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COMMERCIAL LAW

New Commercial Code: Recent Developments

Publication of Bill to Insert Book XIII "Consultation Mechanisms" in New Commercial Code

On 6 September 2013 the government submitted to the Chamber of Representatives the Bill to insert Book XIII regarding consultation mechanisms in the new commercial code (*Wetsontwerp van 6 september 2013 houdende invoeging van het Boek XIII "Overleg", in het Wetboek van economisch recht/Projet de loi du 6 septembre 2013 portant insertion du Livre XIII "Concertation", dans le Code de droit économique* – "Bill Book XIII"). Bill Book XIII aims to reform the current disparate and confusing jumble of economic consultation committees into a more streamlined and transparent whole.

Belgium is a "consultation economy", which means that economic reforms are preceded by sector consultations via advisory committees. The Law of 20 September 1948 on the organisation of the economy (*Wet van 20 september 1948 houdende organisatie van het bedrijfsleven/Loi du 20 septembre 1948 portant organisation de l'économie*) created a Central Economic Council (*Centrale Raad voor het Bedrijfsleven/Conseil Central de l'Economie* – the "CCECRB") which includes both employer and employee representatives and provides high-level advice on economic matters.

In addition to the CCECRB, many sectors feature their own committee or committees. These committees typically consist of representatives with opposing or conflicting interests (such as employers and employees) and have a two-fold function: on the one hand, they can provide sector-specific technical advice and, on the other hand, they provide a platform for debating proposed economic reforms, allowing policy makers to rely on their advice when taking decisions. Examples of such committees include the following:

- the Consumption Council (*Raad voor het verbruik/ Conseil de la Consommation*);
- the Price Commission for Pharmaceutical Specialties (*Prijzencommissie voor de Farmaceutische Specialiteiten/Commission des prix des spécialités pharmaceutiques*);
- the Advisory Committee for Telecommunications (*Raadgevend Comité voor de Telecommunicatie/Comité consultatif pour les télécommunications*);
- the Council for Intellectual Property (*Raad voor de Intellectuele Eigendom/Conseil de la propriété intellectuelle*);
- the Competition Commission (*Commissie voor de Mededinging/Commission de la concurrence*).

The advice of some of these committees is binding, while that of others is non-binding. Some committees provide a single opinion, while other committees provide a series of separate opinions. Moreover, in some cases there are *ad hoc* committees which address a specific concern, while all other issues fall under the competence of a different committee.

Bill Book XIII will centralise and streamline these committees by bringing them under the common umbrella and supervision of the CCECRB. This administrative simplification should ensure a more efficient allocation of resources, while also guaranteeing a better and more coherent structure and a better possibility of review. Bill Book XIII also provides for administrative rules which are common to all committees, and provides that in situations where a policymaker requests several committees to provide advice on a given proposal, the advice should be bundled into one coherent whole.

Bill Book XIII furthermore foresees that special advisory committees (*bijzondere raadgevende commissies/commissions consultatives spéciales*) can be created either by the CCECRB, or by Royal Decree.

As with the other Books of the new commercial code, the date of entry into force of Book XIII is to be determined by Royal Decree.

Publication of Bills governing law of the electronic economy

On 23 July 2013, the government submitted to the Chamber of Representatives the Bill to insert a Book XII entitled "Law of the electronic economy" in the new commercial code and to insert the definitions and the enforcement provisions that are specific to this new Book XII in Books I and XV of the new commercial code (*Wetsontwerp van 23 juli 2013 houdende invoeging van het Boek XII, "Recht van de elektronische economie", in het Wetboek van economisch recht, en houdende invoeging van de definities eigen aan boek XII en van de rechtshandhavingsbepalingen eigen aan boek XII, in de boeken I en XV van het Wetboek van economisch recht/Projet de loi du 23 juillet 2013 portant insertion du Livre XII, "Droit de l'économie électronique" dans le Code de droit économique, portant insertion des définitions propres au livre XII et des dispositions d'application de la loi propres au livre XII, dans les livres I et XV du Code de droit économique* – "Bill Book XII") (*See, this Newsletter, Volume 2013, No. 8, p. 3*).

