DLA PIPER

SPOTLIGHT ON BELGIUM

TRENDS IN THE LEGAL LANDSCAPE

ISSUE 5, SPRING 2014

ISSUE HIGHLIGHTS

INTRODUCTION

One might expect that, with this fifth issue of a quarterly newsletter, we would be able to rely on the cyclical nature of things and simply model this Spotlight on Belgium after our very first issue. This is not the case, however, as we believe that everything is in a constant state of flux – and nowhere is this more apparent than in the field of law.

Indeed, several legal measures have recently entered into force, or will do so in the following few weeks. In social law, there is the new obligation to **motivate the reasons when dismissing an employee**, as Pierre Dion illustrates. Kim Möric sheds light on the new **annual environmental charge on parking spaces attached to office buildings located in the Brussels-Capital Region.** Lastly, **books VI and X of the Belgian Commercial Code** may soon enter into force, as Joris Beckers discusses in his article.

On the other side of the scale, other legislation disappears from the codices. At the end of 2013, the **social housing obligation for housing projects has been nullified**. Els Empereur and Ive Van Giel report on the impact of this decision on existing contracts.

Other matters require a crystal ball. Depending on whether or not Luxembourg is taken off the OECD Global Forum's list before the end of 2014, Belgian companies and permanent establishments may be subjected to **additional reporting obligations with regard to substantial payments made to Luxembourg**. Denis-Emmanuel Philippe and Gregory Komlosi discuss the conditions and illustrate with case studies.

To further complicate matters in this already shifting landscape, there is the element of free choice. Sylvie Van Ommeslaghe and Dodo Chochitaichvili contribute an article on how the **law chosen by the parties to a commercial agency contract may be rejected by the court** of another EU Member state before which the case has been brought in favour of the law of the forum.

As our content matter is constantly evolving, our form is too. As a result, you will notice slight changes to the events and publications section, making them more tailored to your information needs.

Rest assured, however, that some things remain constant. Things like the recognition we receive from our peers and clients as a top player in the legal market, as evidenced by the Trends Legal Awards, where we were named Best Law Firm in IP, IT & TMT as a result of our global and multidisciplinary expertise, our pragmatic approach and our close collaboration with our clients' legal departments.

No matter what else changes, you can continue to expect this attitude from us. And you can continue to consult Spotlight on Belgium for essential updates on the legal developments impacting your business.

DLA PIPER

Bob Martens
Country Managing Partner
Litigation & Regulatory
bob.martens@dlapiper.com

SOCIAL HOUSING OBLIGATION FOR LARGE HOUSING PROJECTS NULLIFIED. WHAT IS NEXT?

On 7 November 2013, the Belgian Constitutional Court nullified the "social housing obligation" that requires developers to dedicate a specified percentage of their large housing projects in the Flemish Region to social housing.

RETROACTIVE FORCE

The Constitutional Court – after intervention by the Court of Justice of the European Union – ruled that the legislation was contrary to EU law, and in particular to the free movement of capital. The Constitutional Court established that the social housing obligation constituted a disproportionate burden on developers, since a number of support measures for the sector, which compensate for the social housing obligation, were found to violate regulations with respect to state aid. The Flemish Government had neglected to report these compensatory measures to the European Commission. Therefore, the compensatory support measures were nullified. This nullification implies that the burden of social housing should be carried by developers without any compensation. The Constitutional Court judged that this constitutes a disproportionate burden on developers.

The obligation which foresees a percentage of "modest" residences, which are a certain offer of rental residences, residences for sale and plots within defined surfaces and volumes, was not contested in the proceedings before the Constitutional Court and thus remains in force.

Since this ruling has retroactive effect, the legislation in question – which has been in force since 1 September 2009 – is considered never to have existed and can no longer be applied. But what about social housing obligations already imposed, or social housing contractually agreed with the authorities which grant the permits (e.g. the board of Mayor and Aldermen)?

NEW APPEAL PERIOD FOR IMPOSED SOCIAL HOUSING OBLIGATIONS

The Constitutional Court's ruling was published in the Belgian Official Journal on 10 February 2014. For a period of six months after publication, it is possible to initiate an administrative appeal or an appeal for revocation (depending on the type of ruling) against any government order or legal ruling based on nullified regulations. This means that a resolution of a municipal executive in which a town planning permit was granted with a social housing obligation can be appealed to the Provincial Executive. An appeal against a ruling made by the Provincial Executive can, in turn, be appealed to the Council for Permit Disputes, and so forth. While there may indeed be good arguments for disputing the social housing obligation itself, the legal situation is uncertain and it is even possible that such an appeal could result in the entire permit being called into question.

A Municipal Social Housing Regulation can be appealed to the Council of State.

REVOCATION

There are also arguments for assuming that in certain situations during this six-month period (and also after this period, according to some, though this is by no means certain), the authorities which grant the permits can revoke a social housing obligation imposed in a permit or an adopted Municipal Social Housing Decree on their own initiative ("ex officio"). In light of the principle of loyalty to, and the full effectiveness of, EU law, it could even be seen as an **obligation for the authorities which grant the permits to make every effort to revoke the imposed social housing obligations, a Municipal Housing Decree, or the social housing zone in a zoning plan on their own initiative**. This legal obligation rests with these authorities, not with the citizens.

IMPLEMENTATION OF THE SOCIAL HOUSING OBLIGATION

It is also possible that a social housing obligation was imposed, but not yet implemented. For example: the payment of a social contribution of EUR 50,000 to a municipality may have been imposed. In the light of the Constitutional Court's ruling, this social contribution no longer needs to be paid; however, if it already has been, it could be recovered as an "undue payment".

PACTA SUNT SERVANDA?

