

Van Bael & Bellis on Belgian Business Law

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Avenue Louise 165 Louizalaan
B-1050 Brussels
Belgium

T +32 (0)2 647 73 50
F +32 (0)2 640 64 99
vbb@vanbaelbellis.com
www.vanbaelbellis.com

COMMERCIAL LAW

Ghent Court of Appeal Confirms Importance of Protesting Invoice in Case of Disagreement

In a recently published judgment delivered on 18 March 2009 (*Laboratoire des spécialités du Dr Ernst's SA v. Omega Pharma NV*), the Ghent Court of Appeal ruled on the significance of a clause which did not allow for any amendment to the agreement unless it was made in writing and signed by all parties (the "Clause"). The Clause was included in a transfer of shares agreement between the Luxembourg company Laboratoire des spécialités du Dr Ernst's SA ("Dr Ernst's") and Omega Pharma NV ("Omega Pharma").

The Court of Appeal was asked to examine whether and to what extent the Clause stood in the way of an amendment to the agreement made in a subsequent invoice with diverging terms and conditions. The question arose after the Court had found that Dr Ernst's had tacitly accepted an invoice of Omega Pharma by failing to dispute it within a reasonable time.

The Court of Appeal concluded that the invoice had precedence over the Clause and held that Dr Ernst's could no longer rely on the Clause. In this regard, the Court noted that Omega Pharma's invoice did not amend the initial agreement itself, given that it merely related to due diligence and contract drafting services which were provided with a view to preparing the transfer of shares.

Interestingly and somewhat surprisingly, the Court added that even if the invoice directly concerned services provided under the agreement and were to deviate from that agreement, it would still be possible to presume on the basis of Dr Ernst's tacit acceptance of the invoice that Dr Ernst's had also agreed to the obligations set forth therein. In other words, the Court maintained that an (even tacitly) accepted invoice is presumed to give a true and fair view of the initial agreement to which it relates and

may override an earlier contractual arrangement to the contrary.

COMPETITION LAW

Table of New Competition Decisions

The decisions of the Competition Council that were published in the *Belgian Official Journal* between 19 January 2010 and 18 February 2010 are listed in the *Annex to this Newsletter*.

CORPORATE LAW

New Rules Governing Anonymity of Shareholders

Background

The Law of 18 January 2010 amending the Law of 11 January 1993 relating to the prevention of the use of the financial system for the purposes of money laundering and terrorism financing as well as the Belgian Companies' Code (the "Law") has been published in the Belgian Official Journal of 26 January 2010. The Law contains various measures designed to combat money laundering and terrorism financing. In particular, the amendments to the Belgian Companies' Code introduced by the Law will have considerable consequences for the anonymity of shareholders in unlisted limited liability companies. The Law entered into force on 5 February 2010.

A new Article 515*bis* has been included in the Belgian Companies' Code, which provides that:

- any individual or legal entity
- acquiring or selling securities with voting rights, whether or not representing the share capital
- in an unlisted limited liability company (*naamloze vennootschap/société anonyme*)

- having issued bearer (*aan toonder/au porteur*) and/or dematerialised securities
- as a result of which the number of securities held by such individual or legal entity exceeds, or drops below, 25% of the voting rights in the company at the moment of acquisition
- is obliged to notify the number of securities held as a result of such acquisition
- to the company
- within five business days after the acquisition.

For the avoidance of doubt, this obligation does *not* apply to unlisted limited liability companies that issued only registered securities (*effecten op naam/titres nominatifs*).

The Law also applies to holders of securities in unlisted limited liability companies having issued bearer and/or dematerialised securities, holding minimum 25% of the voting rights in the company on 5 February 2010. In this case, they are also obliged to notify the number of securities they hold in the company by 5 August 2010 at the very latest.

In case of infringement of the above notification obligations, the holder of securities will be deprived of his voting rights and can even be forced to sell his unnotified participation at the request of the most interested party and a decision of the President of the Commercial Court.

Analysis

As a result, it is becoming increasingly difficult for holders of bearer shares in unlisted limited liability companies to remain anonymous. Interestingly, however, the Law contains an important loophole, since the obligation to notify does not apply to affiliated entities or related individuals. In other words, as long as individual holders of bearer and/or dematerialised securities remain under the 25% threshold, there is no need to notify, even though such individual holders would be affiliated entities or related individuals.

It should also be noted that an – often forgotten and relatively inefficient – provision already contains a similar obligation, *i.e.*, Article 632, §2 of the Belgian Companies' Code on cross-participations. Although this provision only applies to Belgian limited liability companies (*naamloze vennootschappen/sociétés anonymes*) and, therefore, not to individuals or other legal entities, it obliges any such Belgian limited liability company acquiring or selling shares, profit shares or certificates relating thereto exceeding, or dropping below, 10% (*i.e.*, substantially less than 25%) of the voting rights in another Belgian unlisted limited liability company, to notify the relevant target. Interestingly, and unlike Article 515*bis*, this provision also applies to subsidiaries and third parties acting for the account of the acquirer.

As a result, any person interested in avoiding the obligation of Article 515*bis*, should also make sure (i) they hold less than 10% of the voting rights on a consolidated basis; or (ii) hold such voting rights as an individual; or (iii) convert the target company into a company other than a Belgian limited liability company. However, non-compliance with Article 632, §2 does not carry any penalties and is rarely complied with.

To summarise, the new Article 515*bis* of the Belgian Companies' Code is an additional obligation that contains important loopholes and adds no value to the current rules with a similar purpose. It would have made more sense to incorporate the new Article 515*bis* into Article 632, §2, and to give that provision teeth.

