotal role in the stimulation of infrastructure projects, through investments in equity and debt. In order to eliminate unjustified hurdles preventing (re-)insurance companies from making such investments, the Commission proposed a number of amendments to the Commission Delegated Regulation 2015/35 concerning the calculation of regulatory capital requirements for several categories of assets held by insurance and reinsurance undertakings (the "Solvency II Regulation"; the proposed amendments can be found **here**).

The main novelty is the introduction of a new asset category in the Solvency II Regulation, the 'qualifying infrastructure investment', which will benefit from its own risk calibration, resulting in lower capital charges. Consequently, the amount of eligible basic own funds which (re-)insurers must hold against the debt and equity of these

infrastructure investments ("capital requirements") will be reduced. This will make it less burdensome for insurers to make such investments.

Prospectus Directive

Finally, the Commission launched a consultation on Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading (the "Prospectus Directive"; *See, this Newsletter, Volume 2013, No 8, p. 2*), and has pledged to announce proposed changes before the end of the year. The changes will seek to reduce administrative burdens on companies, while maintaining effective investor protection. This should make it easier and less expensive for companies to raise capital throughout the EU.

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| COMMERCIAL LAW

Law Amending Code of Economic Law Published in Belgian Official Journal

On 30 October 2015, the Law amending the Code of Economic Law was published in the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*) (*Wet van 26 oktober 2015 houdende wijziging van het Wetboek van economisch recht en houdende diverse andere wijzigingsbepalingen/Loi du 26 octobre 2015 modifiant le Code de droit économique et portant diverses autres dispositions modificatives* – the "Law").

The Law had been proposed by the government on 27 August 2015. On 22 October 2015, it was adopted by the Chamber of Representatives.

For a discussion of the Law's main novelties, we refer to the September issue of this Newsletter (*See, this Newsletter, Volume 2015, No. 9, p. 4*).

Subject to a limited number of exceptions contained in chapter 12 of the Law, the Law enters into force on 9 November 2015.

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| COMPETITION LAW

Belgian Competition Authority Imposes Fine for Negligent Obstruction of Merger Investigation

On 1 October 2015, the Competition College (*Mededingingscollege / Collège de la concurrence*) of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la concurrence*) ("BCA") imposed a fine of EUR 50,000 on Sanoma Media Belgium N.V. ("Sanoma") for obstruction of a merger investigation due to a delay in providing requested information.

The Competition College found that Sanoma had negligently failed to provide the Competition Prosecutor in a timely fashion with a market study, even though Sanoma had "had knowledge of it for at least two days" prior to providing it. As a result of this delay, the Competition Prosecutor could not take the study into account in his assessment of the proposed sale by Sanoma of several magazines to De Persgroup, as the Prosecutor had already issued his objections before receiving the study (*See, this Newsletter, Volume 2015, No. 8, p. 4*).

The Competition College found that, in the context of the merger proceedings, firms have to be particularly diligent in providing information to the BCA. The Competition College further considered that the fact that the market study would probably not have led the Competition Prosecutor to raise additional objections did not mean that the delay in transmitting the information would not amount to an obstruction of the investigation.

The Competition College applied the 2014 Belgian fining guidelines to the calculation of the fine, which provides that fines for procedural infringements can reach up to 10% of the maximum fine for cartels.

However, the Competition College limited the amount of the fine on account of two factors. First, the Competition College noted that this is the first time in Belgium that delaying the transmission of information due to negligence has been considered tantamount to the obstruction of an investigation. Second, it is the first time that the 2014 Belgian fining guidelines have been applied to the calculation of a fine for this type of infringement.

As a result, the Competition College decided to calculate the fine as if the information had only been transmitted late, but could still have been taken into account by the Competition Prosecutor. Despite this supposedly lenient approach, the Competition College imposed a fine of EUR 50,000.

Brussels Court of Appeal Confirms Temporary Suspension of Exclusivity Clause in International Show-Jumping Regulations

On 22 October 2015, the Brussels Court of Appeal (*Hof van beroep / Cour d'appel*) (the "Court") upheld the decision made by the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la concurrence*) ("BCA") to suspend the exclusivity clause preventing horse riders from participating in show-jumping competitions not approved by the Fédération Equestre Internationale ("FEI").

The exclusivity clause is included in the General Regulations of FEI, the governing body for show-jumping, and prevents athletes and horses from competing in FEI approved events if they participated in an event not authorised by the FEI over the previous six months.

The Competition College (*Mededingingscollege / Collège de la concurrence*) of the BCA decided in July 2015 that this clause should be suspended until a final decision is made on the merits of the case (*See, this Newsletter, Volume 2015, No 7, p. 4*). The FEI then sought both the suspension and the annulment of this interim measure before the Brussels Court of Appeal.