In addition to Bill Book XII, the Chamber of Representatives published the Bill inserting an Article XII.5 in Book XII "Law of the electronic economy" of the new commercial code (*Wetsontwerp van 23 juli 2013 houdende invoeging van artikel XII.5 in het boek XII, "Recht van de elektronische economie" van het Wetboek van economisch recht/Projet de loi du 23 juillet 2013 portant insertion de l'article XII.5 dans le livre XII, "Droit de l'économie électronique" du Code de droit économique* – "Bill Article XII.5") (*See, this Newsletter, Volume 2013, No. 8, p. 3*).

Bill Book XII and Bill Article XII.5 lay down Title 1 of Book XII "Law of the electronic economy", which codifies the following, largely unchanged, laws:

- the Law of 11 March 2003 on certain legal aspects of information society services (*Wet van 11 maart 2003 betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij/Loi du 11 mars 2003 sur certains aspects juridiques des services de la société de l'information*);

- the Law of 12 May 2003 on the legal protection of information society services based on, or consisting of, conditional access (*Wet van 12 mei 2003 betreffende de juridische bescherming van diensten van de informatiemaatschappij gebaseerd op of bestaande uit voorwaardelijke toegang/Loi du 12 mai 2003 concernant la protection juridique des services à accès conditionnel et des services d'accès conditionnel relatifs aux services de la société de l'information*);

- the Law of 26 June 2003 concerning abusive registration of domain names (*Wet van 26 juni 2003 betreffende het wederrechtelijk registreren van domeinnamen/Loi du 26 juin 2003 relative à l'enregistrement abusif des noms de domaine*).

On 15 April 2013, a Bill aimed at inserting a Title 2 in Book XII had already been submitted to the Chamber of Representatives (*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*). Amongst other things, this Bill, which is still pending in Parliament, will create new rules in relation to (i) electronic archiving; (ii) electronic registered letters; and (iii) electronic time registration (*elektronische tijdsregistratie/horodatage électronique*) (*See, this Newsletter, Volume 2013, No. 4, p. 2 and No. 8, p. 3*).

As with the other Books, the date of entry into force of Book XII of the new commercial code is to be determined by Royal Decree.

Bill to insert Book VI of New Commercial Code regarding Market Practices

On 24 September 2013 a Bill to insert a Book VI "market practices and consumer protection" into the New Commercial Code and to insert the definitions that are specific to Book VI, and the

enforcement provisions that are specific to book VI, in Books I and XV of the New Commercial Code, was submitted to the Chamber of Representatives (*Wetsontwerp van 24 september 2013 houdende invoeging van boek VI "Marktpraktijken en consumentenbescherming" in het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek VI, en van de rechtshandhavingsbepalingen eigen aan boek VI, in de boeken I en XV van het Wetboek van economisch recht/Projet de loi du 24 septembre 2013 portant insertion du livre VI "Pratiques du marché et protection du consommateur" dans le Code de droit économique et portant insertion des définitions propres au livre VI, et des dispositions d'application de la loi propres au livre VI, dans les livres I et XV du Code de droit économique* – "Bill Book VI").

Bill Book VI will concern market practices and consumer protection but has not yet been made publicly available (*See, this Newsletter, Volume 2013, No. 3, p. 17 and Volume 2013, No. 7, p. 16 and No. 8, p.4*).

Bill to insert Book XVII of New Commercial Code regarding Special Legal Procedures

On 24 September 2013 a Bill to insert a Book XVII called "special legal procedures" into the New Commercial Code and to insert a definition and enforcement provisions specific to Book XVII into the same code, was submitted to the Chamber of Representatives (*Wetsontwerp van 24 september 2013 houdende invoeging van boek XVII "Bijzondere rechtsprocedures" in het Wetboek van economisch recht, en houdende invoeging van een aan boek XVII eigen definitie en sanctiebepalingen in hetzelfde wetboek/Projet de loi du 24 septembre 2013 portant insertion du livre XVII "Procédures juridictionnelles particulières" dans le Code de droit économique, et portant insertion d'une définition et d'un régime de sanctions propres au livre XVII dans ce même code).*

On that same date, a Bill to insert provisions which deal with a matter as set out in Article 77 of the Constitution into Book XVII "special legal procedures" of the New Commercial Code, was also submitted to the Chamber of Representatives (*Wetsontwerp van 24 september 2013 houdende invoeging van de bepalingen die een aangelegenheid regelen als bedoeld in artikel 77 van de Grondwet, in boek XVII "Bijzondere rechtsprocedures" van het Wetboek van economisch recht/Projet de loi du 24 septembre 2013 portant insertion des dispositions réglant des matières visées à l'article 77 de la Constitution dans le livre XVII "Procédures juridictionnelles particulières" du Code de droit économique).*

Both bills concerning Book XVII were adopted by the Council of Ministers on 19 July 2013 (*See, this Newsletter, Volume 2013, No. 8, p.4*) and will insert special legal procedures such as injunction proceedings and collective recovery proceedings in the New Commercial Code.