If agreements have already been concluded in the execution of a social housing obligation, for example a sales agreement with a social housing corporation including a transfer of land, it could be argued that this **agreement is null and void** due to a lack of (lawful) cause.

DAMAGE COMPENSATION

Depending on whether or not an agreement was concluded, **damage compensation could be claimed** based on contractual or extra-contractual liability, in particular against the Flemish Region. The Flemish Region is responsible for any faults made by its legislative body (adopting a decree that violates European law) and which were established in a ruling by the Constitutional Court.

"CUSTOMISED" SOLUTION – BUT WATCH OUT FOR TERMS OF LIMITATION

Therefore, all interested parties – developers as well as the authorities which grant the permits – need to examine each specific situation to determine what steps can be taken. In light of the legal uncertainties, it is clear that all stakeholders will benefit from a negotiated solution.

Nevertheless, if legal proceedings are inevitable, it is important to know that any **claims against the authorities which grant the permits may be subject to specific and very short terms of limitation**. The six-month period mentioned above expires at the beginning of August 2014. Moreover, it is possible that these authorities still might try to enforce a social housing obligation anyway when granting a permit or through the drafting of planning regulations which are part of zoning plans. Of course, given the grounds for the Constitutional Court's ruling, this possibility is being fiercely contested…

DLA PIPER

Els Empereur
Partner, Real Estate
els.empereur@dlapiper.com

DLA PIPER

Ive Van Giel
Lead Lawyer, Real Estate
ive.vangiel@dlapiper.com

PAYMENTS MADE BY BELGIAN COMPANIES TO LUXEMBOURG

NEW REPORTING OBLIGATIONS AND LIMITATIONS ON DEDUCTIBILITY

The latest developments within the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes ("OECD Global Forum") could trigger additional reporting obligations for Belgian companies and Belgian permanent establishments, with regard to substantial payments made to Luxembourg. If these reporting duties are not complied with, the deductibility of the payments could automatically be rejected. This position has been very recently confirmed by the Minister of Finance.

PAYMENTS MADE TO LOW-TAX JURISDICTIONS

Belgian companies and Belgian permanent establishments are required since 1 January 2010 to annually report (form 275F) all outbound payments made directly or indirectly to recipients in low-tax countries, which annually exceed the total amount of EUR 100,000 per country (article 307 of the Income Tax Code – "**ITC**"). This obligation applies to cash payments and payments in kind. Such reported payments are fiscally deductible if the taxpayer can prove that these are linked to "real and genuine" transactions and that they are not artificial arrangements. Unreported payments are fiscally non-deductible (art. 198,10° ITC).

The tax authorities adhere to a rather broad interpretation of this obligation. They consider, for instance, that payments made to a bank account located in a low-tax jurisdiction must be reported, even if it is held by a resident of a state that does not qualify as a low-tax jurisdiction. The taxpayer may however, be exempt from this reporting duty provided that he proves, by means of objective facts, that the beneficiary is not a tax resident of a low-tax jurisdiction. Furthermore, the tax authorities consider that payments made to individuals and payments made for the account of third parties also fall under this reporting obligation.

The tax administration clarified that this reporting obligation does not apply to:

- banks and credit institutions that make payments on behalf of their clients; and
- payments made by banks, credit institutions, companies listed on the Belgian Stock Exchange, clearing institutions, liquidation settlement institutions and financial institutions acting as an intermediary in the payments concerned.

LOW-TAX JURISDICTION

This new reporting requirement only comes into play for substantial payments made to low-tax jurisdictions within the meaning of article 307 ITC. Are considered to be low-tax jurisdictions:

- states listed under article 179 of the Royal Decree executing the ITC. That list contains the states with a low level of taxation (i.e. with a nominal corporate income tax rate below 10%);
- states which are (black) listed by the OECD Global Forum as non-compliant with the OECD standard of exchange of information during the entire assessment period during which the payments have been made.

At their meeting on 21-22 November 2013, the OECD Global Forum marked four new states as non-compliant with OECD standards of transparency and exchange of information: Luxembourg, Cyprus, the Seychelles and the British Virgin Islands. Austria and Turkey have been marked as partially compliant.

EFFECTIVE CONSEQUENCES FOR BELGIAN TAXPAYERS

On 25 February 2014, the Minister of Finance confirmed in Parliament that pursuant to the update of the OECD Global Forum's list, payments made to Luxembourg and

Cyprus fall under the obligation of article 307 ITC for all assessment periods starting as of 1 December 2013. He also mentioned that the partially compliant states (i.e. Austria and Turkey) do not fall under the scope of application of article 307 ITC.

This being said, the reporting obligation will not necessarily apply to payments made to Luxembourg. Indeed, OECD non-compliant states are only targeted if they remain on the list during the full assessment period in which the payments were made. Hence, this obligation will not apply to e.g. companies with an assessment period corresponding to the calendar year, if Luxembourg is taken off the OECD Global Forum's list before the end of 2014. It is only if Luxembourg remains on this list per 31 December 2014, that the obligation to report payments made to this jurisdiction in 2014 may apply.

CASE STUDIES: FINANCING AND IP STRUCTURES

Should this reporting obligation become effective for payments made to Luxembourg in 2014 (because Luxembourg remains on the "black list" per 31 December 2014), its concrete impact could be illustrated as follows:

- In 2013, a Luxembourg financing company of a multinational group granted a 10.000.000 EUR loan to its Belgian affiliated company at a 2,5% interest rate. Under article 307 ITC, the Belgian company would have to report the 250.0000 EUR interest payments made to the Luxembourg company in 2014. If this reporting obligation is not fulfilled, the interest of 250.000 EUR would automatically become non-deductible.
- A Luxembourg IP company licenses a trademark to a Belgian company. The rate of royalties is set at 3% of the turnover of the Belgian company. In 2014, the Belgian company has a turnover of 10.000.000 EUR. The Belgian company makes a 300.000 EUR royalty payment to the Luxembourg company in 2014. The Luxembourg IP company benefits from the famous IP Regime, i.e. 80% of the royalties paid (240.000 EUR) are exempt in Luxembourg. This structure will only be tax-efficient if the Belgian company reports the royalty payment made to the Luxembourg IP company: if this reporting duty is not observed, the deduction of the royalties paid will be automatically rejected.