The Court dismissed FEI's request for suspension of the interim measure. Although the judgment is not yet publicly available, it seems that the Court found that FEI failed to show that the suspension of its exclusivity clause made it suffer serious and irreparable harm. The Court noted that FEI had been in business for more than a century without having such a clause.

As a result of this judgment, the suspension of the exclusivity clause decided by the BCA continues to apply. The Court still has to rule on the merits of FEI's request for annulment of the interim measure adopted by the BCA.

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Telecommunications Abuse Case before the Brussels Court of Appeal Ends with Settlement between Base, Mobistar and Proximus

On 22 October 2015, telecommunications operators Base, Mobistar and Proximus announced their decision to settle an antitrust dispute which had pitted Base and Mobistar against Proximus for twelve years.

In 2003 and 2004, Base and Mobistar sued Proximus for damages. According to Base and Mobistar, from 1999 to 2005 Proximus (ex-Belgacom) had charged mobile termination rates ("MTRs") for calls originating on Base's or Mobistar's networks and terminating on Proximus' network ("off-net calls") that were abusively high compared to the MTRs Proximus applied to calls both originating and terminating on its network ("on-net calls").

The dispute was brought before the Brussels Commercial Court (*Rechtbank van koophandel / Tribunal de commerce*) and, on appeal, before the Brussels Court of Appeal (*Hof van beroep / Cour d'appel*). On 26 February 2015, the Court of Appeal found that (i) Proximus was dominant on the market for MTRs on its own network; and (ii) it was necessary to commission an expert report in order to determine whether Proximus' MTRs were abusive (*See, this Newsletter, Volume 2015, No 3, p. 4*).

It now seems that the parties have not waited for the Brussels Court of Appeal to resolve the matter. Proximus agreed to pay EUR 66 million to Base and EUR 54 million to Mobistar, in return for the closure of the case. These amounts seem low in comparison with the findings of an interim report on damages prepared by the experts appointed by the Commercial Court. According to that report, the harm caused to Base and Mobistar amounts to EUR 1.84 billion.

The settlement does not constitute a recognition of liability on the part of Proximus.

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| DATA PROTECTION

ECJ Invalidates Safe Harbour Regime Governing Transfers of Personal Data from EU to US

On 6 October 2015, the Court of Justice of the European Union ("ECJ") invalidated the European Commission Safe Harbour Decision (Case C-362/14 (*Maximilian Schrems v. Data Protection Commissioner*)). The ECJ judgment came only weeks after the Advocate General had published his opinion in this case (*See, this Newsletter, Volume 2015, no 9, p. 10*).

Under EU Directive 95/46/EC (the "Data Protection Directive"), personal data must not be transferred to a recipient outside the EEA unless such a recipient is located in a country which is deemed to provide an adequate level of protection (Article 25(1) of the Data Protection Directive). This decision on "adequacy" is made by the European Commission in accordance with Article 25(6) of the Data Protection Directive. For instance, in Decision 2000/520, the European Commission decided that the US Safe Harbour Privacy system ensures an adequate level of protection for personal data transferred from the EU to companies established in the US.

The Safe Harbour system includes a series of principles concerning the protection of personal data to which US companies may subscribe voluntarily. Many US companies have signed up to the Safe Harbour scheme and transfer personal data from the EU on the basis of Decision 2000/520.

The role of national data protection authorities

In the judgment of 6 October 2015, the ECJ first assessed the role of national data protection authorities with regard to the Safe Harbour adequacy decision.

The ECJ held that, in principle, a decision of the European Commission on the basis of Article 25(6) of the Data Protection Directive is binding on all Member States. However, the ECJ also considered that national data protection authorities must be able to examine with complete independence whether the transfer of a person's data to a third country satisfies the requirements laid down by the Data Protection Directive. The European Commission decision on Safe Harbour therefore does not prevent the national data protection authority from examining a claim that would cause the mentioned decision to become invalid.

Nevertheless, a national data protection authority cannot invalidate the European Commission decision. Indeed, the ECJ reminded that it is exclusively competent to invalidate a European Commission decision.

Therefore, the ECJ recommends national data protection authorities to bring a case before national courts and refer questions to the ECJ for a preliminary ruling if an adequacy finding of the European Commission is liable to be declared invalid.

Safe Harbour decision invalidated

Although this was not explicitly requested by the referring court, the ECJ also assessed the validity of European Commission Decision 2000/520. In particular, the ECJ sought to determine whether Safe Harbour provides essentially similar protection as in the EU and reached the conclusion that this was not the case.

First, the ECJ considered that Safe Harbour only includes self-certified companies. Other entities, including public US bodies, do not have to comply with the Safe Harbour principles. Accordingly, the ECJ found that the Safe Harbour regime does not grant essentially the same protection to personal data as EU data protection law.

