

Van Bael & Bellis on Belgian Business Law	April 2013
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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@vbb.com
www.vbb.com

COMMERCIAL LAW

New Commercial Code: Recent Developments and Current Status

In April 2013, two further Bills containing additional parts of the new Commercial Code were submitted to the Chamber of Representatives. Moreover, the first parts of the new Commercial Code have been adopted by Parliament and published in the Official Journal (*Belgisch Staatsblad/Moniteur belge*). The new Commercial Code will ultimately include a total of 17 Books, aimed at codifying and modernising the present heterogeneous, and sometimes contradictory, commercial legislation (See, *this Newsletter, Volume 2012, No. 9, p. 3 and No. 12, p. 2 and Volume 2013, No. 3, p. 17*).

Bill to insert Book III in new Commercial Code

On 8 April 2013, a Bill to insert a Book III entitled “Freedom of establishment, freedom to provide services and general obligations of undertakings” in the new Commercial Code was submitted to the Chamber of Representatives (*Wetsontwerp van 8 april 2013 houdende invoeging van Boek III “Vrijheid van vestiging, dienstverlening en algemene verplichtingen van de ondernemingen”, in het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek III en van de rechtshandavingsbepalingen eigen aan boek III, in boeken I en XV van het Wetboek van economisch recht/Proposition de loi du 8 avril 2013 portant insertion du Livre III “Liberté d’établissement, de prestation de service et obligations générales des entreprises”, dans le Code de droit économique et portant insertion des définitions propres au livre III et des dispositions d’application de la loi propres au livre III, dans les livres I et XV du Code de droit économique – the “Bill Book III”*). In addition to inserting Book III in the new Commercial Code, Bill Book III will also insert definitions and law enforcement provisions that are specific to Book III in Books I and XV of the new Commercial Code.

Bill Book III introduces no major changes to Belgian commercial law. It largely compiles and structures the following existing rules:

- the Law of 26 March 2010 relating to services (*Dienstenwet van 26 maart 2010/Loi sur les services du 26 mars 2010*), which partially implemented Directive 2006/123/EC of 12 December 2006 on services in the internal market into Belgian law (“Directive 2006/123/EC”);
- various specific laws in relation to transparency, information and non-discrimination, as introduced in Belgian law to implement Directive 2006/123/EC;
- the Law of 16 January 2003 regarding the establishment of the Central Commercial Registry, the modernisation of the trade registry, the establishment of authorised registration offices and containing miscellaneous provisions (*Wet van 16 januari 2003 tot oprichting van een Kruispuntbank van Ondernemingen, tot modernisering van het handelsregister, tot oprichting van erkende ondernemingsloketten en houdende diverse bepalingen/Loi du 16 janvier 2003 portant création d’une Banque-Carrefour des Entreprises, modernisation du registre de commerce, création de guichets-entreprises agréés et portant diverses dispositions*);
- the Law of 17 July 1975 on the accountancy of companies (*Wet van 17 juli 1975 met betrekking tot de boekhouding van de ondernemingen/Loi du 17 juillet 1975 relative à la comptabilité des entreprises*).

In addition, Bill Book III introduces some cosmetic changes which mostly involve linguistic issues or aim to ensure consistency of existing definitions.

Bill to insert Title 2 in Book XII in new Commercial Code

On 15 April 2013, a Bill was submitted to the Chamber of Representatives aimed at amending the legislation in relation to the electronic economy (*Wetsvoorstel van 15 april 2013 tot wijziging van de wetgeving wat de invoering van het recht van de elektronische economie betreft/Proposition de loi du 15 avril 2013 modifiant la législation en ce qui concerne l’instauration du droit de l’économie électronique – the “Electronic Economy Bill”*). The Electronic Economy Bill will insert a Title 2 in Book XII of the

new Commercial Code dealing with the electronic economy. Further, it will also introduce definitions and law enforcement provisions that are specific to this new section of Book XII in Books I and XV of the new Commercial Code.

The Electronic Economy Bill pursues two objectives. First, it intends to introduce in the new Commercial Code an unamended version of the Law of 9 July 2001 establishing certain rules in relation to the legal framework for electronic signatures and certification services (*Wet van 9 juli 2001 houdende vaststelling van bepaalde regels in verband met het juridisch kader voor elektronische handtekeningen en certificatie-diensten/Loi du 9 juillet 2001 fixant certaines règles relatives au cadre juridique pour les signatures électroniques et les services de certification* – the “Electronic Signature and Certification Law”).

Second, the Electronic Economy Bill will create new rules in relation to (i) electronic archiving; (ii) electronic registered letters; and (iii) electronic time registration (*elektronische tijdsregistratie/horodatage électronique*).

(i) *Electronic archiving*: the current rules on evidence provide that only the original paper version of a document has the highest evidentiary value. In order to enable the electronic archiving of paper documents without keeping a paper copy, the Electronic Economy Bill amends these rules, bringing the legislation up to date with the current practice of keeping only an electronic copy of important documents. There will be two types of archiving:

- Qualified archiving: electronic documents that are archived by qualified companies will be presumed to be identical to the original paper document, and will have the same evidentiary value. In order to be qualified, archiving companies will have to comply with specific regulations and register themselves with a governmental regulating body.
- Non-qualified archiving: electronic documents that are not archived by qualified companies will not be presumed to be identical to the original paper

document. However, if certain – as yet unspecified – criteria regarding the legibility, reliability and durability of the document are satisfied, the archived document will benefit from a higher evidentiary value than a document which does not meet these criteria.