COMPETITION LAW

Partial Entry into Force of New Competition Law

Following the publication in the Belgian Official Journal of four Royal Decrees, the reformed Competition Law partially entered into force on 6 September 2013. This marks the start of the new Belgian Competition Authority. While the reform changes little to the substance of Belgian competition rules, it does introduce a number of important procedural and institutional changes, including a significant reorganisation of the Belgian Competition Authority (*See, this Newsletter, Volume 2013, No. 1*).

Royal Decrees published on 6 September 2013 contain provisions on (i) the entry into force of the provisions of the new Competition Law (thus correcting an earlier publication – *see, this Newsletter, Volume 2013, No. 8*); (ii) the rules and procedures governing the different bodies that make up the Belgian Competition Authority; and (iii) the conditions of payment and the collection of administrative fines and penalty payments.

The Royal Decree concerning merger notifications was published in the Belgian Official Journal of 9 September 2013. This Royal Decree contains detailed provisions on the practicalities of merger notifications. Separately, a notice makes clear that the old rules governing

the simplified notification procedure will continue to apply for the time being.

The provisions concerning price control have not yet entered into force.

CORPORATE LAW

International Standards on Auditing

On 22 August 2013, the standards complementing the International Standards on Auditing (ISA) were published in the Belgian Official Journal. The new standards had already been adopted by the Institute of Statutory Auditors (*Instituut van de Bedrijfsrevisoren/Institut des Réviseurs d'Entreprise*) on 29 March 2013.

The new standards apply to the report (*verslag/rapport*) due by the statutory auditor (*commissaris/commissaire*) to the general assembly pursuant to Articles 144 and 148 of the Belgian Companies' Code and complement ISA standards 700, 705 and 706. The objective of the new standards is to comply with the Belgian Companies' Code and enable the statutory auditor to report on the statutory and regulatory obligations regarding the annual report and the accounting procedures.

The statutory auditor will now have to structure his report in two parts: (i) a part on the (consolidated) annual accounts; and (ii) a part on the company's legal and regulatory obligations.

The new standards are available in Dutch and in French on the website of the Institute of Statutory Auditors.

DATA PROTECTION

New Regulation on Personal Data Breaches for Telecommunications Operators

On 24 June 2013, the European Commission adopted Regulation 611/2013/EU on the measures applicable to the notification of personal data breaches under Directive 2002/58/EC of the European Parliament and of the Council on privacy and electronic communications (the "Regulation"). The purpose of the Regulation is to provide telecommunications operators and other providers of publicly available electronic communications services (including fixed-line voice telephony, mobile and broadband communications and cable and satellite television) assistance when complying with Article 4 of Directive 2002/58/EC on privacy and electronic communications (the "ePrivacy Directive").

Pursuant to Article 4 of the ePrivacy Directive, providers of publicly available electronic communications services are obliged to notify all data breaches (*i.e.* breaches of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed) to the competent national authorities. In certain cases, subscribers and individuals concerned must also be informed on breaches affecting their personal data. Article 4 of the ePrivacy Directive has been implemented into Belgian Law by a new Article 114/1 in the Electronic Communications Law (*Wet van 13 juni 2005 betreffende electronische communicatie / Loi du 13 juin 2005 relative aux communications électroniques*). This provision was inserted by Law of 10 July 2012 (See, *this Newsletter, Volume 2012, No. 5, p.4*).

Pursuant to the Regulation, telecommunications operators, internet service providers and other providers of publicly available electronic communication services must notify all personal data breaches to the competent national authority no later than 24 hours after the detection of the breach. The telecommunications operators must inform the authority of the time and date of the breach as well as the circumstances, the nature and content of the breach. Other information, including a summary of the incident, the number of subscribers or individuals concerned as well as the potential consequences of the breach on subscribers, may be provided later if it is impossible to provide this information with the initial notification. However, the additional information must be provided to the authorities within three days following the initial notification.