Belgian Supreme Court Gives Judgment in Fortis Case

On 19 February 2010, the Belgian Supreme Court ruled in favour of the Belgian Federal Participation and Investment Company NV/SA (*Federale Participatie en Investeringsmaatschappij/Société Fédérale de Participations et d'Investissement* - "FPIC"), BNP Paribas S.A. ("BNP"), and Fortis Brussels NV/SA ("Fortis"), thereby reversing the judgment of the Brussels Court of Appeal of 12 December 2008. The case pitted the three companies against more than 2,000 Fortis minority

shareholders who had obtained a judgment before the Court of Appeal, in the course of summary proceedings, which provided that a shareholders' meeting would have to decide on the sale of various Fortis entities to BNP.

The Supreme Court followed the advice of the Attorney General to the Supreme Court who considered that the Court of Appeal had not answered one of the arguments of the defendants. That argument was that holding the shareholders' meeting was against the public interest as it would jeopardise the measures that had been taken in order to save Fortis from bankruptcy. According to this reasoning, the shareholders could only seek monetary compensation for the prejudice that they had allegedly suffered as a result of the sale and this in the interest of "the companies concerned, but also their clients, savers, employees, creditors and, given the importance of Fortis bank and its status as systemic bank, the entire Belgian economy".

According to the Supreme Court, the Court of Appeal failed to consider this argument and the underlying balance of interests. The Supreme Court indicated that "by no means does the Court of Appeal answer this elaborate defence according to which the appellant [the FPIC and others] claimed that the requests of the defendants [the minority shareholders] were, given the lack of urgency, without any merit due to the risk posed to the public interest". The Supreme Court added that the Court of Appeal should have considered the fact that, if the shareholders were only entitled to damages, there was no urgency. By not addressing this argument, it failed to reason its decision adequately. The Supreme Court only ruled on this procedural point (lack of reasoning) and did not address the other arguments invoked.

From a procedural point of view, the case is also interesting for another reason. In the course of the proceedings before the Court of Appeal, the minority shareholders decided to revoke their election of domicile at a law firm. As a result, they claimed that the notification of the petition to the Supreme Court was not admissible, because they should have been individually notified. However, the Supreme Court held that, even if, in theory, one is entitled to revoke an

election of domicile, the behaviour of the shareholders in the present case amounted to an abuse of rights. It could thus not be taken into account when ruling on whether the petition was valid. As an abuse of rights is a fault for which one can be held liable under Belgian law, the minority shareholders could, in theory, be ordered to indemnify the appellants before the Supreme Court for all the unnecessary costs that they incurred in this respect.

The case has been remanded to the Court of Appeal of Liège.

DATA PROTECTION

Working Party Provides Guidance on Definition of Controller and Processor

In a long-awaited opinion adopted on 16 February 2010 (the "Opinion"), the Article 29 Working Party (the "Working Party") offered guidance on two fundamental concepts of EU Directive 46/95 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the "Data Protection Directive"): the "controller" and the "processor" of personal data.

The Working Party unites representatives of the different national data protection authorities in the EU. Its opinions provide the most important source of guidance on the interpretation of data protection law in Europe. Almost 15 years after the adoption of the Data Protection Directive, the Working Party for the first time gave detailed guidance on the interpretation of 2 central concepts in that Directive. This is explained by the fact that the determination of the respective roles of controllers and processors – both concepts are defined in the Data Protection Directive – have become increasingly difficult in view of the development of information and communication technologies. In addition to the concepts of controller and processor, the Opinion also indicates which parties should be regarded as "third parties" under the Data Protection Directive.

Controller

According to the Working Party, it is necessary to establish clearly who controls the processing of personal data in order to ensure the adequate protection of personal data and the fundamental rights of the data subjects. Indeed, it is the controller who bears the main responsibilities under the Data Protection Directive. In addition, the controller determines which national law is applicable.

Under the Data Protection Directive, the controller is defined as: “the natural or legal person, the public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data [...]”. The Working Party underlines that this is an autonomous concept which exists in data protection law and is independent from qualifications under other laws or regulations.

The Opinion breaks down the definition of the controller into 3 elements and provides guidance regarding each element of the definition.

Determining the purposes and the means of the processing of personal data

First, the Opinion assesses what it calls the *essential element* to distinguish the controller from other actors, namely that the controller “*determine[s] the purposes and the means of the processing of personal data*”. According to the Working Party, “to determine” implies that the assessment of who should be considered as the controller depends on the factual situation. Indeed, contractual determinations may be taken into account, but will be determined on the basis of the facts of the case in question. Accordingly, the definition in the Data Protection Directive is mandatory and it is not possible to deviate from this definition in a contract. This also makes sense from a functional perspective. Indeed, the controller bears the main responsibilities under the Data Protection Directive, and these responsibilities should be allocated to the entity which actually influences the processing.

The Opinion distinguishes 3 categories of situations for finding the “determining body”.

First, control may stem from explicit legal competences. This is the case not only if the law explicitly designates a controller, but also if the law establishes a task or imposes a duty on someone to collect and process certain data. Second, control may stem from implicit competence. For instance, where an employer processes data on its employees. In this second category, the capacity to determine processing activities can be considered as being attached to the functional role of a person or an organisation. Finally – and this is the trickiest situation in which to determine the controller – control may stem from influence in accordance with the facts of the case. As indicated above, this requires an assessment of the circumstances at hand. Contractual relations may provide an important element, but are not decisive. In addition, the Working Party advises that the following should be considered: (i) the degree of actual control exercised by a party; (ii) the image given to data subjects; and (iii) the reasonable expectations of the data subjects on the basis of this visibility.