- (ii) *Electronic registered letters*: currently, when Belgian law requires that a registered letter be sent, this must be in a paper format. The Electronic Economy Bill intends to allow for the use of electronic registered letters. This service will be provided by certified companies that will have to comply with specific requirements.
- (iii) *Electronic time registration*: the Electronic Economy Bill also provides for a system of electronic time registration of data, independent of the two services mentioned above. As with the system of electronic archiving, there will be a system of qualified electronic time registration and a system of non-qualified electronic time registration. Companies planning to offer services of qualified electronic time registration will have to comply with the same set of rules as companies providing qualified archiving services.

Publication of Book VIII of new Commercial Code

On 29 March 2013, the Law of 28 February 2013 introducing the new Commercial Code was published in the Official Journal (*Wet van 28 februari 2013 tot invoering van het Wetboek van economisch recht/Loi du 28 février 2013 introduisant le Code de droit économique* – the “Law of 28 February 2013”). The Law of 28 February 2013 is the first law adopted and published in view of establishing the new Commercial Code.

The Law of 28 February 2013 contains Book VIII of the new Commercial Code, which compiles several existing laws regarding the quality of products and services into one volume (See, *this Newsletter, Volume 2012, No. 12, p. 2*). The Law of 28 February 2013 also introduces definitions that are specific to Book VIII in Book I of the new Commercial Code. Further, it sets forth the

general principles of the new Commercial Code in Book II.

Current status of various Books of new Commercial Code

Here follows an overview of the current status of the various Books making up the new Commercial Code.

(i) The following Books have been published in the Official Journal:

- Books IV and V containing new competition and price control rules, which were published in the Official Journal on 26 April 2013 (See below).
- Book VIII, which, as noted, contains rules on the quality of products and services (See, this Newsletter, Volume 2012, No. 12, p. 2).

(ii) The following Book has been adopted by Parliament but has not yet published in the Official Journal:

- Book IX which contains rules on the safety of products and services (*Wetsontwerp van 18 januari 2013 houdende invoeging van boek IX. "Veiligheid van producten en diensten" in het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek IX in boek I van het Wetboek van economisch recht/Projet de loi portant insertion du livre IX. "Sécurité des produits et des services" dans le Code de droit économique et portant insertion des définitions propres au livre IX dans le livre Ier du Code de droit économique*) (See, this Newsletter, Volume 2012, No. 9, p. 3).

(iii) The following Books are currently pending before Parliament:

- Book III which concerns the freedom of establishment, the freedom to provide services and sets forth general obligations of undertakings (See above, Bill Book III).

- Book XII, Title 2 which relates to the electronic economy (See above, Electronic Economy Bill).

(iv) The following Books have not yet been submitted to Parliament:

- Book VI concerning market practices and consumer protection, which was adopted by the Council of Ministers on 14 March 2013 (See, this Newsletter, Volume 2013, No. 3, p. 17).
- Book VII regarding the protection of the consumer in the financial sector.
- Book X regarding particular economic agreements.
- Book XI regarding intellectual property.
- Book XIII regarding consultation mechanisms.
- Book XIV regarding measures for crisis management.
- Book XVI regarding the extrajudicial resolution of consumer disputes.
- Book XVII regarding special legal procedures (injunction proceedings and collective recovery proceedings).

Books I (definitions), II (general principles) and XV (enforcement) of the new Commercial Code are adopted together with the substantive Books dealing with specific topics.

The date of entry into force of the new Commercial Code is to be determined by Royal Decree.

COMPETITION LAW

New Competition and Price Control Laws Published in Official Journal

The Official Journal (*Belgisch Staatsblad/Moniteur belge*) of 26 April 2013 contains the text of the new competition and price control laws of 3 April 2013 (See, this Newsletter, Volume 2013, No. 1,

p. 2 and Volume 2013, No. 2, p. 3) (*Wet van 3 april 2013 houdende invoeging van boek IV "Bescherming van de mededinging" en van boek V "De mededinging en de prijsevoluties" in het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek IV en aan boek V en van de rechtshandhabingsbepalingen eigen aan boek IV en aan boek V, in boek I van het Wetboek van economisch recht/Loi du 3 avril 2013 portant insertion du livre IV "Protection de la concurrence" et du livre V "La concurrence et les évolutions de prix" dans le Code de droit économique et portant insertion des définitions propres au livre IV et au livre V et des dispositions d'application de la loi propres au livre IV et au livre V, dans le livre 1er du Code de droit économique*)(*Wet van 3 april 2013 houdende invoeging van de bepalingen die een aangelegenheid regelen als bedoeld in artikel 77 van de Grondwet, in boek IV "Bescherming van de mededinging" en boek V "De mededinging en de prijsevoluties" van het Wetboek van economisch recht/Loi du 3 avril 2013 portant insertion des dispositions réglant des matières visées à l'article 77 de la Constitution, dans le livre IV "Protection de la concurrence" et le livre V "La concurrence et les évolutions de prix" du Code de droit économique*)).

One or more Royal Decrees will determine the dates of entry into force of the law, which is likely to be staggered. The full package of new rules is not believed to become operational until 1 January 2014, although some observers still hope for an earlier complete entry into force on 1 September 2013.

Brussels Court of Appeal Annuls De Beers' Supply Obligation to Spira

On 26 March 2013, the Brussels Court of Appeal annulled three decisions of the President of the Competition Council who had extended the preliminary measures requiring leading diamond supplier De Beers to continue supplying rough diamonds to Belgian diamond trader Spira. The Brussels Court of Appeal held that the preliminary measures imposed on De Beers had ceased to have effect as of 1 May 2012.