CONCLUSION

This new development should be of concern for all Belgian companies making substantial payments to Luxembourg.

If Luxembourg remains on the OECD Global Forum's list per 31 December 2014, Belgian companies will have to report payments made in 2014 to these jurisdictions. In addition, they will have to be able to prove that these payments relate to "real and genuine" transactions and that they are not artificial arrangements. Failure to comply with these conditions may result in the non-deductibility of the amounts paid.

DLA PIPER

Denis-Emmanuel Philippe
Associate Professor at the University of Liège (Tax Institute)
Lead Lawyer, Tax
denis-emmanuel.philippe@dlapiper.com

DLA PIPER

Gregory Komlosi
Lawyer, Tax
gregory.komlosi@dlapiper.com

THE APPLICATION OF THE MANDATORY RULES OF THE LAW OF THE FORUM TO COMMERCIAL AGENCY CONTRACTS

On 17 October 2013 (case C-184/12), the European Court of Justice delivered a judgment to the request for a preliminary ruling referred by the Belgian Supreme Court (Cour de cassation/Hof van Cassatie) in the case of United Antwerp Maritime Agencies NV ("UNAMAR") vs Navigation Maritime Bulgare ("NMB")[1]. This case has a particular interest for parties entered into a commercial agency contract who have chosen as governing law to their contract the law of an EU member State. Although the law of the Member States offers a minimum protection to the agent, such protection may vary within the Member States.

FACTS

In 2005, an agency contract was entered between UNAMAR, a Belgian agent, and NMB, a Bulgarian principal, for the operation of NMB's container liner shipping service. The contract contained a clause that provided that Bulgarian law was the governing law and that any dispute arising out of the contract would be resolved by the arbitration chamber of the Chamber of commerce and industry in Sofia (Bulgaria). In 2008, NMB informed its agents that, due to financial reasons, it was forced to terminate the contractual relationship. In this context, UNAMAR and NMB extended the agency contract until 31 March 2009. UNAMAR considered however that the agency contract was unlawfully terminated and brought an action before the Commercial Court of Antwerp for payment of various forms of compensation provided under the 13 April 1995 Belgian Act on commercial agency contracts ("the Belgian Act"), *i.e.*, compensation in lieu of notice, eviction indemnity and damages for a total of EUR 849,557.05.

PROCEDURAL BACKGROUND

The Antwerp Commercial Court decided, in its judgment of 12 May 2009, that the plea regarding the lack of jurisdiction invoked by NMB had no legal basis and that only the Belgian Act should apply to the case due to the mandatory nature of its provisions.

NMB lodged an appeal against this judgment before the **Antwerp Court of Appeal**. In its judgment of 23 December 2010, the Court of Appeal ruled that the plea on the lack of jurisdiction was founded as the contract contained a valid arbitration clause. In addition, the Court of Appeal held that the Belgian Act was not part of Belgian international public policy and that the Bulgarian law gave the minimum protection provided in the EU Directive[2], so that the mandatory provisions contained in the Belgian Act should not apply. According to this Court, the principle of freedom of contract should prevail over the law of another EU Member State.

UNAMAR challenged the judgment of the Antwerp Court of Appeal before the **Belgian Supreme Court** that considered, in its decision of 5 April 2012 (R.G. n° C.11.0430.N) that:

- the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 does not prevent the national judge to reject the application of an arbitration clause valid pursuant to a foreign law, on the basis of the *lex fori* that considers that the object of the dispute cannot be subject to arbitration;
- according to the *travaux préparatoires* of the Belgian Act, Articles 18, 20 and 21 of the said Act should be considered as mandatory provisions pursuant to the mandatory nature of the EU Directive;
- it follows from Article 27 of the Belgian Act, which provides that "*subject to the application of international*

[1] The text is available here: http://curia.europa.eu/juris/document/document.jsf?text=&docid=143185&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=89734

[2] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ L 382, p. 17.

conventions to which Belgium is part of, any activity of the commercial agent having its principal place of business in Belgium is subject to the Belgian law and within the jurisdiction of Belgian tribunals", that the aim of the Belgian mandatory rules is to provide a wide protection, whatever the applicable law to the contract;

- Article 3 of the 1980 Rome Convention on the law applicable to contractual obligations provides for the freedom of choice of law by the parties, but at the same time, Article 7(2) states that the chosen law by the parties cannot restrict the rules of the law of the forum in a situation where they are mandatory (*loi de police/ bijzonder dwingend recht*).

The Supreme Court decided to stay the proceedings and to refer a request to the European Court of Justice (hereinafter, "the ECJ") for a preliminary ruling. The ECJ was requested to specify the circumstances in which a national court may, pursuant to Article 7(2) of the Rome Convention, disregard the law of an EU member State applicable to a contract in accordance with the law chosen by the parties (*lex contractus*) in favour of the mandatory provisions of the law of the forum (*lex fori*) [here, Articles 18, 20 and 21 of the Belgian Act]. It was in particular asked to give guidance on whether the law of an EU member State, which had correctly implemented the EU Directive and went beyond the minimum protection laid down by said Directive, may impose the wider protection if the *lex contractus* was the law of another EU Member State which had also correctly implemented said Directive.