The definition of the controller furthermore provides that the ability to determine must relate to the “*purposes and means of processing*”. The Opinion explains that determination of the *purposes* of processing is reserved to the controller. Whoever makes this determination is therefore the controller. On the other hand, the determination of the *means* of the processing relates to the technical ways of processing personal data as well as to questions such as “which data should be processed”, “which third parties have access to these data” and “when data shall be deleted”. According to the Working Party, determining the *means* of the processing can be delegated by the controller as far as technical or organisational questions are concerned.

Natural person, legal person or any other body

Second, the Opinion discusses the *personal element* of the definition of the controller, *i.e.*, that the controller is a “*natural person, legal person or any other body*”. In this respect, the Working Party maintains that preference should be given to consider the company or body as controller rather than a specific person within the company. However, special analysis is needed

where a natural person acting within a legal person uses data for his or her own purposes outside the scope and the possible control of the legal person's activities. This personal element of the definition of the controller is particularly relevant for determining who is liable and imposing sanctions.

Alone or jointly with others

The third and final element of the definition of what constitutes a controller relates to the possibility of *pluralistic control*: the determination is "*alone or jointly with others*". Using various examples, the Opinion discusses different situations where a service or an operation can have multiple controllers. The Working Party states that controllers are ultimately responsible for the processing and that the inability to directly fulfil all data protection obligations does not exclude a party from being a controller. If there are multiple joint controllers, the Opinion explains that this may lead to joint and several liability, but that joint and several liability of joint controllers is not a strict rule. Indeed, the various controllers may be responsible, and also liable, for the processing of personal data at different stages and to different degrees.

Processor

As regards processors, which are defined in the Data Protection Directive as: "a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller", the Opinion elucidates the 2 basic conditions for qualifying as a processor, namely: (i) being a separate legal entity; and (ii) processing personal data on the controller's behalf. Importantly, the Opinion also provides guidance to distinguish between a controller and a processor. This distinction is particularly relevant for external service providers. The Working Party states that the qualification depends on the discretion left to the external entities in respect of data processing. Accordingly, service providers which have a broad margin to manoeuvre will be regarded as (joint) controllers for the services they provide, whereas service providers who operate under strict and very specific instructions will be held to be processors.

Third party

Finally, the Opinion briefly discusses the definition of "third party". The Working Party explains that the concept of a third party is not dissimilar from the notion known in civil law. In particular, third parties do not include the data subject, the controller and any person authorised to process the data under the controller's direct authority or on his behalf. The Opinion states that third parties have no legitimacy or authorisation in processing personal data.

In conclusion, the Working Party recognises the practical difficulties in applying the definitions of the Data Protection Directive and emphasises the need to allocate responsibility in such a way that compliance with data protection rules will be sufficiently ensured in practice.

The Opinion forms a welcome clarification which will certainly contribute to a more harmonised interpretation of the basic concepts of EU data protection law. Nevertheless, the Opinion also shows that the allocation of responsibility (and liability) for data protection compliance is in practice often a very difficult exercise.

European Commission Updates Controller to Processor Clauses

On 5 February 2010, the European Commission decided to update the current "controller to processor" standard clauses contained in European Commission Decision 2002/16/EC (the "2002 controller to processor clauses").

The standard clauses published by the European Commission are intended to create an adequate level of protection for the international transfer of personal data outside the EEA to a country which has not been recognised as providing an adequate level of protection for personal data. Indeed, EU Directive 46/95 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the "Data Protection Directive") prohibits the transfer of personal data to third countries which do not offer an adequate level of protection. Such a transfer may nevertheless be permitted if the exporting

controller can rely on one of the criteria listed in the Data Protection Directive (or its national implementing legislation), or if the exporter establishes sufficient safeguards, for instance by concluding a data transfer agreement with the foreign data importer.

Incorporating the standard clauses adopted by the European Commission in such a data transfer agreement has a twofold advantage. First, it ensures that the foreign recipient of the personal data must respect the data protection requirements applicable to the exporter and, second, national data protection authorities are obliged to permit the transfer on the basis of these clauses.

The European Commission has adopted 3 different sets of standard clauses. 2 sets of clauses relate to the transfer from a controller in the EU to another controller outside the EEA and the third set of standard clauses relates to the transfer from a controller in the EU to a processor outside the EEA. This last set has now been amended.

The main innovation is that the standard clauses now allow processors to outsource (parts of) the processing of personal data to so-called sub-processors. The inability of the 2002 controller to processor clauses to deal with sub-processors had become a major issue since in practice many processors rely on sub-processors for services which require the processing of personal data.

While the increased flexibility is welcomed by EU businesses, the new standard clauses have also received criticism for their inability to deal with a situation where a processor established in the EU outsources the processing of personal data on behalf of an EU controller to a sub-processor outside the EEA.

The amended standard clauses will enter into force on 15 May 2010. Data transfer agreements based on the 2002 controller to processor clauses remain valid after this date. However, when such agreements are amended, the amendments should be in line with the new standard clauses.

EDPS Warns ACTA May Be Incompatible with EU Data Protection Rules

In an Opinion of 22 February 2010 (the "Opinion"), the European Data Protection Supervisor (the "EDPS") criticised the ongoing negotiations regarding the proposed Anti Counterfeit Trade Agreement ("ACTA").

ACTA is a draft multinational agreement which is being negotiated between 12 parties, including the EU. The agreement aims to create a high international standard of enforcement rules to fight counterfeiting and piracy.