The Belgian diamond saga started in October 2009 when Spira filed a complaint against the Supplier-of-Choice distribution system for rough

diamonds applied by De Beers. The President of the Competition Council imposed an obligation to supply on De Beers in the form of an interim order. On appeal against this measure, the Brussels Court of Appeal decided, on 19 October 2011, that this measure should come to an end on 30 April 2012, unless new circumstances on the market were to occur (See, *This Newsletter, Volume 2011, No. 1*). Nevertheless, subsequent decisions of the President of the Competition Council prolonged the interim measures until the end of 2012 (See, *This Newsletter, Volume 2012, No. 5 and No. 8*).

In an appeal lodged by De Beers against these decisions, the Brussels Court of Appeal held that, in line with its 2011 judgment, the interim measures had ceased to have effect as of 1 May 2012 since the conditions for an extension had not been fulfilled. The Court further held that new interim measures would not be justified given that there is currently no investigation on the merits ongoing against De Beers on this issue at either Belgian or EU level.

CONSUMER LAW

European Commission Publishes Progress Report on Implementation of E-Commerce Action Plan

On 23 April 2013, the European Commission (the "Commission") published a first report on progress made in the implementation of its e-commerce Action Plan 2012-2015 (the "Action Plan") (Commission Staff Working Document – E-commerce Action Plan 2012-2015. State of play 2013 – the "Report"). The Commission adopted the Action Plan in January 2012 to accelerate the development of online services, and in particular, of e-commerce (See, *this Newsletter, Volume 2012, No. 1, p. 3*).

The Report sets out progress made with respect to each of the 16 targeted initiatives which the Commission had identified in the Action Plan, as grouped into 5 broad priority areas. The Report finds that many important actions set out in the Action Plan have already been initiated, whereas others are underway.

The Report lists the following priority actions:

- *First priority: Develop legal rules to facilitate cross-border offers of online products and services*

The Commission initiated reviews of the Regulation on consumer protection cooperation (Regulation 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws) and the E-commerce Directive (Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market).

In addition, the Commission offered guidance on Article 20 of the Services Directive (Directive 2006/123/EC of 12 December 2006 on services in the internal market) which provides that consumers should generally not be faced with differences of treatment due to their nationality or residence.

The Commission also continued work towards the implementation of its intellectual property rights strategy (See, *this Newsletter, Volume 2011, No. 5, p. 13*) and has set out a plan for the next 2 years to create a digital single market in the area of copyright. Moreover, it is currently reflecting on potential barriers associated with the e-book market.

Further, the Commission is monitoring the application and effect of the competition rules. In this regard, it comments that there does not seem to be a widespread problem due to selective distribution systems in the online world.

Other actions of the Commission include a review of the current VAT rates structure.

- *Second priority: Improve operator information and consumer protection*

The Commission points out that (i) the European Consumer Centre Network has continued to raise traders' awareness of their obligations; (ii) it launched a multi-stakeholder dialogue on comparison tools to compare the prices, quality and durability of goods and services more easily; (iii) it adopted a Communication on a European

Consumer Agenda presenting a comprehensive vision for EU consumer policy in the years ahead (See, *this Newsletter, Volume 2012, No. 6, p. 3*); (iv) it presented a European action plan for online gambling; and (v) it conducted a public consultation on a common logo for legally-operating online pharmacies/retailers offering medicinal products for sale at a distance.

Further, the Commission tabled proposals for (i) an optional Common European Sales Law (See, *this Newsletter, Volume 2011, No. 10, p. 2*); (ii) a data protection reform (See, *this Newsletter, Volume 2012, No. 1, p. 6*); and (iii) a regulation on electronic identification and signatures.

- *Third priority: Ensure reliable and efficient payment and delivery systems*

The Commission is working to promote an integrated European market for card, internet and mobile payments for the benefit of consumers and merchants. It is scheduled to adopt not only a proposal to revise the Payment Services Directive (Directive 2007/64/EC of 13 November 2007 on payment services in the internal market) but also a legislative proposal on multilateral interchange fees in the near future.

In late November 2012, the Commission adopted a Green Paper with a view to launching a public consultation on the delivery of parcels, with particular focus on cross-border issues and e-commerce needs.

- *Fourth priority: Combat abuse and resolve disputes more effectively*

The Commission has also announced an initiative on notice-and-action procedures which are put in place by online intermediaries to allow citizens or organisations to notify illegal content, without revising the E-commerce Directive. Pointing out that the online infringement of intellectual property rights is still a matter of direct concern, the Commission has indicated that it will publish, in June 2013, the results of a survey which it launched in December 2012 to gather evidence to assess the efficiency of existing national intellectual property civil enforcement systems. Further, the Commission has been active in the fields of alternative dispute-settlement systems as well as cybercrime and cyber security.

- *Fifth priority: Deploy high-speed networks and advanced technological solutions*

The Commission adopted new EU Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks. It also announced a regulatory package to give a new impetus to the rolling out of high speed broadband networks. Further, the Commission has published a cloud computing strategy and a Radio Spectrum Policy Programme.

At the end of 2013, the Commission will organise a stakeholder conference to take stock of progress regarding the elements of the Action Plan and to assess further needs.

The Report is available at http://ec.europa.eu/internal_market/e-commerce/communications/2012/index_en.htm.

INTELLECTUAL PROPERTY

Court of Justice of European Union Dismisses Challenge by Italy and Spain of Council Decision Authorising Enhanced Cooperation on EU Patent

On 16 April 2013, the Court of Justice of the European Union (“ECJ”) handed down its judgment on challenges brought by Italy and Spain against an EU Council decision of 10 March 2011 to authorise enhanced cooperation on the EU patent. Enhanced cooperation is a special EU procedure allowing a minimum of nine Member States to establish advanced integration or cooperation in specific areas without involving the other Member States.