In Belgium, the Belgian Institute for Postal Services and Telecommunications (*Belgisch Instituut voor postdiensten en telecommunicatie / Institut belge des services postaux et des télécommunications* – "BIPT") is in charge of receiving the data breach notifications. BIPT is likely to adopt further procedures and notification forms in the near future.

In some cases, the company suffering the data breach will also have to inform subscribers or other data subjects. In particular, data subjects must be informed when the personal data breach may adversely affect their privacy or personal data. Whether a person's privacy or personal data is "*adversely affected*" depends on: (i) the nature and content of the data concerned; (ii) the likely consequences of the breach for the subscriber or individual concerned; and (iii) the circumstances of the breach. The Regulation also explains how the information must be provided to the data subjects: "*by means of communication that ensure prompt receipt of information and that are appropriately secured according to the state of art*" and must be expressed in a clear and understandable language and be made without undue delay. In some cases, if the provider requires time to obtain contact details of the individual data subjects, the provider may have to publish a piece of general information in the media and follow this up with a communication to the individual data subjects concerned at a later time.

The Regulation furthermore encourages telecommunications operators to encrypt or otherwise protect personal data according to the European Commission's standards. Companies that have implemented appropriate technological protection measures in order to render the data unintelligible will not have to notify personal data breaches to the subscribers or other data subjects. Nevertheless, the Regulation underlines that encryption is not sufficient as a protection measure and the providers should also adopt further technical and organisational measures to protect personal data.

The harmonised rules on data breach notification provide an interesting test-case in view of the draft Data Protection Regulation. This is because the current draft Data Protection Regulation provides for a general data breach notification for all controllers of personal data (*i.e.*, not limited to electronic communication service providers). The draft Data Protection Regulation is currently going through the legislative process and will replace Data Protection Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (See, *this Newsletter, Volume 2012, No. 2, p.10-11*). The Belgian Privacy Commission (*Commissie voor de bescherming van de persoonlijke levenssfeer / Commission de la protection de la vie privée*) also recommended a general data breach notification procedure in its guidance on the measures which data controllers should implement in order to protect personal data against breaches (See, *this Newsletter, Volume 2012, No. 3, p.7-8*).

The Regulation came into force on 25 August 2013 and can be consulted here. It has direct effect without the need for further implementation at the national level.

FINANCIAL MARKETS

Better Protection of Consumers and More Competences for FSMA

The Laws of 30 and 31 July 2013 increasing the protection of purchasers of financial products and services and broadening the competences of the financial regulator were published in the Belgian Official Journal on 30 August 2013 (*Wetten tot versterking van de bescherming van de afnemers van financiële producten en diensten alsook van de bevoegdheden van de Autoriteit voor Financiële Diensten en Markten en houdende diverse bepalingen/Lois visant à renforcer la protection des utilisateurs de produits et services financiers ainsi que les compétences de l'Autorité des services et marchés financiers, et portant des dispositions diverses*; the "Laws"). With the exception of specific provisions, they entered into force on 9 September 2013.

The Laws seek to increase the supervisory efficiency of the financial sector and the

protection of consumers of financial products and financial services. The main amendments can be summarised as follows:

More repressive competences for the FSMA

Although most laws dealing with matters falling under the supervision of the Financial Services and Markets Authority (the "FSMA") provide for enforcement measures, they almost all remain silent regarding the possibility of the FSMA adopting such measures. The Laws now arm the FSMA with a legal basis for taking repressive enforcement measures. Furthermore, the administrative sanctions will enable the FSMA to react in a proportional fashion to the infringement (under the previous regime, the only measure which the FSMA could take was the suspension or the withdrawal of the authorisation).

Improved protection of general public

Previously, the FSMA enjoyed limited powers for the purpose of protecting the general public. The Laws now empower the FSMA to carry out investigative acts, to add more information to the alerts which it addresses to the public and to intervene more repressively when violations are being established. Further, the relevant criminal provisions protecting the general public have also been revised.