The EDPS is concerned that the draft agreement may run counter to EU data protection rules and regrets that he was not consulted by the European Commission on the content of the agreement. In his Opinion, the EDPS advocates the right balance between the demands for the protection of intellectual property rights and the privacy and data protection rights of individuals.

Although the EDPS was not able to view any draft of the ACTA agreement, he discusses the legality of its possible content based on the scant public information on the negotiated text as well as information from unofficial sources.

In particular, the EDPS assumes that ACTA will introduce a "three strikes Internet disconnection policy". Under such a policy all content transferred over the Internet is being monitored. Persons who have been caught transferring infringing files three times are disconnected from the Internet. According to the EDPS, such a measure is highly invasive in the individuals' private sphere and is not a proportionate response to the legitimate purpose which it pursues.

In addition, the EDPS doubts whether the data exchanges envisaged in the context of ACTA are necessary, proportionate or even legitimate. Indeed, the planned international cooperation will require the transfer of personal data, presumably including sensitive data, outside the EEA.

The EDPS calls for a public and transparent dialogue on ACTA which would help to ensure

that the measures to be adopted are compliant with EU privacy and data protection requirements.

The criticism of the EDPS comes on top of earlier calls for more transparency of ACTA. The next round of negotiations on ACTA is scheduled for 12 to 16 April 2010 in Wellington, New Zealand.

INFORMATION TECHNOLOGY

Advocate-General Gives Guidance on Concept of Bad Faith When Registering EU Top Level Domain Name

In *Case C-569/08 Internetportal und Marketing GmbH v Richard Schlicht*, Advocate-General Trstenjak (the “AG”) delivered on 10 February 2010 an opinion regarding the revocation of a speculative and abusive registration of an .eu Top Level Domain name on the basis of Article 21 of Regulation No. 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration (“Regulation 874/2004”).

Internetportal und Marketing GmbH (“Interportal”), a website operator and an internet marketer, had successfully registered a total of 33 German generic terms as trade marks with the Swedish trade mark register, each incorporating the special character “&” before and after each letter or between individual letters. In particular, Internetportal’s application for registration concerned the word mark “&R&E&I&F&E&N&” within Class 9 of the international classification. Internetportal had done so in a crafty attempt to circumvent the technical rule laid down in the second paragraph of Article 11 of Regulation 874/2004. This rule provides that, in the first phase of domain name registration (the “sunrise period”), special characters (such as “&”) must be eliminated entirely from the corresponding domain name.

Interportal subsequently submitted applications for the registration of 180 domain names consisting of generic terms, including the

domain www.reifen.eu. Interportal claimed that it intended to use the domain to operate an internet portal for trading in tyres. However, it has not yet taken any noteworthy preparatory steps for its construction.

In fact, during the first part of the phased registration procedure, the domain www.reifen.eu was registered in Internetportal’s name on the basis of its Swedish trade mark “&R&E&I&F&E&N&”. Internetportal presumed that, after registration of that trade mark as a domain name under the .eu Top Level Domain, application of the transcription rules laid down in Article 11 of Regulation 874/2004 would cause the “&” characters to be eliminated, thus leaving behind the German word “REIFEN” which, as a generic term (*i.e.*, the German word for tyres), should never, in Internetportal’s view, be protected under trade mark law.

Still, Richard Schlicht (“Schlicht”), the proprietor of the Benelux word mark “Reifen” for cleaning agents for surfaces such as window glass, successfully opposed the registration of the domain www.reifen.eu before the Czech Arbitration Court, as a result of which the domain name was withdrawn and transferred to Schlicht. Internetportal subsequently brought an action before the Austrian courts seeking a declaration that the domain name “reifen” under the .eu Top Level Domain should not be withdrawn from it and should not be transferred to Schlicht. The case went all the way up to the Austrian Supreme Court (*Oberster Gerichtshof*) which referred a number of questions to the ECJ regarding the application of Article 21 of Regulation 874/2004.

Article 21 of Regulation 874/2004 provides that a registered domain name shall be subject to revocation where that name is identical or confusingly similar to a name in respect of which a right is recognised or established by national and/or Community law (*e.g.*, a trade mark right) and where the domain name has been registered by its holder without rights or legitimate interest in the name or is being used in bad faith.

First, with regard to what should be understood as a right within the meaning of Article 21, the AG stated that the proprietor of a national trade

mark has a right so long as that trade mark has not been cancelled on grounds of bad faith or on other grounds. In addition, a right exists even if the trade mark which provides the basis for the domain registration differs from the domain name as a consequence of the correct elimination from the latter of the special characters which that trade mark contains. This is the case for “&R&E&I&F&E&N&” which, as a consequence of the elimination of the “&” characters, provides the basis for registration of the domain www.reifen.eu.

Second, according to the AG, a mere declaration of intention to use the domain name cannot be regarded as demonstrating a legitimate interest and should be at least accompanied by a plan or other evidence that the holder is using or that he is intending to use the domain name.

Third, for the purposes of determining whether conduct can be categorised as being in bad faith within the meaning of Article 21, the AG emphasised that the national court is required to take into account all the relevant factors specific to the case before it, including (i) the circumstances in which the trade mark was acquired, in particular the intention not to use it on the market for which protection was sought; (ii) the fact that the trade mark is a German-language generic name; and (iii) the possibly abusive use of the “&” character in order to influence the application of the transcription rules under Article 11 of Regulation 874/2004. However, such conduct is only abusive in so far as the sole purpose of the registration is to be able to request registration of the domain name corresponding to the trade mark in the sunrise period.