By decision of 10 March 2011, the Council authorised enhanced cooperation between 25 Member States to create a unitary patent (the “EU patent”) (See, *this Newsletter, Volume 2011, No. 3, p. 5*). Italy and Spain, which refused to participate, challenged the Council’s decision before the ECJ, seeking its annulment on the grounds that it was invalid. The ECJ rejected this challenge.

First, the ECJ noted that Article 118 of the Treaty on the Functioning of the European Union (“TFEU”) confers on the EU the competence to

create European intellectual property rights (“IPRs”). Furthermore, the competence to establish language arrangements for those rights is closely bound to the introduction of these IPRs. In this respect, the ECJ recalled that those competences that fall within the ambit of the functioning of the internal market are shared between the EU and Member States. Concretely, this non-exclusiveness of competences means that the Council has jurisdiction to authorise enhanced cooperation. The ECJ therefore rejected the argument of Italy and Spain according to which the Council had no competence to authorise the enhanced cooperation.

Second, the ECJ held that nothing in the TFEU forbids Member States from establishing between themselves enhanced cooperation within the ambit of those competences of the EU that must, in line with the Treaties, be exercised unanimously. The ECJ stated that, on the contrary, those powers may be used in enhanced cooperation and that provided the Council has not yet decided to act by qualified majority, it is the votes of only those Member States taking part that constitute unanimity. Consequently, the ECJ reasoned that the Council’s decision to authorise enhanced cooperation by no means constitutes circumvention of the requirement of unanimity or the exclusion of those Member States that did not join in making requests for enhanced cooperation. To reach this conclusion, the ECJ considered that the EU had not proven able to establish the EU patent and its language arrangements within a reasonable period. The contested decision therefore does not, according to the ECJ, amount to misuse of powers, but rather, having regard to the impossibility of reaching common arrangements for the whole of the EU within a reasonable period, contributes to the process of integration.

Third, the ECJ examined the argument of Italy and Spain according to which the Treaties do not authorise the Council to enact enhanced cooperation except “as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the EU as a whole”. Here, the ECJ observed that the EU’s interests and the process of integration would, quite clearly, not be protected if all fruitless negotiations could lead to

instances of enhanced cooperation, to the detriment of the search for a compromise enabling the adoption of legislation for the EU as a whole. In the present case, however, the ECJ was satisfied that the Council had carefully and impartially ascertained that the condition of “last resort” had been met. In particular, the Council had correctly taken into account the fact that the legislative process had begun in 2000 and covered several stages. It was also apparent that a considerable number of different language arrangements for the EU patent had been discussed among all Member States within the Council, and that none of those arrangements, with or without the addition of elements of compromise, had managed to find support capable of leading to adoption at EU-level of a full legislative package relating to that patent. Therefore, the ECJ rejected the applicants’ “last resort” argument.

Fourth, the ECJ dismissed the arguments of Italy and Spain on the new EU patent’s alleged lower level of uniformity in comparison to the European Patent Convention currently in force in all Member States.

Finally, the ECJ did not accept the applicants’ plea that the contested decision disregarded the EU’s judicial system.

Given that none of the pleas in law relied on by Italy and Spain in support of their action were upheld, the ECJ dismissed the actions in their entirety.

In related news, Spain lodged two new separate actions before the ECJ in March 2013 (Cases C-146/13 and C-147/13) against Regulation 1257/2012 on enhanced cooperation in the area of the creation of unitary patent protection, and Regulation 1260/2012 on enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements. These latest challenges risk further delaying the implementation of the new EU patent system. More information should become available in due course.

Antwerp Court of Appeal: Simulcasting Digital/Analog is not New Communication

On 4 February 2013, the Antwerp Court of Appeal partially upheld the judgment of the Court of First Instance of Mechelen holding that simulcasting does not amount to new cable distribution within the meaning of the Law on copyright and related rights of 30 June 1994 (the “Copyright Law”). In contrast, the Court of Appeal requested further information from the parties to determine whether Telenet needs a specific authorisation from collecting societies representing the copyright-owners for two further activities.

In the case before the Court of Appeal, cable television distributor Telenet had sought to obtain a declaratory judgment that it does not require authorisation from collecting societies for the following three activities: (i) simulcasting, i.e. the simultaneous, unaltered and unabridged retransmission by cable of digital and analog signal; (ii) direct “injected” signal into the cable; and (iii) transmissions that are part of an “all rights included” agreement with the broadcasting service.

The Court of First Instance sided with Telenet confirming that Telenet does not require authorisation, nor does it need to pay a levy in any of these situations. The Court of Appeal agreed that simulcast transmissions do not require a separate authorisation by the copyright owner, but held that for the remaining two points Telenet might need authorisation from the collecting societies.

Simulcasting transmissions

The term simulcasting refers to the situation in which Telenet broadcasts transmissions both digitally and analogically to its subscribers. Subscribers watch digital or analog television depending on their equipment. The Court of Appeal upheld the decision of the court of first instance finding that such simultaneous broadcasting does not constitute two different transmissions for which Telenet would require a separate authorisation.

Articles 51 and 52 of the Copyright Law provide that authorisation is required for transmissions via cable to the public of radio or television

programmes of a first transmission that are meant to be received by the public. The Court of Appeal held that a simulcast broadcast constitutes a single signal for each subscriber. The subscriber can view either the digital or analog broadcast, but not both at the same time. When the subscriber switches (from analog to digital – or *vice versa*), the public is not altered, only the quality of image and sound. As a result, the Court of Appeal held that there are not two separate communications to the public, or two groups of the public. Therefore, no separate authorisation (or additional fee) is required for simulcasting.