The ECJ further maintained that US procedures do not allow for judicial or administrative means of redress, as required under Article 47 of the EU Charter of Fundamental Rights and therefore do not afford the level of judicial protection expected by EU citizens. According to the ECJ, the European Commission Decision 2000/520 also limits the powers granted to national data protection authorities under the Data Protection Directive.

As a result, the ECJ stepped in and declared European Commission Decision 2000/520 to be invalid.

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Consequences and reactions

Since the Safe Harbour decision was declared invalid, this will have an immediate effect on transfers of personal data between unrelated companies, intra-group transfers of such data, as well as services that companies rely on, such as cloud services. In particular, transfers of personal data from the EU to the US on the basis of the Safe Harbour decision could be prohibited.

Because of the resulting uncertainty, companies may start looking for alternative solutions, such as standard data transfer agreements and Binding Corporate Rules ("BCR"). In addition, companies will have to review their existing contracts with service providers that transfer personal data outside the EU.

In a first response to the ECJ judgment, the European Commission recommended that transatlantic transfers of personal data should be continued on the basis of alternative measures or derogations contained in the Data Protection Directive. The European Commission also promised to provide guidance to national data protection authorities to address questions regarding international transfers in a harmonised manner.

The Article 29 Working Party ("WP29"), an independent European advisory body on data protection and privacy comprised of a representative of the national data protection authorities of each EU Member State, issued a press release following the judgment in which it called for a harmonised approach. In an attempt to allow companies to comply with the invalidation of the Safe Harbour decision, it indicated that no enforcement action in this regard would be taken before the end of January 2016. By contrast, a separate press release from the German data protection authorities appears not to exclude such enforcement action.

On 29 October 2015, the European Parliament adopted a Resolution which welcomes the ECJ judgment and urges the European Commission to assess its legal impact on other instruments, including the recent EU-US umbrella agreement. The EU-US data protection "Umbrella Agreement" puts in place a comprehensive high-level data protection framework for EU-US law enforcement cooperation. The EU and US authorities reached a political understanding on this Umbrella Agreement in September 2015.

The ECJ judgment also puts pressure on the US Federal Trade Commission and the European Commission which are currently negotiating a "new" Safe Harbour framework. In addition, this judgment is likely to have an impact on the draft General Data Protection Regulation which is in the final stages of the legislative process.

The judgment can be found **here** and a press release on this judgment is available **here**.

Cloud Computing Code of Conduct Rejected by Article 29 Working Party

On 22 September 2015, the Article 29 Working Party ("WP29"), an independent European advisory body on data protection and privacy comprised of a representative of the national data protection authorities of each EU Member State, issued an opinion in which it refused to approve a self-regulation instrument in the cloud computing sector.

The draft Data Protection Code of Conduct for Cloud Service Providers (the "Code") had been submitted to WP29 by the Cloud Select Industry Group ("C-SIG"), a working group consisting of representatives of the industry, on 16 January 2015. The Code is designed to provide guidance to cloud computing providers relating to applicable data protection rules in Europe.

The WP29 rejected the Code on the basis that it did not consistently meet the minimal legal requirements and that its added value in regard to Directive 95/46/EC and national legislation was not readily apparent.

The WP29 expressed concerns relating to the negative impact of the current allocation of responsibilities on individuals, calling for closer cooperation among cloud service providers in the handling of data subjects' complaints and requests. It also stated that although the Code will help cloud service providers demonstrate they are privacy compliant, it will not necessarily prevent data protection authorities from exercising their enforcement powers.

The Opinion also stated that the Code should elaborate on the transition towards data protection regulation, the difference between self-assessment and third party

certification and the powers of the relevant governance body, especially as far as deterrence mechanisms are concerned. Furthermore, the WP29 indicated that the Code must prevent the adoption of terms of service that excessively limit obligations and responsibilities.

Additional elements that required clarification included the transparency of the location of data processing, the processing of sensitive data (*e.g.*, financial or health data), requirements for international transfers, security measures not being clearly defined and differentiated on the basis of the nature of the data processed, the right to conduct IT audits, and data portability as a key right of users.

Despite its refusal to approve the draft Code, the WP29 did mention that it was encouraged by the progress made by C-SIG in developing the Code and that it will support the group's efforts to finalise it.

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| FINANCIAL LAW

Brussels Court of Appeal Reduces Fines Imposed on Fortis' Former Top Executives

On 24 September 2015, the Brussels Court of Appeal (*Hof van beroep / Cour d'appel*; the "Court") reduced the fines that the Financial Services and Markets Authority (*Autoriteit voor financiële diensten en markten / Autorité des services et marchés financiers*; the "FSMA") had imposed on Ageas, the successor in title of Fortis Bank, and on two of its former top executives, Jean-Paul Votron and Gilbert Mittler.