The AG added that the large-scale registration of trade marks in the Swedish register, all by the same process, using the “&” character, may also be evidence of lack of good faith on the part of the domain name holder, in so far as those registrations could be qualified as forms of “domain-grabbing” conduct in the sense of Article 21 (3).

The Court of Justice of the EU is expected to hand down a judgment within the next six months.

INSOLVENCY AND RESTRUCTURING

Turnhout Commercial Court Rules on Conditions to Enter into Judicial Composition

On 27 October 2009, the Turnhout Commercial Court issued a judgment denying a company the suspension of payment of its debts, whilst, at the same time, granting it access to a judicial composition (*Gerechtelijk akkoord/Concordat judiciaire*) procedure under the Judicial Composition Law dated 31 January 2009 (*Wet continuïteit ondernemingen/Loi relative à la continuité des entreprises* - “the Law”) (See, *this Newsletter*, Volume 2009, No. 1).

There are three judicial composition procedures under the Law: (i) amicable settlement with creditors; (ii) judicial composition under judicial supervision; and (iii) judicial composition by transfer of all or some of the assets of the company/debtor to a third party. This last procedure is of interest to the case at hand, and can be considered an alternative to a bankruptcy procedure, in so far as the company/debtor does not need to consent to the sale of the assets concerned.

In its reasoning, the Court started by pointing out that the fact that a company is in a state of bankruptcy should, in theory, not be an obstacle to the opening of the judicial composition procedure. Article 23 of the Law provides that the state of bankruptcy of the debtor does not rule out the application of a judicial composition procedure. The objective of the legislator was to allow the procedure to be granted as often as possible, in order to avoid bankruptcies whenever feasible.

However, the fact that a company is in a state of bankruptcy does not entitle it automatically to benefit from the suspension of payment of its debts. Indeed, in view of developing case law, two main criteria are to be applied to determine whether a suspension is justified: (i) the public interest (*i.e.*, the social value of the company as a socio-economic entity); and (ii) the reasonable chances of survival of the company.

In its evaluation of the situation of the company, the Court considered that being duly registered as a contractor and having four employees did not cause it to meet the public interest criterion. As to the chances of survival, the Court noted that the debts of the company exceeded by almost EUR 200,000 the net assets, making it very hard to believe that the company had any chance of overcoming this situation. As a result, the Court denied the company the right to suspend the payment of its debts.

Whereas the second consideration seems appropriate, the public interest criterion as applied by the Court and its implications remain unclear. In the reasoning of the Court, only “sufficiently” large companies may be granted the suspension of the payment of debts. Not only does the text of the Law not provide any arguments to this effect, but it is also not clear why smaller companies should not benefit of this right provided by the Law.

However, although the Court denied the suspension of payment, it did order, in accordance with Article 27 of the Law, the appointment of a judicial trustee (*gerechtsmandataris/mandataire de justice*) to proceed with the sale of the assets of the company to a third party.

INTELLECTUAL PROPERTY

Advocate-General Delivers Opinion on Trade Mark Protection for Lego Bricks

On 26 January 2010, Advocate-General Mengozzi (the “AG”) advised the Court of Justice of the European Union (“ECJ”) in *Case C-48/09 Lego Juris A/S v Office for Harmonisation in the Internal Market (“OHIM”) and MEGA Brands, Inc.* to adopt a broad interpretation of Article 7(1)(ii)(e) of the Community Trade Mark Regulation (the “CTM Regulation”). This Article precludes the registration of signs that consist exclusively of a shape which is necessary to obtain a technical result.

In 2008, Mega Brands, Inc. (“Mega Brands”), a direct competitor of Lego, had successfully claimed the invalidity of Lego's registration of its red brick as a Community Trade Mark (“CTM”) for construction toys before the Court of First Instance (“CFI”) (now the General Court), after the OHIM had already ruled in favour of Mega Brands (*See, this Newsletter, Volume 2008, No. 11 and Volume 2007, No. 6*).

In his opinion of 26 January 2010, the AG identified case C-299/99 *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd* (“Philips”) as the only precedent for an interpretation of Article 7(1)(ii)(e) of the CTM Regulation. According to the AG, the ECJ listed the grounds on which it was appropriate to refuse registration of functional shapes, but failed to give practical guidelines for registering functional signs as trade marks.

Nevertheless, the AG derived guidance from Philips. In particular, the AG explained that the ECJ held that Article 7(1)(ii)(e) of the CTM Regulation is intended to prevent the monopolisation of functional shapes and to preserve the strict delineation between the various intellectual property rights. In addition, Article 7(1)(ii)(e) of the CTM Regulation was held to preclude the registration of shapes whose essential characteristics perform a technical function. Finally, the ECJ established that the possibility to perform the same technical function through other shapes cannot overcome the absolute ground for refusal or invalidity contained in Article 7(1)(ii)(e) of the CTM Regulation.

In addition, the AG proposed his own methodology for determining whether a shape falls outside the scope of Article 7(1)(ii)(e) of the CTM Regulation and may qualify for trade mark registration.

The AG stated that as a first step, the examiner must identify the most important elements of the shape for which registration is sought. According to the AG, each of those elements must be compared with the technical result to determine if the shape is necessary to obtain the relevant technical result. During this first step, the examiner must not take into account the overall impression of the shape, its dominant or

distinctive features or the perception of the average consumer. The AG furthermore explained that previous patent and/or design protection may lead to a strong presumption that features are functional based on the explanations in the relevant documents. In such cases, expert evidence may be required. If, the AG continued, all the defining characteristics of a shape perform a technical function, then registration as a trade mark must be refused.