THE RESPONSE OF THE EUROPEAN COURT OF JUSTICE

The ECJ made the following observations:

- the Belgian Act has a wider scope of the term "*commercial agent*" than the EU Directive as it intends to offer the protection to all self-employed commercial agents;
- the principle of the freedom of contract of the parties to a contract must be observed, so that the plea of mandatory provisions must be interpreted strictly. In order to determine whether a national law is of mandatory nature, the national judge must take into account the terms of the law, the general structure and all the circumstances in which the law was enacted to protect an interest deemed crucial by the Member State concerned;

Based on these observations, the ECJ ruled that Articles 3 and 7(2) of the Rome Convention must be interpreted as meaning that **the law of an EU member State, which meets the minimum protection requirements laid down by the EU Directive and which has been chosen by the parties to a commercial agency contract, may be rejected by the court of another EU Member State before which the case has been brought in favour of the law of the forum owing to the mandatory nature, in the legal order of that Member State, of the rules governing the situation of self-employed commercial agents**. This may happen only if the court before which the case has been brought finds, on the basis of a detailed assessment, that, in the course of that implementation, the legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent a protection going beyond that provided for by that Directive, taking account of the nature and the objective of such mandatory provisions.

COMMENTS

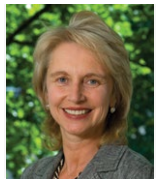
Firstly, it should be pointed out that the ECJ did not follow the argument of the Advocate General Wahl according to which the answer to the request for a preliminary ruling should depend on the minimum or full harmonisation measure. In this case, the Advocate General considered indeed that the EU Directive provided for a minimum protection for the agent, so that the law of a Member State that goes beyond the scope and minimum protection laid

down in the EU Directive may be applied against the law of another Member State chosen by the parties[3]. Instead, the ECJ adopted an approach which invites the national judge to rule whether the law of the forum is of mandatory nature. Should the Belgian Supreme Court consider that the provisions of the Belgian Act provide for a wider protection than the EU Directive and Bulgarian law, and that such protection is crucial in the Belgian legal order, then the Belgian Act is likely to apply to the contractual relationship between the parties, despite the chosen law by the parties, be it the law of another EU Member State or of a third State[4].

It is up to the Belgian Supreme Court to rule now on whether the provisions of the 1995 Belgian Act are of mandatory nature, so as to exclude the application of the law of another Member State, which has correctly implemented the EU Directive. In its detailed analysis, the national judge should take into account the interpretation of the notion of "mandatory rule" adopted by the ECJ and the principle of freedom of contract, the cornerstone of the Rome Convention, so that any derogation of mandatory nature should be strictly interpreted..

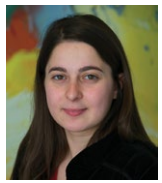
Secondly, it should be noted that the ECJ was only asked to rule on the question of the determination of the applicable law to the agency contract in accordance with the 1980 Rome Convention, and not on the question of jurisdiction of the Belgian Court. In this case, it appears that both questions of applicable law and jurisdiction are closely linked and will be examined by the judge to determine whether the dispute can be subject to arbitration. The decision of the Supreme Court is therefore awaited by the arbitral community to provide guidance on this issue.

DLA PIPER



Sylvie Van Ommeslaghe
Of counsel, Litigation & Regulatory
sylvie.vanommeslaghe@dlapiper.com

DLA PIPER



Dodo Chochitaichvili
Lawyer, Litigation & Regulatory
dodo.chochitaichvili@dlapiper.com

[3] The opinion of Advocate General Wahl is available here: http://curia.europa.eu/juris/document/document.jsf?text=&docid=137402&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=90355

[4] In the *Ingmar* case (C-381/98), the ECJ held that where the commercial agent carries on his activities in the EU, the parties cannot evade the mandatory provisions of the EU Directive by chosing the law of a non-EU country. Instead Articles 17 and 18 of the EU Directive, which guarantee certain rights to commercial agents after termination of agency contracts, must be applied where the commercial agent carried on his activity in a Member State although the principal is established in a non-EU country and the contract is governing by the law of that country.

NEW ENVIRONMENTAL TAX ON OFFICE PARKING SPACES IN THE BRUSSELS-CAPITAL REGION

Owners and occupiers of office buildings with parking spaces located in the Brussels-Capital Region need to be aware of the new annual environmental tax ("environmental charge") that entered into force on 5 February 2014 as new provisions of the regional decree of 2 May 2013 implementing the Brussels Code on Air, Climate and Energy Management.

Article 2.3.54 of this decree **restricts the number of parking spaces depending on where the building is located in the Brussels-Capital Region** (zone A, B or C):

- for buildings or parts of buildings located in zone A: 2 parking spaces for the first 250 m² of floor area and 1 parking space per additional 200 m² of floor area;
- for buildings or parts of buildings located in zone B: 1 parking space per 100 m² of floor area;
- for buildings or parts of buildings located in zone C: 1 parking space per 60 m² of floor area.

The maps of the different zones have been published on the Brussels-Capital Region's website, according to a notice published in the Belgian Official Gazette on 5 February 2014.[1]

These thresholds are not new. They are inspired by article 11 of title VIII of the Regional Planning Regulations (RRU) that already contained similar restrictions.

However, unlike the Regional Planning Regulations, the order of 2 May 2013 provides for a new environmental tax, namely an **"environmental charge" due annually *for each parking space in excess of the above-mentioned maximum limits*** in application of article 2.3.56 of the said decree. The amount of this environmental charge (to be paid each year for each parking space in excess) varies according to the zone where the building concerned is located, namely:

- EUR 450 for zone A
- EUR 350 for zone B
- EUR 250 for zone C

The debtor liable for the payment of the environmental charge is the holder of the environmental permit or the persons who have maintained or established such parking spaces without a permit or in violation of their environmental permit.