The Court had to review three appeals lodged against the decision of the FSMA sanctions commission (*sanctiecommissie / commission des sanctions*; the "Sanctions Commission") of 17 June 2013 (the "Decision"). Following a procedure of more than three years, the Sanctions Commission had imposed fines on Ageas (EUR 500,000) and Messrs. Votron and Mittler (EUR 400,000 each) for violation of specific provisions of the Law of 2 August 2002 on the supervision of the financial sector and on financial services (*Wet betreffende het toezicht op de financiële sector en de financiële diensten / Loi relative à la surveillance du secteur financier et aux services financiers*; the "Law").

In particular, the Sanctions Commission had found that Ageas and Messrs. Votron and Mittler had each infringed Article 21, §1st, 4° of the Law which provides that "[*i*]*t is prohibited for any person [...] to disseminate information or rumours through the media or the Internet or by any other means, which give, or are likely to give, false or misleading signals as to financial instruments, where the person in question knew, or ought to have known, that the information was false or misleading [...]*". Over the period May-June 2008, four public communications were specifically considered to be in breach of the Law. These included the statements made during the Fortis investor days of 22 and 23 May 2008 by Messrs. Votron and Mittler, respectively (the "First Communication" and "Second Communication") and during the financial breakfast in Utrecht on 5 June 2008 by Mr. Votron (the "Third Communication"). At issue were also assertions by Herman Verwilst at the Goldman Sachs conference in Berlin on 12 June 2008 (the "Fourth Communication").

According to the Sanctions Commission, each of these four communications contained misleading and/or false information concerning the financial situation of Fortis/Ageas following the takeover bid for the Dutch bank ABN Amro. In particular, key information was hidden from and wrongly delivered to the public with respect to the solvency of Ageas/Fortis and the divestment of certain assets. Further, the Sanctions Commission also found that Messrs. Votron and Mittler, as well as Ageas/Fortis should have disclosed, as per Article 10 of the Law, in these four communications, inside information that had come to their attention, including significant changes to information that had already been disclosed.

The Court examined each of the four communications for the purpose of determining whether the Law had been breached.

- With respect to the First Communication, the Court upheld the reasoning of the Sanctions Commission and considered that Mr. Votron had provided false information with respect to the divestment process of certain assets of ABN Amro. Contrary to his assertions that discussions were pending with potential buyers and that binding offers had been received, the Court stated that he knew that the process was not going according to plan and that the only binding offer that Ageas/Fortis had received – namely from Deutsche Bank – was made on unfavourable terms for Ageas/Fortis. However, unlike the Sanctions Commission, his statement that the timing was in line with what had been requested by the European Commission was considered not to be misleading.
- The Court also found that Mr. Mittler had breached the Law at the investor day by stating, in the Second Communication, that Ageas/Fortis was on track to meet its look-through solvency targets at/by the end of 2009 and that its solvency position remained strong thanks to the successful execution of its initial capital management plan. In fact, the Court concluded, just like the Sanctions Commission, that Mr. Mittler had delivered false information in relation to the solvency of Ageas/Fortis and had attempted to hide the increasing deficit

by delivering over-confident forecasts to calm down the market, while he knew, or ought to have known, that the situation did not justify optimistic and reassuring statements.

- The Third Communication was also found by the Court to be in breach of the Law, again confirming the Sanctions Commission's findings. Indeed, Mr. Votron had declared that the solvability was strong and in line with the capital management plan, while Mr. Mittler had informed him, ahead of the financial breakfast, that additional measures were going to be necessary to remedy the deteriorated solvency situation. However, unlike the Sanctions Commission, the Court found that neither Mr. Votron nor Mr. Mittler had a legal obligation to mention the existence of such additional measures, which pertained to Ageas/Fortis itself, in the framework of their obligations to disclose privileged information to the public.

- In relation to the Fourth Communication, the Court also found a violation of the Law in Mr. Verwilst's statement that the plan in place to rebuild the solvency of Ageas/Fortis would cause Ageas/Fortis to be back on target by the end of 2009. This statement proved once again too optimistic and misleading for investors. Indeed, at that time Mr. Verwilst knew that the results of the measures already undertaken by Ageas/Fortis with respect to its solvency were disappointing and that new measures were going to be necessary, such as a capital increase and the modification of Ageas/Fortis' dividend policy. The Court did not examine the penalties imposed on Mr. Verwilst, as this formed part of a separate procedure before another chamber of the Brussels Court of Appeal. That Court held that the mere fact that violations of specific provisions of the Law had been found to exist was sufficient and that an additional financial penalty such as a fine was not necessary.