If only some essential elements of the shape are (at least in part) functional, the examiner must proceed to the second step. In such cases, the AG is of the opinion that the exclusion contained in Article 7(1)(e)(ii) of the CTM Regulation should be interpreted broadly. In view of the purpose of Article 7(1)(e)(ii) of the CTM Regulation, *i.e.*, that a functional shape should be available to all, the AG expressed the belief that shapes involving functional as well as non-functional elements should, in principle, also be excluded from trade mark registration. The AG would nevertheless permit registration of such hybrid shapes if their registration does not hamper interoperability or availability to competitors. The AG indicated that this may be determined on the basis of an assessment of alternative shapes available on the market. According to the AG, the trade mark holder may also be prepared to accept the necessary disclaimers in which he abandons any exclusive rights on the use of specific elements of the trade mark in order to counter possible anti-competitive effects.

Lastly, once the obstacles of either exclusive or partial functionality have been overcome, the AG stated that the examiner should look at the distinctive character of the shape. At this stage, the overall impression conveyed by the sign is relevant and the distinctiveness of the shape must be assessed in relation to the goods and services for which registration is sought, taking into account the perception of the relevant consumer. Thereby, the AG brought attention to Article 7(3) of the CTM Regulation, which prohibits the proprietor of a functional shape from relying on the fact that the latter has become distinctive through use. In that context, the AG indicated that it is important to differentiate recognition of a particular shape (*e.g.*, because it has enjoyed past patent or

design protection) from acquired distinctiveness in respect of non-functional shapes or other types of signs.

The ECJ is expected to hand down a judgment within the next six months. If the court follows the AG's opinion, it will become more difficult to secure trade mark registration for shapes with functional features.

Bill to Clarify Prosecution and Investigation Measures in Relation to Counterfeiting and Privacy

On 11 February 2010, a Bill containing miscellaneous provisions (the "Bill") was submitted to the House of Representatives with a view to amending, *inter alia*, a number of provisions of the Law of 15 May 2007 on the penalizing of counterfeiting and piracy of intellectual property rights (*Wet betreffende de bestraffing van namaak en piraterij van intellectuele eigendomsrechten/Loi relative à la répression de la contrefaçon et de la piraterie de droits de propriété intellectuelle* – the "Piracy Law").

The Piracy Law imposes a series of criminal penalties on counterfeiters and other persons who purposely and in bad faith infringe other parties' intellectual property rights, including trade mark, design and patent rights. A condition for finding infringement within the scope of the Piracy Law is that the act of infringement is committed in the course of trade and as part of a commercial activity whose purpose is to obtain an economic advantage. The Bill seeks to clarify certain aspects of the Piracy Law and enable an efficient implementation of the investigation and prosecution measures provided therein.

In particular, the Piracy Law allows the public prosecutor to order the destruction of counterfeit goods at the expense of the owner, the holder, the consignee of the goods or the holder of the right if, for instance, such is required in the interest of public safety or if the custody or the storage is capable of posing a threat to public order.

The Bill clarifies that destruction of counterfeit goods will only be possible in respect of goods

that have been seized by government officials when performing a search at the alleged infringer's premises on the basis of Article 19, §1 of the Piracy Law. In addition, the Bill prohibits the destruction of counterfeit goods where a settlement is reached with the alleged infringer, provided the settlement is not disputed and subsequently transferred to the public prosecutor. In case of destruction of counterfeit goods, the Bill also imposes an obligation on the prosecutor to take a sample of the goods. With respect to the expenses incurred as a result of the destruction, the Bill explicitly provides that the owner, the holder, the consignee of the goods and the right holder are held severally and jointly liable.

Moreover, the Piracy Law establishes a mechanism whereby a warning letter can be addressed by the Minister of Economic Affairs or his representative to the alleged infringer requesting the latter to cease the infringing acts. This letter should list the measures that exist to stop the infringing acts, including orders to destroy the counterfeit goods or transfer the property to the Treasury, payment of the unpaid taxes for private copying, or the removal of the infringing elements.

EPO Rules on Patentability of Treatment Method by Surgery

On 15 February 2010, the Enlarged Board of Appeal (the "Enlarged Board") of the European Patent Office (the "EPO") handed down a decision concerning the exclusion for patentability of methods for the surgical treatment of the human or animal body under Article 53(c) of the revised European Patent Convention ("EPC") of 2007 (previously Article 52(4) of the EPC of 1973). In particular, Article 53(c) of the EPC excludes from patentability methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body. In its decision, the Enlarged Board answered certain questions referred to it by the Technical Board of Appeal (the "Technical Board").

The proceedings before the Technical Board concern an appeal by Medi-Physics Inc. ("Medi-

Physics") lodged against a decision of the Examining Division of the EPO of 17 April 2003. The Examining Division had refused patent protection for Medi-Physics' medical method for evaluating blood flow and imaging the pulmonary and/or cardiac vasculature. This imaging method involves administering of a contrast agent to a patient by inhalation or by injection.

According to the Examining Division, the claimed method constitutes a diagnostic method for the treatment of the human or animal body. Moreover, the Examining Division stated that the claimed method comprises a surgical step, insofar as the administering of the imaging agent is done by injection. As a consequence, the method is excluded from patent protection pursuant to Article 53(c) of the EPC. Medi-Physics appealed against the decision of the Examining Division which referred a number of questions to the Enlarged Board.

First, the Technical Board asked whether a method should be denied patent protection under Article 53(c) of the EPC if this method includes a physical intervention on the human or animal body which does not per se aim to maintain life and health.