The said provisions (2.3.54 and 2.3.56) entered into force on the day of publication of the Government of the Brussels-Capital Region's Decree of 16 January 2014, published on 5 February 2014 in the Belgian Official Gazette. The IBGE indicates on its website that *"With effect from 1st January 2015: the tax in respect of the fiscal year 2014 for holders of environmental permits (new, extended or renewed during 2014) that have chosen to keep their excess parking spaces is due and will become payable in 2015".*

This information needs to be adjusted and must be understood as follows: **all new applications, extensions or renewals of environmental permits received after 5 February 2014 are subject to the aforementioned provisions on the environmental charge**.

The environmental charge for existing parking spaces already covered by an environmental permit should only become due *on the occasion of the extension or renewal of the environmental permit.* Therefore, the **environmental charge regime applies to extension applications submitted from 5 February 2014**. Permits for which an extension application was submitted prior to 5 February 2014 should not be liable for the environmental charge for excess parking spaces.

[1] http://www.leefmilieubrussel.be/uploadedImages/Contenu_du_site/Professionnels/Guide_du_permis_d_environnement/carte.gif

Therefore, when environmental permit holders submit an extension application, they will have the choice between:

(i) complying immediately with the new standards:

- either by eliminating the "excess" parking spaces or converting them for another use;
- or by transforming them into public parking spaces, including making them available to local residents or reallocating them for uses other than car parking;

(ii) maintaining all or some of the parking spaces considered as "excess" according to the new standards, subject to the payment of an annual "environmental charge", in proportion to the number of excess parking spaces maintained. The holder will also have the same choice when renewing an expiring permit (i.e. when an extension within the meaning of article 62 of the order of 5 June 1997 can no longer be obtained).

DLA PIPER

Kim Möric
Partner, Litigation & Regulatory
kim.moric@dlapiper.com

INTRODUCTION TO THE NEW OBLIGATION TO MOTIVATE THE DISMISSAL REASONS

On 12 February 2014, the expected Collective Bargaining Agreement n° 109 regarding the motivation of dismissal reasons ("CBA n° 109") was concluded within the National Labour Council. It will enter into force as of 1 April 2014.

The CBA n° 109 introduces a **new obligation for employers in Belgium to, at request of the employee, motivate the specific dismissal reasons when dismissing an employee**, except in legally determined circumstances. The disclosed motivation should include all necessary information, allowing the employee to fully understand the reasons which have led to their dismissal.

By default the employer will be held to pay an additional indemnity equal to two weeks' remuneration.

The dismissal reasons must be linked to the employee's work ability, behavior at work or with any business requirements of the company of the employer, under penalty of payment of an additional indemnity varying from 3 to maximum 17 weeks' remuneration due to flagrant and unreasonable dismissal (i.e. a dismissal which would not have been decided upon by a normal and reasonable employer).

Lastly, the CBA n° 109 provides specific rules regarding the division of the burden of proof between employer and employee during judicial proceedings. This involves the motivation obligation of the employer as determined in the said CBA.

The burden of proof will be divided according to the following basic principles:

- If the employer has complied with his motivation obligation within two months after having received a formal request from the employee, or if he duly disclosed the reasons for dismissal spontaneously to the employee, then the employee will carry the burden of proof;
- If the employer did not comply with his motivation obligation within two months after having received a formal request from the employee, the employer will carry the burden of proof to demonstrate that the employee's dismissal cannot be considered as a flagrant and unreasonable dismissal;
- An employee who initially did not request for motivation of his dismissal reasons, but who afterwards claims flagrant and unreasonable dismissal, will carry the burden of proof for demonstrating that his dismissal can indeed be considered as such.

As of 1 April 2014, the **previously applicable principle of unfair dismissal will be abolished**, except for specific categories of blue-collar employees defined by the Act of 26 December 2013 on the harmonization of rules between blue-collar and white-collar employees.

DLA PIPER

Pierre Dion
Lawyer, Employment
pierre.dion@dlapiper.com

COMMERCIAL SECTIONS OF BELGIAN COMMERCIAL CODE READY FOR IMPLEMENTATION

Although the Belgian Commercial Code (Wetboek economisch recht/Code de droit économique) was already formally introduced on 28 February 2013, several volumes thereof still remain unimplemented.

However, pursuant to recent legislative efforts, book VI (market practices and consumer protection) and book X (agency, commercial collaboration and distribution) may soon enter into force.

BOOK VI – MARKET PRACTICES AND CONSUMER PROTECTION

On 21 December 2013, the Belgian legislator passed a law introducing book VI of the Commercial Code dealing with market practices and consumer protection ("**Book VI**"). However, Book VI has not yet entered into force. Pursuant to Article 14 of the aforementioned law, the entry into force of Book VI has to be determined by a Royal Decree and currently no such Royal Decree has been issued. The current estimation is that **Book VI will enter into force prior to the general elections on 25 May 2014**.

For the most part, Book VI is a copy of the current Law of 6 April 2010 regarding market practices and consumer protection ("**Market Practices Act**").

Interestingly, however, Book VI does not cover cessation orders, which are currently included in Articles 110 to 118 of the Market Practices Act. Those provisions are scheduled to be incorporated in book XVII (special legal procedures) of the Commercial Code. However, until then, the **cessation measures included in Articles 110 to 118 of the Market Practices Act remain applicable**.

Similarly, the Law of 6 April 2010 regarding certain procedures of the Market Practices Act has not been included in Book VI and, therefore, remains separately applicable. The provisions of this law should normally also be incorporated in book XVII of the Commercial Code as they deal with cessation measures.

Finally, it is noteworthy that Book VI differs slightly from the Market Practices Act with regard to the prohibition of selling goods at a loss.