Introduction of "mystery shopping" and other techniques

The introduction of the "mystery shopping" technique enables the FSMA to put to the test the persons under its supervision. The FSMA now also benefits from the remote control technique allowing it to request a financial institution to give access to specific parts of its website reserved to its clients (however, without access to the clients' data). Furthermore, once a year the FSMA may request the external complaint department to provide aggregated data on the nature of the most frequent complaints and the follow-up thereof.

Restraining market abuses and increasing transparency

The Laws also implement Regulation 236/2012/EU of 14 March 2012 on short selling and certain aspects of credit default swaps. In this regard, the Laws extend the possibility for the FSMA to impose, in exceptional market circumstances, temporary measures regarding the trading of financial instruments. The prohibition of market manipulation now also applies to manipulations through derivatives or "credit default swaps". Furthermore, the manipulation of benchmark indices is henceforth subject to administrative and criminal sanctions.

New rules of conduct

The MiFID rules of conduct provide for general and specific rules for credit institutions and investment firms, as well as their agents. As of 1 January 2014, the Laws subject the brokers of these institutions and firms to the specific rules of conduct under MiFID while, previously, they were only subject to the general rules. The specific rules should be adapted in the near future by Royal Decree to take into account the particularities of brokers. These rules may also be made to apply to insurance firms and intermediaries.

The Laws introduce a level playing field between banks, insurance companies and intermediaries. Both insurance companies and intermediaries will now have to act in an honest, fair and professional way and provide their clients with correct, clear and non-misleading information.

Express knowledge requirement for persons in contact with the general public

An effective protection of consumers requires that any person in contact with consumers knows and understands the essential features of the products (*e.g.*, fixed income or not, risk of financial loss, legal nature of the product) so as to be in a position to provide practical information.

Implementation of Omnibus I Directive

Finally, the Laws implement parts of Directive 2010/78/EU (the "Omnibus I Directive") amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority). The Omnibus I Directive introduced *ad hoc* collaboration mechanisms in different directives, which required adaptations to national law.

INTELLECTUAL PROPERTY

Trade Marks: No Likelihood Of Confusion Between "Ballon d'or" And "Golden Balls"

In its judgment of 16 September 2013, the General Court (the "GC") overturned the decision of the First Board of Appeal of the Office of Harmonisation for the Internal Market (the "Board of Appeal"). The GC thereby refused the opposition against the registration of the trade mark "Golden Balls" brought by the right holder of the earlier trade mark "Ballon d'or" (Cases T-448/11 and T-437/11).

"Ballon d'or" is the award for the footballer of the year that was registered as a Community Trade Mark by the French company Intra-presse. The Ballon d'or award and World Player of the Year award of the International Federation of Association Football ("FIFA") merged in 2010. On the other hand, "Golden Balls" is a British sportswear company. Under Article 8(1) (b) of Regulation No 207/2009 of 26 February 2009 (the "Trade Mark Regulation"), the proprietor of an earlier trade mark may object to the registration of a later trade mark if the relevant public is likely to be confused between the earlier and the later trade marks.

In the case at hand, the parties disagreed on whether the two signs were similar and therefore likely to confuse the relevant public. According to established case-law, whether two signs are similar is determined by comparing visual, phonetic and conceptual aspects of the signs. Not surprisingly, it was held that the signs "Ballon d'or" and "Golden Balls" were visually and phonetically very different. However, the Board of Appeal found that conceptually the signs were identical or at least very similar. It considered that the words "golden" and "balls" are parts of basic English-language vocabulary and can be understood by the French speaking relevant public.

However, on appeal, the GC held that a linguistic difference can in some cases prevent the conceptual comparison of the signs. Whether similarity based on the conceptual comparison is prevented by the visual and phonetic differences caused by the difference in language of the signs will depend on, *inter alia*, the linguistic knowledge of the relevant public, the degree of relationship between the languages and the actual words used. The GC considered that in the present case, contrary to what the Board of Appeal contested, there is, at most, a very weak conceptual similarity. Even if it was accepted that francophone consumers would understand the meaning of "Golden balls", the consumers would also notice the use of plural (contrary to the singular use of the word "ballon") and the different position of the words "golden" and "d'or".