In its answer to this question, the Enlarged Board held that a claimed method for which it is important to preserve the life and health of the subject during its use and which involves an invasive step constituting a substantial physical intervention on the body which requires professional medical expertise and entails a substantial health risk does not qualify for patent protection pursuant to Article 53(c) of the EPC.

Second, the Technical Board sought to know whether patent protection could be granted if the applicant omits the step at issue from the wording of a claim, or if the applicant agrees to a disclaimer excluding this step, or if the claim includes this step, but is not limited to it.

The Enlarged Board answered that a claim which contains a step that comprises a method of surgical treatment for the human or animal body, cannot be left to stand. However, the loss of patentability pursuant to Article 53(c) of the EPC can still be avoided by means of a

disclaimer. Remarkably, the Enlarged Board allowed the unpatentable step to be disclaimed but added that applicants need to ensure that the disclaimer fulfils all the requirements mentioned in the EPC and in the relevant decisions of the Enlarged Board.

Finally, the Technical Board asked if a claimed method should be regarded as being a “*constitutive step of a treatment of the human or animal body by surgery*” under Article 53(c) of the EPC, if the data collected via that method immediately allows a surgeon to decide on the course of action to be taken during a surgical intervention.

According to the Enlarged Board, the mere fact that the information obtained on the basis of the method for which patent protection is sought instantly allows a surgeon to decide on the course of action to be taken during a surgical intervention, does not make that method a treatment of the human or animal body by surgery within the meaning of Article 53(c) of the EPC.

Brussels Court Calls for ECJ Guidance in Sabam v. Scarlet

On 28 January 2010, the Court of Appeal of Brussels referred questions to the Court of Justice of the European Union (“ECJ”) on whether a court order obliging an internet service provider (“ISP”) to filter internet traffic in order to stop consumers from up- or downloading copyright protected works is compatible with EU law.

The case before the Court of Appeal pits Sabam, a Belgian collecting society representing copyright holders, against Scarlet (formerly Tiscali), an ISP. Based on Article 87 §1 of the Copyright Law of 30 June 1994 (*Wet betreffende het auteursrecht en de naburige rechten / Loi relative au droit d’auteur et aux droits voisins*), which permits the judge to impose injunctions on intermediaries, Sabam successfully demanded that Scarlet would be ordered to adopt filtering software to stop illegal transfers of copyright protected files through peer to peer filesharing networks. On 29 June 2007, the President of the Court of First

Instance of Brussels ordered Scarlet to implement the filtering software under forfeiture of penalty payments to Sabam (See, *this Newsletter, Volume 2007, No. 7*).

Later, Scarlet obtained a temporary release from penalty payments to Sabam because the suggested filtering software proved to be unworkable (See, *this Newsletter, Volume 2008, No. 10*).

In the meantime, Scarlet appealed against the decision of the President of the Court of First Instance of Brussels of 29 June 2007. Before determining whether a workable solution was available, the judge on appeal stayed the proceedings and referred 2 questions to the ECJ to find out whether the order sought by Sabam was compliant with EU law. In particular, the Court of Appeal wishes to know whether the filtering system was compatible with the existing regulatory framework including the rules applicable to IPS as well as the rules on the protection of the fundamental rights of the Internet users.

Accordingly, the Court of Appeal of Brussels referred the following questions to the ECJ:

1. Do EU Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society and EU Directive 2004/48 on the enforcement of intellectual property rights, read in conjunction with EU Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, EU Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market and EU Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector, interpreted with regard to Articles 8 and 10 of the European Convention on Human Rights, allow Member States to authorize a national court, which handles the case in a procedure on the merits and solely on the basis of the legal provision which holds that “[the national court] can equally

impose a prohibitory injunction on intermediaries whose services are relied upon by a third party to infringe copyright or a neighbouring right”, to order an ISP to put into place, vis-a-vis all of its customers, *in abstracto* and as a preventive measure, at the expense of the ISP and without limitation in time, a system filtering all electronic communications, both incoming and outgoing, passing through its service, in particular by means of peer to peer software, with the aim to identify the circulation on its network of electronic files containing a musical, cinematographic or audiovisual work in which the claimant alleges to enjoy rights and to block the transfer thereof, either at the request or at the time it is sent?

2. If the answer to question 1 is positive: does the mentioned regulatory framework require that the national court, requested to rule over a request for injunctive relief against an intermediary on whose services a third party relies on to infringe a copyright, applies the principle of proportionality when it is asked to rule over the efficacy and the dissuasive effect of the requested measure?"

TAXATION

Continued Entitlement to Notional Interest Deduction for Companies in Dissolution

In an answer to a parliamentary question dated 18 January 2010 and registered under number 52-91, the Minister of Finance indicated that companies in dissolution are entitled to use the notional interest deduction. This is logical since companies in dissolution continue to be subject to ordinary corporate income tax up to the closing of their liquidation. Further information can be found on the website of the Chamber of Representatives.

(<http://www.lachambre.be/kvvcr/showpage.cfm?section=qrva&language=fr&cfm=qrvaXml.cfm?legislat=52&dossierID=52-B090-561-0057-2009201011449.xml>).

TELECOMMUNICATIONS

Chamber of Representatives Enacts Portability of E-mail Addresses and URL's

On 23 February 2010, the Chamber of Representatives adopted a draft Bill (*Wetsvoorstel tot wijziging van de Wet van 13 juni 2005 betreffende de elektronische communicatie wat betreft de verandering van operator/Proposition de loi modifiant la Loi du 13 juin 2005 relative aux communications électroniques en ce qui concerne le changement d'opérateur* – the “Draft Bill”) which aims to encourage competition on the market for internet services by granting consumers certain rights when changing their Internet provider.