Direct injection of the signal

“Direct injection” refers to the situation where the broadcasting company connects to the network of one or more cable companies directly. The programme in question is not first broadcast via ether or satellite and then retransmitted via cable as usually is the case, but is broadcast for the first time via cable. The judge at first instance held that it is the broadcaster that bears the responsibility to obtain authorisation for this first transmission and that the cable company is in that case merely an intermediary which makes the necessary physical facilities available. Therefore, Telenet’s involvement cannot be regarded as transmission to the public under Article 52 of the Copyright Law.

The Court of Appeal disagreed because Telenet cannot be regarded as an intermediary as its activities exceed the mere making available of the physical facilities. The Court of Appeal explained that Telenet puts together different packages and provides various options for its subscribers. Direct injection is therefore a transmission within the meaning of Article 52 of the Copyright Law. Consequently, Telenet requires the authorisation of copyright-holders for such a transmission.

All rights included agreements

At first instance, Telenet had maintained that certain transmissions are subject to the so-called “all rights included” agreements with the broadcasting organisations. In these agreements, the broadcaster guarantees Telenet that all levies have been paid. The Court of Appeal referred in this respect to Article 53, §1 of the Copyright Law which provides that copyright can only be

exercised by the collecting societies. Article 53, §3 of the same Law provides an exception to this rule: broadcasters can exercise their own copyright in the context of their own transmissions. This exception is stricter than that provided in Article 10, last sentence of Directive 93/83/EEC of 27 September 1993 which provides that broadcasters can also exercise the transmission rights that have been transferred to them by copyright-owners. The latter possibility under the Directive has not been transposed into national law. Therefore Telenet cannot invoke it against the collecting societies.

Hence, the Court of Appeal held that collecting societies retain the right to grant and to enforce copyright authorisations, with the exception of own transmissions of the broadcasting organisations. Since they can enforce copyright, collecting societies can require Telenet to demonstrate that it obtained the required authorisations, even if Telenet has an “all rights included” contract with the broadcaster.

Therefore, in relation to “direct injections” and transmissions that are part of “all rights included” contracts with broadcasters, it is up to the collecting societies to specify for which transmissions they claim copyright. Telenet will then have to show that it has already obtained the required authorisation. The Court of Appeal reopened the proceedings to allow the parties to demonstrate these elements.

Remarkably, the Court of Appeal did not refer questions to the Court of Justice of the European Union (“ECJ”) as was suggested by a number of parties in the proceedings. Moreover, the judgment follows on the heels of guidance given by the ECJ in the “TV Catchup” case. The ECJ clarified, on that occasion, that streaming television broadcasts through the Internet is considered to constitute a new communication to the public, irrespective of the fact that it can only be viewed by TV license holders and therefore does not reach a new public (See, *this Newsletter, Volume 2013, No. 3, p. 11*).

European Commission Launches Anti-Counterfeiting Campaign

On 19 April 2013, the European Commission published a memorandum on the dangers of buying counterfeit goods as part of its recently launched campaign against counterfeiting.

The Memorandum explains that the trade in fake goods amounts to 200 billion euro per year worldwide and does not only affect the economy, but may also be harmful for consumer health and safety.

The European Commission adds that counterfeit products, such as fake medicines and medical devices, are harmful to consumers since they are often of poor quality, made of wrong materials and have questionable effectiveness. Therefore, the European Commission plans to set up a global medical device identification system to facilitate the recognition of counterfeits. Counterfeit products may also be harmful to consumer health and safety if they contain chemical substances which are not in compliance with the REACH and consumer safety regulations. Moreover, the Memorandum states that counterfeit goods affect the economy by competing on unfair terms with genuine products. As a result, counterfeiting harms legitimate enterprises and increases unemployment.

In February 2013, the European Commission proposed a multi-annual plan and introduced two legislative proposals in the area of product safety to fight against counterfeiting (the "Product Safety and Market Surveillance Package"). The legislative initiatives allow Members States to withdraw non-compliant and dangerous products from the market immediately; improve traceability of consumer products throughout the consumer chain; and create a more cooperative system of market surveillance across the EU. The Product Safety and Market Surveillance Package still needs to be approved by the European Parliament and the Council. The package is expected to enter into force in 2015.

More information can be found at: [http://europa.eu/rapid/press-release MEMO-13-346_en.htm](http://europa.eu/rapid/press-release_MEMO-13-346_en.htm)

FPS Economy Publishes Statistics on Anti-Counterfeit Seizures in 2012

On 23 April 2013, the Federal Public Service Economy ("FPS Economy") published statistics on counterfeit goods seized in 2012. In 2012, the total number of seized goods amounted to 412,397 with a total market value of over EUR 12 million. Most seizures concerned audio and video storage devices (*i.e.*, CDs, DVDs and video games), electronic and electrical equipment and clothing and accessories. FPS Economy has indicated that efforts were focused on goods that are potentially harmful to consumer health and products that cannot easily be recognised as counterfeit.

FPS Economy always destroys seized products following a court order, or, in case of an out-of-court procedure, the infringer's consent to the destruction.

The press release with a table of the number of seizures per category of goods is available in [Dutch](#) and [French](#).

Red Bull v. Bulldog: Advocate General Clarifies Meaning of "Due Cause"

On 21 March 2013, Advocate General Kokott gave her opinion on a question sent to the Court of Justice of the European Union (the "ECJ") for a preliminary ruling on the "due cause" which may shield a third party from the accusation of illegitimate use of a reputable trade mark (Case C-65/12).