With respect to Ageas/Fortis, the Court did not rule on all the breaches upheld by the Sanctions Commission pursuant to the *non bis in idem* principle. Under this principle, nobody should be tried for acts for which he or she has already been held accountable. Since Ageas/Fortis had already been penalised and fined by the Rotterdam Appeal Court (*College van Beroep*) in relation to the first three communications, the Court only considered that Ageas/Fortis had breached the Law with respect to the Fourth Communication for the reasons referred to above.

On this basis, the Court annulled the Decision and, consequently, reduced the fines to EUR 250,000 for Ageas and EUR 200,000 for each of Messrs. Votron and Mittler.

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| INTELLECTUAL PROPERTY

Court of Appeal of Brussels Applies UsedSoft Jurisprudence

On 16 September 2015, the Court of Appeal of Brussels (the "Court") applied the reasoning adopted by the Court of Justice of the European Union in *UsedSoft* (*See, this Newsletter, Volume 2012, No. 7, p. 10 and 11*) to a case relating to the delivery of defective software programs.

In June 2005, Richa ordered from Saga Consulting the Business One software program, developed by SAP, expanded with the software Fashion Add On. Fashion Add On is produced by Straton IT-Consulting ("Straton") specifically and exclusively for use with the Business One software. Saga Consulting ordered Business One directly from SAP and ordered Fashion Add On licences from CTAC, which acts as an intermediary for Straton's software. Fashion Add On was delivered, by means of a login and a password, from Straton to CTAC which passed it on to Saga Consulting. Saga Consulting installed the software on Richa's IT systems.

Once installed at Richa's premises, the software did not function properly as it was extremely slow to handle large orders. Saga Consulting and Straton attempted to solve the problem, but the problems persisted.

Richa therefore initiated proceedings against Saga Consulting for termination of the agreement. It also claimed damages. Saga Consulting compelled CTAC and Straton to intervene in the proceedings.

The first judge sided with Richa. It confirmed the termination of the agreement between Richa and Saga Consulting and ordered the latter to pay damages to Richa. The judge also ordered CTAC and Straton to indemnify Saga Consulting for damages paid to Richa.

Straton appealed this decision to the Court and all parties repeated their claims.

The Court first looked at Richa's request to terminate the agreement. It held that Saga Consulting, as the seller, was liable for hidden defects preventing the software from being suitable for its intended purpose. According to the Court, Saga Consulting was – or at least should have been – aware of Richa's intended purpose for the software (*i.e.*, processing of large orders). As a consequence of the termination, Richa was allowed to choose between returning the software to Saga Consulting and receiving its money back or keeping the software and recovering part of its money.

Richa's request to return the software, prompted the practical issue of how such software could be returned to Saga Consulting efficiently since there were no physical copies to return and Richa had knowledge of the login and password to use the software. The Court decided that the termination of the agreement between Richa and Saga Consulting was sufficient in that regard since it triggered the extinction of the right to use the software. The Court also ordered Saga Consulting to pay damages to Richa.

Next, the Court focused on Saga Consulting's claims against CTAC. Saga Consulting contended that the agreement concluded with CTAC was a purchase agreement and that the software which CTAC had delivered did not comply with the agreement.

Referring to the *UsedSoft* case, the Court found that all the constitutive elements for the transfer of the right of ownership of the copy of a computer program were present: (i) downloading onto the customer's server of a copy of a computer program; (ii) conclusion of a user licence agreement for that copy; (iii) payment of a fee intended to enable the right holder to obtain compensation corresponding to the economic value of that copy of the work. The Court therefore held that the agreement between Saga Consulting and CTAC was to be regarded as a purchase agreement and CTAC as a reseller. The fact that the agreement between Straton and CTAC provided that all rights relating to the software belonged exclusively to Straton, also when changes or expansions occurred, had, according to the Court, no bearing on the above. The Court clearly distinguished between the software and the associated rights on one hand and the copies with licence agreements for its use on the other. The retention of title clause only applied to the first case.

In addition, the Court decided that Saga Consulting was not allowed to pursue remedies against its seller, CTAC,

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for non-compliance of Fashion Add On with the purchase agreement. CTAC had no knowledge of the use which Richa intended to make of Fashion Add On. It therefore had no possibility to warn, either Richa or Saga Consulting, of the possible weaknesses of Fashion Add On when used with Business One for large orders. It was Saga Consulting's responsibility to make sure that the software was suitable for the use which Richa intended for the software.

The Court then stated that the same reasoning applied to CTAC's claims against Straton. Saga Consulting was therefore held solely responsible for the damages suffered by Richa.

Court of Appeal Permits Repackaging of Parallel Import Pharmaceuticals

On 14 September 2015, the Court of Appeal of Mons permitted parallel imported pharmaceutical products to be repackaged and sold in package sizes that are predominant on the Belgian market.