One of the factors preventing consumers from changing their Internet provider, is the fact that they will lose their current e-mail address. Until recently, the same held true for consumers who wanted to change their mobile phone operator but were held back from doing so because they wished to keep their mobile phone number. By introducing number portability, competition on the market for mobile telephony has been enhanced considerably. The Draft Bill aims to achieve the same effect on the market for Internet services.

The Draft Bill therefore effects a number of modifications to the Law of 13 June 2005 on electronic communications (*Wet van 13 juni 2005 betreffende de elektronische communicatie / Loi du 13 juin 2005 relative aux communications électroniques*). A new provision in the Law on electronic communications will oblige all Internet providers to draft, with common consent, a code of conduct and present it to the Belgian Institute for Postal Services and Telecommunications (*Belgisch Instituut voor Postdiensten en Telecommunicatie/Institut belge des services postaux et des telecommunications* – the “BIPT”). This code of conduct must contain provisions which at least satisfy the following requirements:

- when a consumer terminates his contract with his Internet provider and this contract

offered the possibility to create an e-mail address based on the provider's trading name or brand, the consumer can request his provider to offer him, for six months after the termination of the contract and at the choice of the provider, one of the two following services: either the forwarding of e-mails to the consumer's new e-mail address or continued (that is, for six months after the termination of the contract) access to the e-mail address of the terminated provider;

- when a consumer terminates his contract with his Internet provider and this contract offered the use of web space, the consumer can request his provider to keep the consumer's website(s) available for six months after the termination of the contract.
- The two services must be free of charge;
- The provider must inform the consumer about the two services upon termination of the contract;

The BIPT must organise a public consultation on the code of conduct and subsequently decide whether the code complies with the above legal requirements. The Draft Bill also provides that the Internet provider must at least once a year make reference on the customer's invoices to the possibility of e-mail and URL portability after termination of the contract. The Draft Bill has now been sent to the Senate.

TRADE PRACTICES

Brussels Court of Appeal Confirms Precedence of Directive 2005/29/EC over Law on Unfair Trade Practices

On 4 February 2010, the Brussels Court of Appeal annulled a judgment of the President of the Brussels Commercial Court (the "President") of 20 February 2006 relating to joint offers (*Les Editions Urbaines SA v. P.F.*). The case dealt with the practice of the publishing company Les Editions Urbaines of jointly offering the

publication of the same advertisement in the paper version of the magazine *Vlan* and on the *Vlan.be* website. At the first instance level, the President found that this joint offer infringed Article 54 of the Law on Unfair Trade Practices (*Wet van 14 juli 1991 betreffende de handelspraktijken en de voorlichting en bescherming van de consument/Loi du 14 juillet 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur - the "Law"*).

The Court of Appeal came to the opposite conclusion in view of the judgment of the Court of Justice of the EU ("ECJ") of 23 April 2009 in joined cases *VTB-VAB NV v. Total Belgium NV* and *Galatea BVBA v. Sanoma Magazines Belgium NV*. As we reported earlier (See, *this Newsletter, Volume 2009, No. 4, p. 16*), the ECJ decided in this case that the Law, which, subject to limited exceptions, prohibits joint offers, is incompatible with Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices ("Directive 2005/29/EC").

Having regard to the ECJ judgment and the precedence of European law over national law, the Court of Appeal noted that the President erroneously examined whether the joint offer of Les Editions Urbaines was compatible with the Law. Instead, the President should have assessed whether the joint offer was compatible with Directive 2005/29/EC. In this respect, the Court considered it to be of no relevance that the time limit for transposition of Directive 2005/29/EC had not yet expired at the time of the facts given that, before the end of that period, EU Member States should abstain from taking any measures which would seriously jeopardize the attainment of the goal prescribed by the Directive.

The Court of Appeal then examined whether Les Editions Urbaines' joint offer was unfair within the meaning of Directive 2005/29/EC. As the Court rightly pointed out, a joint offer is to be considered as unfair if it materially distorts (or is likely to materially distort) the economic behaviour of the average consumer with regard to the product at stake. The Court held that this criterion was not satisfied in the case at hand since the defendant, P.F., had failed to show

that the joint offer might harm consumers and foreclose the market for internet advertisements and, indirectly, do so for paper advertisements. It added that both markets were very competitive and that many competitors offered combined advertisements.

In view of the above, the Court of Appeal concluded that the President had erroneously found that the joint offer of Les Editions Urbaines infringed Article 54 of the Law.

TABLE OF NEW COMPETITION DECISIONS

Every month, we bring you the new decisions by the Competition Council that have been published in the *Belgian Official Journal*. The following decisions were published in the period between 19 January 2010 and 18 February 2010:

DATE	DECISION NUMBER	PARTIES	NATURE	DECISION
04.11.2009	2009-C/C-27 (<i>BS/MB</i> 22 January 2010, 2867) p.	Belgian Airports Brussels South Charleroi Airport SA	Concentration (Airport operations sector)	Approved without conditions
09.12.2009	2009-D/V-28 (<i>BS/MB</i> 22 January 2010, 2859) p.	KPN Belgium NV	Request for recusal of Competition Council members	General Assembly of Competition Council dismissed request (See, <i>this Newsletter, Volume 2010, No. 1, p. 5</i>)
09.12.2009	2009-D/V-29 (<i>BS/MB</i> 22 January 2010, 2854) p.	KPN Belgium NV	Request for recusal of Competition Council members	General Assembly of Competition Council dismissed request (See, <i>this Newsletter, Volume 2010, No. 1, p. 5</i>)