The GC also recalled that, according to case-law, *"a mere conceptual similarity between two marks can create a likelihood of confusion where the goods are similar, provided that the earlier mark has a distinctive character*." (See case T-33/03 Osotspa v OHIM – Distribution & Marketing (Hai), at paragraphs 61, 64 and 65). It further explained that *"even if the earlier mark enjoys a high distinctive character, […] a very weak conceptual similarity, requiring a prior translation, cannot be sufficient to create, in itself, a likelihood of confusion."*

The GC considered that the right holder of the earlier trademark "Ballon d'or" had not established the specific distinctive character of its mark and that moreover, any conceptual similarity between the trademarks "Ballon d'or" and "Golden Balls" which requires a prior

translation, was very weak. Therefore, the GC held that the Board of Appeal was wrong to find the existence of likelihood of confusion and annulled the Board of Appeal's decision.

Commission's Consultation Shows Mixed Views On Civil IP Enforcement Proceedings

In July 2013, the European Commission published the results of its consultation on the accessibility of proceedings for the civil enforcement of intellectual property ("IP") rights and the efficiency of such proceedings. In particular, the European Commission wanted to test the water for possible fast-track and small claims procedures in IP disputes. The consultation has yielded mixed results, and the European Commission considers that stakeholders are divided over the question whether fast-track and small claims proceedings are in fact necessary.

Almost half of the contributors objected to the idea of establishing fast-track proceedings arguing that IP cases should not receive preferential treatment and that such proceedings could facilitate the abuse by right holders of their IP rights. They also stressed that regulation at EU level would be difficult due to national discrepancies in court procedures. They added that in any case, fast track proceedings remain unsuitable for complicated cases. On the other hand, 42.1% of the respondents were in favour of fast-track proceedings which they argued could ensure immediate relief in cases where the evidence is uncontested. Nevertheless, the majority of stakeholders did not consider fast-track proceedings to be useful for community trade marks and community designs.

As regards small claims proceedings, many stakeholders were not in favour of such proceedings on the grounds that they could be used to bring legal actions without sufficient grounds for infringement. Such proceedings would moreover not provide a solution for commercial and complex IP disputes. Conversely, 32.8% of the participants in the consultation supported the small claims proceedings arguing that these would allow smaller parties to participate in the legal system and reduce the administrative burden. Participants also found that small claims proceedings could have a deterring effect as IPR enforcement would become more widely applicable.

The mixed results of the consultation on the need for fast-track and small claims proceedings will make it difficult for the European Commission to draw conclusions. The European Commission's summary of the consultation results can be found here:

http://ec.europa.eu/internal_market/consultations/docs/2012/intellectual-property-rights/summary-of-responses_en.pdf

Advocate General Gives Opinion concerning Technical Protection Measures for Gaming Consoles

On 19 September 2013, Advocate General Sharpston issued an opinion following a request for a preliminary ruling from an Italian court (*Tribunale di Milano*) concerning the legality of Nintendo's technical protection measures by which that party blocked third-party accessories to its gaming consoles.

The case pitted Nintendo, one of the world's largest video game companies, against PC Box Srl ("PC Box") which markets devices enabling video games other than those manufactured by Nintendo or by independent producers under licence from Nintendo to be played on the Nintendo gaming consoles.

Nintendo argued that the technological measures preventing the use of third parties video games were implemented in order to avoid infringements of its copyright. According to Article 6 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the "Directive"), copyright holders may apply such technological measures in order to prevent infringements of exclusive rights.

In this case that seems to have a bearing on the state of competition for video games, the Advocate General addressed the materials from a copyright perspective. Firstly, the Advocate General asserted that technological measures covered both the copyright protected material (such as the Nintendo-licensed video game) and

the installed measures on a device (such as the Nintendo console).

Secondly, the Advocate General analysed the possibility for a copyright holder to adopt technological measures provided their effect is not merely to restrict unauthorised reproduction of the copyright material. Indeed, while Nintendo ensured that unauthorised copies of Nintendo-licensed games would not be used with its console, it also prevented the interoperability of its consoles with video games produced by third parties.

According to Advocate General Sharpston, the national court should decide, based on the facts of the case, whether Nintendo has the right to block other devices in order to protect its copyright. The *Tribunale de Milano* must apply a proportionality test, a principle which is referred to in recital 48 of the preamble to the Directive.

In other words, "*could Nintendo have protected its own or licensed games without preventing or restricting the use of its consoles to play 'homebrew' games"*? The test involves answering the following questions; (i) whether a measure pursues a legitimate aim; (ii) whether it is suitable to achieve that aim and; (iii) whether it does not go beyond what is necessary to achieve it.