The case pitted Merck Sharp & Dohme ("MSD") against parallel importer Impexeco. MSD makes and sells pharmaceutical products based on the active ingredient losartan. These products are sold in Belgium under the trade marks Cozaar® and Loortan®. Impexeco bought Cozaar® boxes of 28 tablets in Poland and repackaged the products for sale on the Belgian market in boxes of 98 tablets, which is the most common packaging format for this product in Belgium.

MSD objected to the importation of the repackaged products and requested the Mons Commercial Court to prohibit Impexeco from importing the products.

The Mons Commercial Court imposed on 8 February 2013 a penalty on Impexeco for its failure to provide a final packaging sample to MSD prior to the importation and its failure to mention on the packaging that the goods had been imported by Impexeco. However, Impexeco was allowed to carry on importing the medicines.

Following the decision at first instance, Impexeco sent a sample of its final packaging for the imported products to MSD on 15 May 2013.

MSD further appealed against the decision of the Mons Commercial Court claiming that Impexeco should not be allowed to repackage the imported products.

The Court of Appeal recalled that the rules on parallel importation of pharmaceutical products seek to establish a balance between trade mark law and competition law. In particular, trade mark law provides that exclusive rights of goods sold in the EU/EEA are exhausted unless legitimate reasons exist to object to a further sale, such as the fact that the goods have been altered or reconditioned. On the other hand, competition law precludes the artificial partitioning of the single EU market.

The balance is supposed to be struck by the application of the so-called *BMS* criteria (Case C-427/93, judgment of the Court of Justice of the European Union, 11 July 1996), which were summarised by the Court of Appeal of Mons as follows. Repackaging is permitted only if:

- the use by the trade mark proprietor of the rights granted by the trade mark to object to the sale of reconditioned goods would result in the artificial partitioning of the single market. The reconditioning must thus be objectively necessary to enter the market in the country of destination;
- the reconditioning must not negatively affect the original state of the product;
- the party responsible for the reconditioning as well as the manufacturer are clearly mentioned on the packaging;
- the presentation of the reconditioned product does not impair the reputation of the trade mark or its proprietor; in other words, the reconditioning cannot be defective, of poor quality, etc.; and
- the importer must give prior notice to the trade mark proprietor before the sale of the reconditioned product.

MSD argued that there was no objective necessity to repackage the products as a mere relabelling would have been sufficient. MSD thereby referred to the *BMS* case which held that repackaging is not objectively necessary if a mere relabelling is sufficient. However, the Court of Appeal sided with Impexeco in finding the repackaging objectively necessary in the case at hand. The Court of Appeal considered that the Belgian market consisted almost exclusively

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of packages of 98 tablets. Moreover, the Federal Agency for Medicines and Health Products (*Federaal Agentschap voor Geneesmiddelen en Gezondheidsproducten/ Agence fédérale des médicaments et des produits de santé*) had objected to a relabelling of the products. Finally, based on surveys submitted by Impexeco, the Court of Appeal found that the reluctance on the market to accept relabelled products further showed the necessity for repackaging.

As a result, MDS's action to prohibit the repackaging was rejected.

European Commission 2016 Work Programme

On 27 October 2015, the European Commission adopted its Work Programme for 2016 which contains the actions which the European Commission will take to implement the Digital Single Market Strategy and other initiatives.

The European Commission will present its vision on a further harmonisation of EU copyright rules in December 2015. The proposal should make copyright better fitted to the digital age. Further initiatives involving copyright should follow in the course of 2016. The European Commission also intends to review the Satellite and Cable Directive. It has already launched a public consultation on 24 August 2015 to determine whether EU rules which define where and how satellite broadcasters and cable companies should clear copyright are up-to-date (*See, this Newsletter, Volume 2015, No. 8, p. 8*).

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| LABOUR LAW

Social Elections 2016: Clock Is Ticking (Part 1)

Between 9 May and 22 May 2016, social elections will take place to appoint the members of the works council (*WC*) and the committee for the prevention and protection on the work floor (*CPPW*). However, as the different phases of the election procedure together will last up to 150 days, the start of the procedure is only some weeks away (between 11 and 24 December 2015, depending on the actual election date).

The election procedure is subject to a strict timeline which should be followed to avoid the elections being considered null and void and that new elections should be organised within the company. Non-compliance with the procedure can also lead to administrative or criminal fines.

The elections are principally organised at the level of the Technical Business Unit (*TBU*). This does not necessarily coincide with a legal entity of a given firm. Indeed, a TBU can be part of a legal entity and, conversely, several legal entities can form a single TBU. In order to determine a TBU, it should be assessed whether an entity can be considered as an autonomously operating entity based on economic criteria (e.g. common administration, common means of communication, same shareholders, belonging to one economic group, same activities or coordinated activities, same logo, the legal entities participate in each other's capital, etc.) and social criteria (common intranet, telephony, fax number, same remuneration policy, proximity and communal facilities, use of similar employment contracts, common infrastructure such as buildings, parking lot, canteen, entrance, etc.). In case of contradictions, the social criteria will prevail.