Since 11 July 1983, Red Bull has owned a word mark and a figurative trade mark for the sign "Red Bull Krating-Daeng", registered for alcohol-free drinks. The company uses the brand for its well-known energy drink "Red Bull".

Mr. de Vries owns the word mark and figurative trade marks for "The Bulldog" which were filed on 14 July 1983, including for alcohol-free drinks. Mr. de Vries had been using this sign, before registering it as a trade mark, in connection with various commercial and sales activities at which drinks were sold. In 1997 Mr. de Vries started using the trade mark for energy drinks.

Red Bull has been trying, for a number of years, to prevent Mr de Vries from manufacturing and selling his energy drink with the mark “The Bulldog”, because of its similarity with the mark “Red Bull” which Red Bull claims may cause confusion for consumers. Article 5(2) of Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (the “Trade Mark Directive”) authorises the proprietor of a reputable mark “*to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark*”.

This case was brought to the Dutch Supreme Court (*Hoge Raad der Nederlanden*) which referred it to the ECJ, seeking clarification on the requirement of “due cause”, under Article 5(2) of the Trade Mark Directive.

In her opinion of 21 March 2013 (the “Opinion”), Advocate General Kokott noted the differences in the term “due cause” between the various language versions of the Trade Mark Directive. The Dutch version refers to a “valid reason” (*geldige reden*), whereas the English, German and French versions are less restrictive and suggest that it would be sufficient for the use of the sign by the third party to be based on a legitimate interest which outweighs that of the owner of the mark having a reputation.

The Advocate General further explained that “due cause” must be assessed in the light of whether the use of the sign takes unfair advantage of the reputation of the trade mark. According to the Advocate General, the elements to take into account in this balancing exercise required by Article 5(2) are: (i) the extent of the reputation and the scale of distinctive character of the trademark; (ii) the degree of similarity between the conflicting marks; (iii) the nature of the goods and services concerned; and (iv) the degree to which they are related.

The Advocate General noted that when the sign “The Bulldog” was filed for alcohol-free drinks in

1983, Red Bull’s trade mark was just a few days older. Therefore, it is doubtful whether Red Bull was already well-known at that time. Thus the use of an existing trade mark cannot, in principle, be considered unfair only because another trademark subsequently acquired a reputation.

The Advocate General also considered that even if Mr de Vries only began to use his trade mark for energy drinks in 1997, the other (and earlier) use of his trade mark must be taken into account, particularly because these other uses may already have conferred the owner of the mark a reputation and a power of attraction which may be considered as legitimate interests.

Therefore, pursuant to the principle of fair competition, the Advocate General reasoned that the companies must, without prejudice to the existence of a risk of confusion, be authorised to use the trade marks by which they have made themselves known on the market.

In light of these factors, the Advocate General concluded that when assessing whether the use of a sign, similar to the well-known mark, without due cause takes unfair advantage of the distinctive character or reputation of that well-known mark, the fact that the third party has already been using that sign in good faith for other products or services prior to the reputable mark having been filed or having acquired its reputation, should be taken into account.

The ECJ is expected to hand down its judgment before the end of the year.

LABOUR LAW

Flemish Decree on Use of Languages is Disproportionate to Aims Pursued and Incompatible with Freedom of Movement for Workers

In a judgment of 16 April 2013, the Court of Justice of the European Union (“ECJ”) held that the Decree of the Flemish Community (*Vlaamse Gemeenschap, communauté flamande*) of 19 July 1973 on the use of languages in relations between employers and employees and also in company documents and papers that are required by law and by regulation (*Decreet tot regeling van*

het gebruik van de talen voor de sociale betrekkingen tussen de werkgevers en de werknemers, alsmede van de voor de wet en de verordeningen voorgeschreven akten en bescheiden van de ondernemingen/Décret réglant l'emploi des langues en matière de relations sociales entre employeurs et travailleurs, ainsi qu'en matière d'actes et de documents d'entreprise prescrits par la loi et les règlements) (the "Decree") is not in line with the freedom of movement for workers within the European Union.

The Decree applies to persons and legal entities having a place of business in the Dutch-speaking region. It stipulates that the language to be used for relations between employers and employees, as well as for company acts and documents required by law, should be Dutch.

Documents or acts that are contrary to the provisions of this Decree are considered null and void. However, a finding of nullity cannot adversely affect the employee and is without prejudice to the rights of third parties. The employer will be liable for any damage caused by these documents or acts to the employee or third parties.

The Labour Court of Antwerp was asked to give judgment on a claim for an additional indemnity in lieu of notice from an employee due to the fact that the cross-border employment contract between the company and the employee had been drafted in another language than Dutch.

In the case at hand, Mr. L., a Dutch national residing in The Netherlands, had been employed for an unlimited period of time as Chief Financial Officer by a Belgian company established in Antwerp, Belgium. The contract of employment (drafted in English) stipulated that Mr. L. had to carry out his work in Belgium although some work would be done in The Netherlands.

Mr. L. was dismissed with immediate effect in a letter drafted in English. Pursuant to Article 8 of the employment contract, the Belgian company paid Mr. L. an indemnity in lieu of notice equal to three months' salary and an additional payment equal to six months' salary.

However, Mr. L. argued that the employment contract, including Article 8 concerning the

severance payments due to Mr L., had not been drafted in Dutch and should therefore be deemed null and void in accordance with the Decree, as the Belgian company is an undertaking whose established place of business is located in the Dutch-speaking region of Belgium. Mr L. concluded that the parties were not bound by the terms of Article 8 of the employment contract and that he was therefore entitled to a higher compensation.