As to the first element, the Advocate General's opinion states that "*the aim of preventing or restricting acts not authorised by the right holder is inherent in any system of copyright and is specifically encouraged by the legal protection required under Article 6 of the Directive*".

Regarding the second element, it will be up to the national court to decide whether the technological measures can effectively protect Nintendo against unauthorised reproduction. Advocate General Sharpston therefore links the suitability of the measures with their effectiveness to reach the legitimate aim. Moreover, she adds that "*if* (…) *the national court were to find that Nintendo was pursuing in addition any other aim not justified in the context of that directive, the extent to which the nature of the technological measures was determined by the latter aim would have to be taken into account*" when examining the suitability of the measures.

The third element addresses the question of whether the measures go beyond what is necessary to achieve the aim. According to the Advocate General, this means that the national court must assess the degree of restriction of acts which do not require the rightholder's authorisation. Beyond that, the same court will also have to decide "*whether other measures could have caused less interference while still providing comparable protection of right holders' right*".

It is only after applying the three elements of the proportionality test that the *Tribunale de Milano* will be able to rule on the matter, according to the Advocate General.

LABOUR LAW

More Flexibility in Working Time

New, more flexible measures governing working time entered into force. These are the Law of 17 August 2013 regarding the modernisation of the labour law and other provisions (*Wet betreffende de modernisering van het arbeidsrecht en houdende diverse bepalingen; Loi relative à la modernisation du droit du travail et portant des dispositions diverses*) and the Royal Decree of 11 September 2013 determining the negotiation procedure to raise the internal threshold of labour time which must be applied during a reference period and the quota of overtime for which the employee can decide not to take compensatory rest as determined in Article 26 bis, §1 bis and §2bis of the Labour Law of 16 March 1971 *(Koninklijk Besluit tot vaststelling van de onderhandelingsprocedures voor het verhogen van de interne grens van de arbeidsduur die in de loop van een referteperiode moet worden nageleefd en van het quotum overuren waarvoor de werknemer kan afzien van de inhaalrust in toepassing van artikel 26bis, § 1bis en § 2bis, van de arbeidswet van 16 maart 1971; Arrêté royal déterminant les procédures de négociations pour augmenter la limite interne de la durée du travail à respecter dans le*

courant d'une période de référence et le quota d'heures supplémentaires pour lesquelles le travailleur peut renoncer à la récupération en vertu de l'article 26bis § 1erbis et § 2bis de la loi du 16 mars 1971 sur travail). These measures implement part of the agreement of 27 February 2013 between the social stakeholders.

The Law of 17 August 2013 modifies the internal threshold that must be respected within the reference period during which the average weekly working time must be observed in accordance with Article 26bis of the Labour Law of 16 March 1971. As soon as the internal threshold of 65 overtime hours (130 hours in specific cases and after a negotiation procedure) is reached during the reference period, compensatory rest must be granted immediately.

As of 1 October 2013, this threshold is increased to 78 hours. If the reference period is extended from a semester to one year, the threshold is increased to 91 hours. However, that threshold of 91 hours can only be applied as of the fourth month after the start of the reference period of one year. In specific cases and after a negotiation procedure, it is possible to raise the threshold further to 130 hours. The new Law creates a possibility to negotiate (by collective bargaining agreement at sector level), in a second phase, for the purpose of raising the threshold from 130 to 143 hours.

The "overtime credit" for which the employee can choose not to recuperate his working time (on account of an extraordinary increase of work or unforeseeable necessity) is also modified. This overtime credit was capped at 65 hours (130 hours after a negotiation procedure) per calendar year, but will be increased to 91 hours per calendar year as of 1 October 2013. If a negotiation procedure is followed, it is possible to increase the capped number of hours to 130. The new Law creates a possibility to negotiate (by collective bargaining agreement at sector level), in a second phase, for the purpose of raising the maximum number of hours to 143.

A third modification is that for the extension of the reference period from a trimester to one year by collective bargaining agreement, it is no longer necessary to follow the procedure to modify the work rules. In the past, such a modification was only possible by implementing it in the work rules, for which the burdensome procedure of the modification of the work rules had to be followed. Now, such modifications are part of the work rules as of the date of the registration of the collective bargaining agreement with the competent authorities.