Social elections should be organised in every TBU that usually employs an average of at least 50 employees (election of CPPW members). For the election of WC members, the TBU should count at least 100 employees or only 50 employees if a WC was elected or should have been elected during the previous social elections in 2012.

At the latest on the 60th day before day X (X-60), *i.e.*, the day after the posting of the actual election date, the company must inform the WC, the CPPW, the trade union representatives or employees in writing of (i) the TBU('s) that have been identified and the different economic and social criteria used for that purpose; (ii) the number of employees per category (blue collar / white collar / management / young employees); (iii) the functions and names of the management; and (iv) the functions and names of the executives.

Between day X-60 and X-35 consultations will take place regarding the above communication.

At the latest on day X-35 (between 5 and 18 January 2016, depending on the actual election date) the company must advise the WC, the CPPW, the trade union representatives or employees in writing of its decision concerning (i) the TBU('s); (ii) the functions and names of the management; and (iii) the functions and names of the executives.

Between X-35 and X-28 the employees and/or trade unions can lodge an appeal before the labour courts against the three above decisions. The courts must give a judgment within 23 days as from the receipt of the petition (between 4 and 17 February 2016, depending on the actual election date).

On day X, the WC, CPPW or employer must post the following information in every establishment at a place accessible for all employees: date and timing of elections, address and name of TBU, number of mandates and division, voters lists or indication of the place where the lists are posted, list of "management staff" or indication of the place where the list is posted, list of "executives" or indication of the place where the list is posted, schedule of the elections and person or service charged with the distribution of the polling letters.

The start of the protection period for the benefit of candidates starts on X-30, not on X+35, the latter being the date by which the lists of candidates must be filed. This means that during a period of 65 days between X-30 and X+35 the candidates are not known by the company yet (in the absence of official candidate lists) and thus, there is a risk that the employer would terminate a protected employee without following the specific procedure. If the employer terminates a candidate, the employee can request to be

reinstated. If the company refuses to accede to such a request, a protection indemnity is due unless the company is able to prove that the employee abused his/her right by only submitting his/her candidacy following the dismissal. Such a proof is notoriously difficult to obtain as the company does not have access to the candidate lists until X+35 and thus cannot determine on which date before X+35 the employee decided to become a candidate.

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| MARKET PRACTICES

Uber Ordered to Terminate UberPOP Service in Brussels

On 23 September 2015, the President of the Dutch-speaking Brussels Commercial Court (the "President") gave judgment in cease-and-desist proceedings lodged by Taxi Radio Bruxellois NV ("TRB"), which operates under the business name of "Taxis Verts", against various companies of the Uber group regarding Uber's activities in Brussels (President of the Dutch-speaking Brussels Commercial Court, 23 September 2015, *Uber Belgium BVBA, Uber BV, Uber International BV and Rasier Operations BV v. Taxi Radio Bruxellois NV, in the presence of Brussels Hoofdstedelijk Gewest, Belgische Federatie van Taxis en Nationale Groepering van Ondernemingen met Taxi- en Locatievoertuigen met Chauffeur VZW*).

The judgment was given in the context of opposition proceedings lodged by Uber Belgium BVBA ("Uber Belgium") against a judgment by default of the President of the French-speaking Brussels Commercial Court of 31 March 2014 (the "Initial Judgment"). The Initial Judgment found that Uber Belgium had committed an unfair commercial practice by transmitting requests for taxi rides to drivers who are not in the possession of the licence referred to in Article 3 of the Ordinance of the Brussels Capital Region of 27 April 1995 on taxi services and vehicle location services with driver (*Ordonnantie van het Brussels Hoofdstedelijk Gewest van 27 april 1995 betreffende de taxidiensten en de diensten voor het verhuren van voertuigen met chauffeur/ Ordonnance de la Région de Bruxelles-Capitale du 27 avril 1995 relative aux services de taxi et aux services de location de voiture avec chauffeur* – the "Ordinance"). Accordingly, the Initial Judgment ordered Uber Belgium to cease and desist from this practice subject to a penalty of EUR 10,000 per infringement.

On 24 April 2014, Uber Belgium lodged an action to have the Initial Judgment set aside. TRB subsequently served a third-party notice on the Dutch Uber entities Uber BV, Uber International BV and Rasier Operations BV (collectively "Uber Netherlands"). Following a request of Uber Netherlands to have the case dealt with in Dutch, the case was transferred to the President.