The Labour Court of Antwerp decided to refer the following question to the ECJ for a preliminary ruling:

'Does the [Decree on Use of Languages] infringe [Article 45 TFEU] concerning freedom of movement for workers within the European Union, in that it imposes an obligation on an undertaking established in the Dutch-speaking region when hiring a worker in the context of employment relations with an international character, to draft all documents relating to the employment relationship in Dutch, subject to the sanction of nullity?'

Article 45 TFEU precludes any national measure which, even though applicable without discrimination on grounds of nationality, is capable of hindering or rendering less attractive the exercise by Union nationals of the fundamental freedoms guaranteed by the Treaty.

The ECJ held that the Decree is liable to have a dissuasive effect on non-Dutch-speaking employees and employers from other Member States and therefore constitutes a restriction on the freedom of movement for workers.

As regards the justification for such a restriction, according to well-established case-law, national measures capable of hindering the exercise of the fundamental freedoms guaranteed by the Treaty may be allowed only if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued.

The ECJ held that the legislation of a Member State which would not only require the use of the official language of that Member State for cross-border employment contracts, but which also, in

addition, would permit the drafting of an authentic version of such contracts in a language known to all the parties concerned, would be less prejudicial to the freedom of movement for workers than the current legislation while being appropriate for securing the objectives pursued by that legislation.

The ECJ thus held that the Decree goes beyond what is strictly necessary to attain its objectives and cannot therefore be regarded as proportionate.

Notwithstanding this judgment, the Decree still applies and should continue to be observed in order to avoid litigation. It is now up to the Flemish Parliament to decide on the requisite amendments to the Decree in order to bring its legislation in line with the freedom of movement for workers.

LITIGATION

Draft Bill Amending Arbitration Rules

On 11 April 2013, the Belgian Government introduced a Bill amending the sixth chapter of the Judicial Code (*Gerechtigd Wetboek/Code judiciaire*) relating to arbitration (the "Bill"). The Bill is largely based on the UNCITRAL Model Law (*UNCITRAL Model Wet/Loi type de la CNUDCI*), as amended in 2006.

The objective of the Bill is to align Belgian legislation with the more developed legislation on arbitration in other countries. The Bill incorporates most of the provisions of the UNCITRAL Model Law and reforms the existing Belgian legislation on arbitration as follows:

- the conditions for objective arbitrability are clarified in so far as the source of litigation should concern a pecuniary interest (new Article 1676, §1, Judicial Code);
- the double degree of jurisdiction in case of claims for the recusal of an arbitrator or a claim for annulment of an arbitral award is removed. (new Article 1680, §5, Judicial Code);
- an arbitral agreement can be entered into verbally so that its existence does not

necessarily have to be proven in writing (new Article 1681, Judicial Code);

- the parties can agree on the procedure to challenge the arbitrators, notably by referring to the rules of an arbitral institution (new Article 1687, §1, Judicial Code);
- the regime for provisional or conservatory measures ordered by an arbitral tribunal is detailed (new Articles 1691 to 1697, Judicial Code);
- the principles of equal treatment of all parties and fairness must be applied during the proceedings (new Article 1699, Judicial Code);
- the courts can assist when taking evidence (new Article 1708, Judicial Code);
- an arbitral award can only be set aside on the basis of a limited number of grounds (new Article 1717, Judicial Code), and in certain cases, only if it is established that the omission has had an influence on the award (new Article 1717, §2, a) ii and v, Judicial Code). The same rule applies to the enforceability of an arbitral award (new Article 1721, a) ii and v, Judicial Code);
- the claim for setting aside or declaring the arbitral award enforceable must be brought before one of the five Courts of First Instance (*Rechtbank van Eerste Aanleg/Tribunal de Première Instance*) having its seat in the same districts of the Court of Appeals (*Hof van Beroep/Cour d'Appel*) (new Article 1680, §6 and §7, Judicial Code).

However, unlike other countries, the Bill also intends to retain specific aspects of the current Belgian legislation such as:

- its wide scope of application: the Bill is, unlike the UNCITRAL Model law, not limited to international commercial arbitration but applies to all types of arbitration;
- the absence of any distinction between international arbitration and national arbitration;
- the distinction between the arbitral proceedings organised directly by the parties and arbitrators

(*ad hoc*) as opposed to the arbitral procedures conducted, in full or in part, by an arbitral institution (institutional).

PUBLIC PROCUREMENT

New Regulatory Framework for Public Procurement will Enter into Force on 1 July 2013

On 29 March 2013, the Council of Ministers decided that the new regulatory framework for public procurement will enter into force on 1 July 2013. This is the date that had already been put forward by the Public Procurement Commission (*Commissie voor de overheidsopdrachten/Commission des marchés publics*) in January 2013 (See, *this Newsletter, Volume 2013, No. 2, p. 15*).