MARKET PRACTICES

Minister Vande Lanotte Sheds Light on Prospective Rules Governing Sales at a Loss

In his response of 4 September 2013 to a written parliamentary question, the Minister for Consumer Affairs, Johan Vande Lanotte, has given insight in how the future rules on sales at a loss, as contained in Book VI "market practices and consumer protection" of the prospective new commercial code ("Book VI"), will look like. For the status of the Bill containing Book VI, see this Newsletter.

In line with his earlier statements on the topic, Minister Vande Lanotte asserts that the prohibition of sales at a loss aims to protect individual retailers and SMEs against competition from large chains which, contrary to individual retailers and SMEs, can sell certain products at a loss and recoup the resulting losses elsewhere (*i.e.*, make the losses up with sales of other products).

This allegedly being the sole goal of the prohibition of sales at a loss, Minister Vande Lanotte has defended on earlier occasions that this prohibition would be compatible with EU law (*See, this Newsletter, Volume 2013, No. 5, p. 9 and No. 7, p. 16*). As we reported in the March edition of this Newsletter (*See, this Newsletter, Volume 2013, No. 3, p. 15*), the Court of Justice of the European Union ("ECJ") held on 7 March 2013 that the Belgian prohibition of sales at a loss is incompatible with EU law in so far as that prohibition pursues objectives relating to consumer protection (ECJ, case C-343/12, *Euronics Belgium CVBA v. Kamera Express BV and Kamera Express Belgium BVBA*).

Interestingly, in his answer to the parliamentary question, Minister Vande Lanotte points out that Book VI will relax the prohibition of sales at a

loss. The novelty will be that businesses will be able to consider the volume discounts which they actually obtained in the previous year for the good at issue when calculating their reference purchase price (*i.e.*, the purchase price against which it is to be assessed whether or not there is a sale at a loss). It will be possible to deduct four-fifths of the thus obtained volume discount from the reference purchase price. According to Minister Vande Lanotte, this novelty should allow healthy and fair competition between companies.

REAL ESTATE

Deadline for Coordination of Statutes Pursuant to New Apartment Act Extended

On 1 September 2013, the Law of 17 August 2013, amending the Law of 2 June 2010 (the "Apartment Act") modernising the functioning of the co-ownership (*mede-eigendom/copropriété)* of real property, entered into force (the "Law") (*Wet van 17 augustus 2013 tot wijziging van de wet van 2 juni 2010 tot wijziging van het Burgerlijk Wetboek teneinde de werking van de mede-eigendom te moderniseren en transparanter te maken wat de termijn voor het in overeenstemming brengen van de akten betreft/Loi du 17 août 2013 modifiant, en ce qui concerne le délai de mise en conformité des actes, la loi du 2 juin 2010 modifiant le Code civil afin de moderniser le fonctionnement des copropriétés et d'accroître la transparence de leur gestion*). To ensure a proper implementation of the Apartment Act of 2010, the Law extends the deadline to bring in line the statutes with the new legal provisions by another year (*See, this newsletter, Volume 2013, No. 4, p. 15*).

The main reason for the extension is the ambiguity regarding the interpretation of Article 19, §2 of the New Apartment Act which holds that no authentic deed is required to amend the rules of co-ownership (*reglement van mede-eigendom/règlement de copropriété*) as long as the general meeting (*algemene vegadering/assemblée générale*) does not amend the basic deed (*basisakte/acte de base*) itself. However, uncertainties remained whether other amendments to the rules of co-ownership, which do not merely result from the New Apartment Act, required an authentic deed.

The Law does not amend the New Apartment Act itself, but provides clarification in an Explanatory Memorandum (*memorie van toelichting/exposé des motifs*). The Explanatory Memorandum now states that Article 19, §2 of the New Apartment Act is an exception to the general rule of Article 577-4, §1 of the Civil Code which provides that each amendment to the rules of co-ownership and the basic deed require an authentic deed. The exception, however, is limited to amendments necessary for the coordination with the New Apartment Act. Hence, an authentic deed is still required for all other amendments not relating to the implementation of the New Apartment Act.

As a result of the present extension, property managers (*syndicus/syndic*) now have the obligation to prepare and submit a coordinated version of the basic deed, the rules of co-ownership and the internal rules (*huishoudelijk reglement/règlement d'ordre intérieur*) to the general meeting for approval before 1 September 2014.