Before the President, TRB argued that Uber Belgium and Uber Netherlands are distorting competition by transmitting requests for taxi rides to drivers who are not in the possession of the licence required under the Ordinance and do not comply with the Ordinance's rules. According to TRB, this distortion of competition is harmful not only to taxi drivers who do comply with the Ordinance but also to providers of dispatching services like TRB, which act as an intermediary between the taxi drivers and the customers.

Uber Belgium, for its part, sought the annulment of the Initial Judgment. By way of counterclaim, Uber Netherlands (i) asserted that TRB infringes competition law and the rules on fair market practices by including non-compete clauses in its contracts and by entering into restrictive agreements with its competitors; and (ii) requested the President to order TRB to cease and desist from these practices, subject to a penalty payment.

The President held that the Initial Judgment should be reformed as it is not Uber Belgium but other companies of the Uber group which actually provide the contested services. Accordingly, the President held that TRB's claim against Uber Belgium is unfounded.

The President continued by examining the situation of Uber Netherlands. In this regard, the President noted that it was not in dispute that providers of dispatching services (like Uber Netherlands and TRB) are themselves not subject to the Ordinance's licence requirement. However, according to the President, it should be examined whether the licence requirement applies to the drivers whom Uber Netherlands puts in contact with customers.

Pursuant to Article 2, 1° of the Ordinance, the existence of a "taxi service" and, hence, the applicability of the Ordinance's licence requirement, is subject to three cumulative conditions: (i) the service should consist of the paid transport of people by a carrier with a vehicle (which should satisfy specific conditions); (ii) the vehicle should be made available to the public either at a specific parking space on the public road or at any place which is not open to public traffic; and (iii) the destination should be determined by the client.

In assessing whether these conditions were met by the Uber drivers, the President dismissed the arguments of Uber Netherlands that there cannot be a "taxi service" because (i) its ride-sharing services called UberPOP are: (a) provided by "private individuals" and (b) do not qualify as public utility services; and (ii) it is the UberPOP driver who determines the destination and not the user of UberPOP. The UberPOP services differ from Uber's so-called UberX services in that they are not provided by professional, licensed drivers but by non-professional drivers.

The President next examined whether the UberPOP drivers provide the service against remuneration (first condition). In this regard, the President noted that the remuneration of UberPOP drivers may either (i) exceed their actual costs incurred; or (ii) cover their costs only.

The President observed that, in the first case (remuneration exceeds costs), the three conditions of Article 2, 1° of the Ordinance are met. Accordingly, the President concluded that Uber Netherlands had committed an unfair market practice within the meaning of Article VI.104 of the Code of Economic law (*Wetboek van Economisch Recht van 28 februari 2013/Code de droit économique du 28 février 2013*) (this provision prohibits any act contrary to fair market practices by which a company harms or may harm the professional interests of one or more other companies). Uber Netherlands was found to have done so by transmitting requests for paid taxi services to unlicensed UberPOP drivers whose remuneration exceeds their actual costs incurred. The President ordered Uber Netherlands to cease and desist from these practices subject to a penalty of EUR 10,000 per infringement and per party (starting from the twenty-first calendar day following the date of service of the judgment).

In the second situation (remuneration covers costs only), the President questioned whether the Ordinance's licence requirement is compatible with the principle of proportionality, as laid down in Article 5 of the Treaty on the European Union and Article 52, §1 of the Charter of Fundamental Rights of the European Union (the "Charter"), read in conjunction with (i) Articles 15, 16 and 17.1 of the Charter; and (ii) Articles 49 and 56 of the Treaty on the Functioning of the European Union ("TFEU"). Articles 15, 16 and 17.1 of the Charter guarantee the freedom to engage in work, freedom to conduct a business and the right to property respectively. Articles 49 and 56 TFEU protect the right of establishment and the freedom to provide services.

For this reason, the President decided to refer a question for a preliminary ruling to the Court of Justice of the European Union ("ECJ"). The President asked the ECJ to clarify whether the Ordinance is compatible with the above provisions should it be interpreted in such a way that the notion of "taxi services" would also apply to occasional private drivers who are unpaid and who engage in ride-sharing by accepting requests for rides that are communicated to them through a software application of Uber Netherlands, which is established in another EU Member State (*See*, ECJ, case C-526/15, *Uber Belgium*).

The President has not yet ruled on the counterclaim which Uber Netherlands had brought against TRB for the alleged infringement of competition rules. As regards the relevant product market definition, the President considered that Uber Netherlands and TRB are active on the same market. However, since Uber Netherlands had not provided any specific market data (number of drivers, number of vehicles, number of rides, prices, etc.), the President decided to continue the debate in order to allow the parties to exchange additional briefs on the counterclaim of Uber Netherlands.

On 14 October 2015, Uber suspended its UberPOP service in Brussels following the President's ruling. Uber currently only provides services through licensed drivers (*i.e.*, the UberX service). However, it announced in the press that it intends to appeal the judgment.

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