The regulatory framework that will enter into force on 1 July 2013 comprises the following texts:

- the provisions of the Law of 15 June 2006 on public procurement contracts and certain contracts for works, supplies and services (*Wet overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten van 15 juni 2006/Loi du 15 juin 2006 relative aux marchés publics et à certains marchés de travaux, de fournitures et de services* – the “Law of 15 June 2006”) which have not yet entered into force (See, *this Newsletter, Volume 2011, No. 8, p. 9 and No. 9, p. 8*);
- the provisions of the Royal Decree of 15 July 2011 on the award of public procurement contracts in the classical sectors (*Koninklijk Besluit van 15 juli 2011 plaatsing overheidsopdrachten klassieke sectoren/Arrêté royal du 15 juillet 2011 relatif à la passation des marchés publics dans les secteurs classiques*) which have not yet entered into force (See, *this Newsletter, Volume 2011, No. 8, p. 9*);
- the Royal Decree of 16 July 2012 on the award of public procurement contracts in the special sectors (*Koninklijk Besluit van 16 juli 2012 plaatsing overheidsopdrachten speciale sectoren/Arrêté royal du 16 juillet 2012 relatif*

à la passation des marchés publics dans les secteurs spéciaux) (See, *this Newsletter, Volume 2013, No. 2, p. 15*);

- the Royal Decree of 14 January 2013 establishing the general implementing measures of the public procurement contracts and the public works concessions (*Koninklijk Besluit van 14 januari 2013 tot bepaling van de algemene uitvoeringsregels van de overheidsopdrachten en van de concessies voor openbare werken/Arrêté royal du 14 janvier 2013 établissant les règles générales d'exécution des marchés publics et des concessions de travaux publics*) (See, *this Newsletter, Volume 2013, No. 2, p. 15*); and
- a Royal Decree, which is still to be published in the Belgian Official Journal (*Belgisch Staatsblad/Moniteur belge*), on competitive procurement in the framework of the European Union of certain contracts for works, supplies and services in the water, energy, transport and postal services sectors (*Koninklijk Besluit betreffende de mededinging in het raam van de Europese Unie van bepaalde opdrachten voor werken, leveringen en diensten in de sectoren water, energie, vervoer en postdiensten/Arrêté royal relatif à la mise en concurrence dans le cadre de l'Union européenne de certains marchés de travaux, de fournitures et de services, dans les secteurs de l'eau, de l'énergie, des transports et des services postaux*).

The draft Royal Decree which formalises the Council of Ministers' decision will now be submitted to the Council of State for advice, after which it will be published in the Official Journal (*Belgisch Staatsblad/Moniteur belge*).

The new regulatory framework governing public procurement still has to be complemented with rules on legal protection, as currently contained in book IIbis of the Law of 24 December 1993 on public procurement contracts and certain contracts for works, supplies and services (*Wet van 24 december 1993 betreffende de overheidsopdrachten en sommige opdrachten voor aanneming van werken, leveringen en diensten/Loi du 24 décembre 1993 relative aux marchés publics et à certains marchés de travaux, de fourniture et de services*). In this

regard, a bill was submitted in the Chamber of Representatives on 16 April 2013 “on the reasoning, the information and the legal remedies with respect to public procurement contracts and certain contracts for works, supplies and services” (*Wetsvoorstel van 16 april 2013 betreffende de motivering, de informatie en de rechtsmiddelen inzake overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten/Proposition de loi du 16 avril 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics et de certains marchés de travaux, de fournitures et de services*).

The new regulatory framework for public procurement, as based on the Law of 15 June 2006, will presumably be in place for only a short duration before being revised. Discussions are ongoing at the EU level to modernise the current EU public procurement rules (See, *this Newsletter, Volume 2011, No. 12, p. 14*).

REAL ESTATE

Deadline for Coordination Pursuant to New Apartment Act Expires on 1 September 2013

Introduction

On 28 June 2010, the law of 2 June 2010 amending the Civil Code and modernising the functioning of the co-ownership of real property was published in the Belgian Official Journal (*Wet van 2 juni 2010 tot wijziging van het Burgerlijk Wetboek teneinde de werking van de mede-eigendom te moderniseren en transparanter te maken/Loi du 2 juin 2010 modifiant le Code Civil afin de moderniser le fonctionnement des copropriétés et d'accroître la transparence de leur gestion*; the “New Apartment Act”). The New Apartment Act amended the legal regime applicable to the co-ownership (*mede-eigendom/copropriété*) of real property, such as apartment buildings.

New provisions

Although the philosophy and the structure of the old regulatory framework, introduced in 1924 and amended in 1994, had been maintained, the New

Apartment Act sought to improve the functioning of that framework. The most important amendments can be summarised as follows:

- the possibility to create sub-associations with legal personality (*deelverenigingen met rechtspersoonlijkheid/associations partielles avec personnalité juridique*) in order to ensure a more efficient management of groups of buildings or large co-ownerships;
- the introduction of a number of new provisions aimed at ensuring that the general meeting (*algemene vergadering/assemblée générale*) functions as a more efficient and democratic body with more involvement of the co-owners;
- the clarification of the mission of the property manager (*syndicus/syndic*) and the implementation of mechanisms aiming at increasing the control over the latter;
- increased transparency of the relationship between the co-owners and the property manager by the introduction of corporate governance principles; and
- the introduction of the joint ownership council (*raad van mede-eigendom/conseil de copropriété*) responsible, amongst others, for the supervision of the property manager.

Scope and entry into force

The New Apartment Act entered into force on 1 September 2010 and applies both to existing and new co-ownerships. As the New Apartment Act is mandatory law (*dwingend recht/règle impérative*), it applies automatically regardless of any contrary provision in the statutes (*statuten/statuts*) or the (lack of) coordination thereof.

Coordination

In order to ensure a proper implementation, the New Apartment Act provided for the obligation to coordinate the current statutes by bringing those in line with the new legal provisions. Initially, the property manager was under the obligation to present a coordinated version of the basic deed (*basisakte/acte de base*), the rules of co-ownership (*reglement van mede-eigendom/règlement de copropriété*) and the

internal rules (*huishoudelijk reglement/règlement d'ordre intérieur*) to the general meeting before 1 September 2011. However, the initial deadline has been extended for an additional two years. As a result, property managers now have the obligation to submit a coordinated version of the statutes to the general meeting for approval before 1 September 2013.