Article 101 of the Market Practices Act prohibits companies from selling goods at a loss. This is a *per se* prohibition. In 2012, a Belgian Court asked the European Court of Justice ("**ECJ**") whether this prohibition was in breach of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market ("**Directive**"). Indeed, the aforementioned *per se* prohibition is not included in the limitative list of *per se* prohibitions stipulated in the Directive and Member States are not allowed to deviate from the Directive.

In a Judgment of 7 March 2013, the ECJ decided that Article 101 of the Market Practices Act would be in breach of the Directive in so far as it falls under the scope of the Directive, i.e. in so far as it aims to protect consumers.

As such, the ECJ left it to the Belgian courts to decide whether or not Article 101 of the Market Practices Act also protects consumers.

In an attempt to uphold the Belgian prohibition of selling goods at a loss, the **legislator has now expressly specified in the corresponding Article VI.116 of Book VI that its scope is to "ensure the fair market practices between companies"**. Whether this addition is sufficient to exclude the article from providing any consumer protection is a question that will most likely be addressed by the Belgian courts in due course.

BOOK X – AGENCY, COMMERCIAL COLLABORATION AND DISTRIBUTION AGREEMENTS

On 20 February 2014, the Belgian Parliament adopted a Bill ("**Bill**") introducing book X of the Commercial Code dealing with agency, commercial collaboration and distribution agreements ("**Book X**").

Although some hoped that it would be more comprehensive, Book X simply incorporates the existing laws governing (i) agency agreements (i.e. the Law of 13 April 1995) (Title 1), (ii) pre-contractual information for commercial collaboration agreements (i.e. the Law of 19 December 2005) (Title 2) and (iii) the unilateral termination of certain distribution agreements of indefinite duration (i.e. the Law of 27 July 1961) (Title 3).

One relevant novelty of Book X is that the **rules on pre-contractual information will also apply to agency agreements**, with the exception of insurance and bank agency agreements which remain excluded.

At present, Article 2 of the law of 19 December 2005 regarding pre-contractual information for commercial collaboration agreements provides that it applies to agreements between two parties who act in their own name and on their own behalf, whereby one party receives a compensation from the other party for its services. As a result, agency agreements are currently excluded from the aforementioned law on pre-contractual information since agents do not perform their activities on their own behalf.

Both of the aforementioned requirements have been excluded from the definition of commercial collaboration agreements stipulated in Article I.11 2° of Book X. A commercial collaboration agreement is now defined as "*an agreement entered into by multiple persons, whereby one person gives the other the right to use one or more of the following commercial formulas for the sale of goods or the delivery of services: a common sign or trade name, the transfer of know-how and/or commercial or technical support.*"

As a result of the broadening of the definition of commercial collaboration agreements, agency agreements will become subject to pre-contractual information obligations. Nevertheless, the legislator has made two exceptions in Article X.26 of Book X, namely for bank and insurance agency agreements, which are expressly excluded from the pre-contractual information obligations contained in Book X. The reason given in the explanatory memorandum of the Bill is that both types of agency agreements are already subject to specific laws, namely a Law of 27 March 1995 and a Law of 22 March 2006.

Finally, it is noteworthy that, compared to Article 5 of the Law of 19 December 2005, Article X.30 of Book X explains more extensively the different **sanctions that are available to the commercial collaborator (i.e., the agent, distributor etc.) in case they do not receive some or all of the mandatory pre-contractual information**. Those sanctions include notably the right to request the entire or partial annulment of the agreement. Furthermore, Article X.30 also contains a **possibility for the commercial collaborator to waive their right to request the annulment of the agreement**. Interestingly, that right only becomes available one month after the conclusion of the contract. Moreover, the commercial collaborator then also has to expressly explain why they waive their annulment right.

Given the speed at which the Bill was drafted and approved, it seems that it is the intention of the legislator to pass the law on Book X before the general elections on 25 May 2014.

DLA PIPER

Joris Beckers
Lead Lawyer, IPT
joris.beckers@dlapiper.com

EVENTS

DLA PIPER EVENTS – UPCOMING

We know that keeping up to date with legal developments is important to you. DLA Piper has a variety of face-to face and online events to support your professional needs.

DLA PIPER ACADEMIES – BELGIUM

The ever popular DLA Piper Academy – developed specifically for our clients in Belgium

29 April 2014, 12:00 – 14:00 hours – BRUSSELS

Antitrust and IPRs – What's left?

This session will be held in English.

15 May 2014, 12:00 – 14:00 hours – ANTWERP

Recent case-law regarding the new Public Procurement Regulation

This session will be held in Dutch.

20 May 2014, 12:00 – 14:00 hours – BRUSSELS

The freedom to copy and the protection of knowhow and (trade and industrial) secrets

This session will be held in Dutch.

10 June 2014, 12:00 – 14:00 hours – BRUSSELS

Simplified liquidation and merger/division procedure of private companies: opportunities and points of interest from a corporate and tax law perspective

This session will be held in French.

12 June 2014, 12:00 – 14:00 hours – ANTWERP

Modernising the rules on securities and collateral arrangements: potential influence on every commercial contractual relationship

This session will be held in Dutch.

19 June 2014, 12:00 – 14:00 hours – ANTWERP

Revision on the rent – commercial lease article 6 of the Commercial Lease Act of 30 April 1951

This session will be held in Dutch.

Full information about DLA Piper Academies in Belgium can be found on http://www.dlapiper.com/en/belgium/insights/events/

WEBINARS

No matter where you are in the world, we have a series of webinars you can listen to live or in recording.

7 May 2014, 16:00 – 17:00 hours

Technology and Sourcing Webinar Series 2014 – Cyber Security (UK/US focus)

21 May 2014, 16:00 – 17:00 hours

Media, Sport & Entertainment Webinars 2014 – Regulatory codes and issues – commercial opportunities

28 May 2014, 10:00 – 11:00 hours

Technology and Sourcing Webinar Series 2014 – Best practice in Agile Contracting

18 June 2014, 16:00 – 17:00 hours

Media, Sport & Entertainment Webinars 2014 – Distribution opportunities

23 July 2014, 16:00 – 17:00 hours

Media, Sport & Entertainment Webinars 2014 – Fair Dealing

For a full list of DLA Piper webinars, please navigate to http://www.dlapiper.com/en/belgium/insights/events/ *and select Event Type – Webinar under the additional filter options.*

EXTERNAL EVENTS – PAST

DLA Piper lawyers regularly speak at our own and third party events and conferences events. Here is where you may have seen us in the past months.

Following the annulment by the Constitutional Court of the Flemish Region "social charges" legislation for large residential projects, **Els Empereur** (Partner, Real estate) and **Ive Van Giel** (Lead lawyer, Real estate) hosted a number of seminars on the matter. These include:

- DLA Piper Academy at our Antwerp Office on 6 February; a seminar of the Notary Study Circle in Kasterlee on 13 February; a seminar by the Building Confederation in Hasselt on 10 March (hosted for developers and authorities of the Limburg Province) and a seminar in Ghent, organized by the Flemish Planning Organization for developers, municipalities and planning experts on 2 April.

On 18 March, **Patrick Van Eecke** (Partner, IPT) discussed the legal aspects of big data during the "Big Data: legal, privacy and information security issues" seminar hosted by Leuven, Inc. This conference focused on the legal and ethical considerations regarding users' privacy in the context of big data.

On 20 March, **Antoon Dierick** (Lawyer, IPT) gave a presentation on the legal aspects of cloud computing during the Cloud Computing Event organized by BELRIM, the Belgian risk management association, in which he discussed Belgian and European legislation and contractual points of attention.

On 25 March, **Denis-Emmanuel Philippe** (Lead lawyer, Tax) presented a seminar on recent developments in Belgian corporate income tax to the Ordre des Experts Comptables at the Auderghem cultural centre. On 1 April, he gave a seminar on the tax attractiveness of Luxemburg structures (SPF, SICAV-SIF and SOPARFI) for Belgian residents in Luxemburg.

On 26 March, **Alec Van Vaerenbergh** (Lead Lawyer, Litigation & Regulatory) was among the selected guests at the reception at *Palais des Beaux-Arts* hosted on the occasion of President Obama's visit to Brussels. President Obama's speech about international relations, the role of the European Union and the recent events in Ukraine was appreciated by 2,000 privileged guests. Mr **Van Vaerenbergh** was invited to the event in his capacity as a former Fulbright guarantee during his LL.M. studies at New York University.

USEFUL PUBLICATIONS

DLA Piper is always at the forefront of legal thought, bringing you know-how and legal updates. Below is a selection of legal handbooks and insights you may find useful.

Employment:

Be Global: Employment law e-bulletin – March 2014

- Be Global is a publication by DLA Piper's Global Employment Group, designed to keep you informed on recent developments around the world.

Finance:

Global Financial Markets Insight – Issue 2, Q1 – 2014

- This issue looks at some of the issues that will be prominent in the emerging financial environment and the developing products that are arising in the post recessionary global economy.

European Acquisition Finance Debt Report 2014

- This report, now in its fifth year, presents detailed results of our survey of over 250 debt providers, advisors, sponsors and corporates active in the European acquisition finance debt market. It also includes extracts from interviews with numerous senior dealmakers.

General business:

The Trust Deficit: After the Crash

- The findings are illuminating in this regard, as the evidence points to a serious breakdown of trust between these key pillars of society.

Intellectual Property & Technology:

Data Protection Laws of the World Handbook: Third Edition:

- This edition of the Handbook covers over 70 jurisdictions and is available in a new online format with a number of new features, and continues to offer a high-level snapshot of selected aspects of data protection laws across the globe.

Intellectual Property and Technology News (EMEA)

- Issue 5 – Q1 2014 The fifth edition of Intellectual Property and Technology News (EMEA) provides a cross-section of cutting edge issues in the ever-more convergent fields of IP, technology and media.

Prize promotions across the world handbook

- DLA Piper's Advertising Group is pleased to present to you the 2014 edition of our Prize Promotions Across the World Handbook, covering 20 jurisdictions.

European Parliament passes the data protection regulation

- In a vote, the European Parliament has given its formal approval to its version of the new European Data Protection Regulation.

Litigation & Regulatory:

Antitrust Matters – April 2014

- In our second edition of Antitrust Matters, our team explores antitrust issues across additional jurisdictions.

International Arbitration Newsletter Q1 2014

- Our look at international arbitration news from around the world.

Real Estate:

Real Estate European Sustainability Campaign

- The Real Estate Group has recently launched a European sustainability campaign. Real estate is a major consumer of resources. Modern life means that energy and other resources are heavily consumed in the development and occupation of real estate and the industry will be at the forefront of any reduction in carbon and other sustainability improvements. Key findings are available in:
- Life-Cycle – A legal guide to developing, investing in and managing buildings sustainably
- Towards a greener future – Market report on sustainable real estate

Tax:

International Tax News, March 2014
Our look at tax news from around the world.

These and other DLA Piper legal updates and handbooks can be found on www.dlapiper.com – "Insights"

USEFUL PUBLICATIONS

DLA Piper is always at the forefront of legal thought, bringing you know-how and legal updates. Below is a selection of legal handbooks and insights you may find useful.

Employment:

Be Global: Employment law e-bulletin – March 2014

- Be Global is a publication by DLA Piper's Global Employment Group, designed to keep you informed on recent developments around the world.

Finance:

Global Financial Markets Insight – Issue 2, Q1 – 2014

- This issue looks at some of the issues that will be prominent in the emerging financial environment and the developing products that are arising in the post recessionary global economy.

European Acquisition Finance Debt Report 2014

- This report, now in its fifth year, presents detailed results of our survey of over 250 debt providers, advisors, sponsors and corporates active in the European acquisition finance debt market. It also includes extracts from interviews with numerous senior dealmakers.

General business:

The Trust Deficit: After the Crash

- The findings are illuminating in this regard, as the evidence points to a serious breakdown of trust between these key pillars of society.

Intellectual Property & Technology:

Data Protection Laws of the World Handbook: Third Edition:

- This edition of the Handbook covers over 70 jurisdictions and is available in a new online format with a number of new features, and continues to offer a high-level snapshot of selected aspects of data protection laws across the globe.

Intellectual Property and Technology News (EMEA) Issue 5 – Q1 2014

- The fifth edition of Intellectual Property and Technology News (EMEA) provides a cross-section of cutting edge issues in the ever-more convergent fields of IP, technology and media.

Prize promotions across the world handbook

- DLA Piper's Advertising Group is pleased to present to you the 2014 edition of our Prize Promotions Across the World Handbook, covering 20 jurisdictions.

European Parliament passes the data protection regulation

- In a vote, the European Parliament has given its formal approval to its version of the new European Data Protection Regulation.

Litigation & Regulatory:

Antitrust Matters – April 2014

- In our second edition of Antitrust Matters, our team explores antitrust issues across additional jurisdictions.

International Arbitration Newsletter Q1 2014

- Our look at international arbitration news from around the world.

Real Estate:

Real Estate European Sustainability Campaign

- The Real Estate Group has recently launched a European sustainability campaign. Real estate is a major consumer of resources. Modern life means that energy and other resources are heavily consumed in the development and occupation of real estate and the industry will be at the forefront of any reduction in carbon and other sustainability improvements. Key findings are available in:
- Life-Cycle – A legal guide to developing, investing in and managing buildings sustainably
- Towards a greener future – Market report on sustainable real estate

Tax:

International Tax News, March 2014
Our look at tax news from around the world.

These and other DLA Piper legal updates and handbooks can be found on www.dlapiper.com – "Insights"

EXTERNAL PUBLICATIONS

Below are some of the external publications our lawyers have recently contributed to.

- Verwerven van vastgoed anno 2014 – Hoe langer hoe meer specialistenwerk?/'Acquérir un immeuble en 2014 – Plus c'est long, plus il s'agit d'un travail de spécialiste
  Expertise News, 17 January 2014, p. 12
  Jim Bauwens, Partner, Real estate
  Michael Bollen, Partner, Real estate
  NOTE: The authors discussed the same topic in their contribution to the Z-Legal series, which can be seen **here**.
- Belgium – Eye on the market: Recent trends
  International Mergers & Acquisitions review 2014, pp. 27-30
  Caroline Daout, Partner, Corporate
  Koen Selleslags, Partner, Corporate
  Erwin Simons, Partner, Corporate
- Geschillenbeslechting via het internet… Een eerste stap voorwaarts
  Droit de la Consommation – Consumentenrecht 2013, vol. 199, pp. 3-18
  Antoon Dierick, Lawyer, IPT
- Geschillenbeslechting in consumententransacties: clicks not bricks
  Tijdschrift voor Consumentenrecht & Handelspraktijken 2014, vol. 1, pp. 14-20
  Antoon Dierick, Lawyer, IPT
- Sociale lasten bij woonprojecten vernietigd. Wat nu?
  Expertise News, 14 March 2014, p. 15
  Els Empereur, Partner, Real estate
  Ive Van Giel, Lead lawyer, Real estate
  NOTE: The English version of this article can be read **here**.
- Valsheid in Facebook – een profiel met vele gezichten
  Computerrecht 2013, vol. 6, pp. 328-333
  Alexis Fierens, Lead lawyer, IPT
- Nieuwe milieubelasting op parkeerplaatsen in Brussel
  Expertise News, 14 February 2014, p. 17
  Kim Möric, Partner, Litigation & Regulatory
  NOTE: The English version of this article can be read **here**.
- Impôt des sociétés – Développements récents
  Actualités en droit fiscal et en droit fiscal pénal (Bruylant 2014), pp. 45-88
  Denis-Emmanuel Philippe, Lead lawyer, Tax
- L'avocat à la Cour de cassation dans la vie quotidienne
  Liber Amicorum Georges-Albert Dal (Larcier 2014), pp. 881-888
  Pierre Van Ommeslaghe, Of counsel, Litigation & Regulatory

DLA Piper is a global law firm with 4,200 lawyers located in more than 30 countries throughout the Americas, Asia Pacific, Europe and the Middle East, positioning us to help companies with their legal needs anywhere in the world. In Belgium, the firm has over 120 lawyers operating from offices in Antwerp and Brussels.

CONTACT BRUSSELS

106 Avenue Louise – Louizalaan
B-1050, Brussels
T +32 (0)2 500 1500
F +32 (0)2 500 1600
info.be@dlapiper.com

CONTACT ANTWERP

Brusselstraat 59/5
B-2018, Antwerp
T +32 (0)3 287 2828
F +32 (0)3 230 4221
info.be@dlapiper.com

We very much hope that you have enjoyed this issue of Spotlight on Belgium.

QUESTIONS OR COMMENTS?

Should you have questions about issues raised in any of the articles, you can get in touch with the authors directly. Alternatively, feel free to contact the **editorial team**.

www.dlapiper.com