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News

New Belgian act on security interests on movable assets

The new Belgian act on security interests on movable assets has been adopted ("the Act")[1]. It introduces a fundamental modification of the Belgian pledge regime. Initially set for 1 January 2014, the Act will finally enter into force on 1 January 2018, as provided by the Royal Decree of 14 September 2017[2].

The key feature of the Act consists in the fact that it deeply modifies the Belgian pledge regime by establishing, in addition to the traditional possessory pledge, a non-possessory pledge on movable assets.

The new legislation intends to modernize the rules applicable to the pledges, aims at improving consistency and introduces a uniform regime on the matter. As undertakings will now be allowed to carry out their professional activities while keeping their professional movable assets and being able to grant a pledge over them in order to secure financing, the Act is expected to boost inventory financing, borrowing and lending and other forms of asset financing.

Under the current regime, security on movable assets can only be created either by way of a possessory pledge (*gage* / pand), or a non-possessory pledge on a commercial business, which may only be granted to EU authorized credit institutions or financial institutions (gage sur fonds de commerce / pand op de handelszaak). As regards the pledge on movable assets, it shall be possessory: the creation and perfection of such a pledge require the dispossession of the pledged assets and that the debtor delivers the possession of these assets to the secured creditor or a third party pledgee.

As from 1 January 2018, although the possessory pledge on movable assets will remain in place, the delivery requirement to create and perfect a valid pledge will no longer apply if parties opt for non-possessory pledge on movable assets. The pledge may have a fixed term or an indefinite duration.

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[1] *Loi du 24 juin 2013 réglant des matières visées à l'article 77 de la Constitution en matière de sûretés réelles mobilières et Loi du 11 juillet 2013 modifiant le Code Civil en ce qui concerne les sûretés réelles mobilières et abrogeant diverses dispositions en cette matière* / Wet van 24 juni 2013 tot regeling van aangelegenheden als bedoeld in artikel 77 van de Grondwet inzake de zakelijke zekerheden op roerende goederen en Wet van 11 juli 2013 tot wijziging van het Burgerlijk Wetboek wat de zakelijke zekerheden op roerende goederen betreft en tot opheffing van diverse bepalingen ter zake.

[2] *Arrêté royal du 14 septembre 2017 portant exécution des articles du titre XVII du livre III du Code civil, concernant l'utilisation du Registre national des gages* / Koninklijk besluit van 14 september 2017 tot uitvoering van de artikelen van titel XVII van boek III van het Burgerlijk Wetboek, die het gebruik van het Nationaal Pandregister betreffen.

From an *in rem* agreement, the pledge has become a consensual agreement. However, the Act requires the non-possessory pledge to be proven by way of a written agreement which shall include a precise description of: (i) the assets given as a pledge; (ii) the secured liabilities; and, (iii) the maximum amount secured. Furthermore, this pledge will be enforceable against any third party as from the registration of the corresponding agreement in a new central public register, the National Register of Pledges (Registre national des gages / Nationaal Pandregister). The registration will remain valid for a (renewable) term of 10 years, including the pledge of indefinite duration.

With regard to the pledge on a commercial business, the existing legislation[3] will be abolished by the Act. The benefit of this pledge will no longer be limited to EU authorized credit institutions or financial institutions. In addition, the limitation that only 50% of the stock's value of the commercial business may be covered by the pledge will be repealed. Existing pledges on a commercial business, which are recorded in the mortgage register under the existing regime, will only keep their ranking if they are newly registered in the National Register of Pledges within a period of 12 months (*i.e.*, before 31 December 2018).

In the case of multiple pledgees, priority will be determined according to the *prior tempore* rule (*i.e.*, the anteriority rule). The ranking is determined by the date of registration. Where possessory pledge has also taken place, the dispossession will prevail.

Furthermore, the Act recognizes "super priority rights" of sellers who benefit from a reservation of title clause. The latter will rank above all other pledgees, despite there being no publicity of the reservation of title. The same applies for creditors who rely on a right of retention, for the costs they may incur to preserve the assets in question.

In the event of a payment default, the pledgee will be allowed to immediately enforce the pledge, without prior court approval[4], without prejudice of a required prior notification to the debtor and the other pledgees. Moreover, if so provided in the pledge agreement, the pledgee will also be entitled to appropriate the pledged assets, rather than selling them (to the extent that the pledge agreement also provides that the value of the pledged assets will be determined by an expert on the day of the appropriation, or at the market price when the assets are traded on a market). In the absence of an appropriation clause, the pledgor can still validly consent to appropriation, if such consent is given after the pledgor's default of payment.

The National Register of Pledges will be an online register, available to anyone who pays the required fee and is able to identify itself. Users of the register must identify via their electronic

[3] *Loi du 25 octobre 1919 sur la mise en gage du fonds de commerce, l'escompte et le gage de la facture, ainsi que l'agréation et l'expertise des fournitures faites directement à la consommation* / Wet van 25 oktober 1919 betreffende het in pand geven van de handelszaak, het disconto en het in pand geven van de factuur, alsmede de aanvaarding en de keuring van de rechtstreeks voor het verbruik gedane leveringen.

[4] Except where the pledgor is a consumer, in which case a court decision is necessary.

Belgian ID-card. Persons who do not hold a Belgian ID-card can access via a Belgium-based agent (*e.g.* a notary or a law firm).

The registration fee will be capped to EUR 500 depending of the maximum amount of the secured liabilities (with a minimum of EUR 20). Amendments to registration will be capped to EUR 300 and its removal in full limited to EUR 200. The fee for the consultation of the register is set at EUR 5, while its access remains free for the pledgor and the pledgee.

Case-law & Analysis

The General Court of the EU annuls the Commission's clearance decision of Liberty Global's acquisition of Ziggo in 2014 *(Judgment of 26 October 2017 in Case T-394/15 KPN BV v European Commission)*

In October 2014, the European Commission approved the proposed acquisition of Dutch cable TV operator Ziggo by Liberty Global, subject to commitments. In July 2015, this decision was challenged before the General Court of the EU by Ziggo's competitor KPN.

According to KPN, the commitments would not suffice to address all the competition concerns, especially in the sports broadcast market. KPN argued that the Commission did not carry out a proper investigation into the consequences that the transaction would have on the pay sports TV market and that a stake held by Liberty's chairman in Eurosport had not been scrutinized in the assessment of the transaction.

In KPN's view, pay sports TV and pay films TV would be two separate markets. As opposed to pay films TV, pay sports TV is normally broadcasted live and customers are not willing to watch its content after it has been broadcasted.

In addition, KPN pointed out that there are only two pay TV sports channels in the Dutch market: Liberty's Sport1 (currently Zigo Sport Totaal) and Fox Sports. In KPN's view, the transaction provided Liberty the possibility to deny content or increase prices to its competitors.

The General Court of the EU has found that the Commission erred by not assessing the possible effects of the transaction on the potential market for the wholesale supply and acquisition of premium TV sports channels. The Commission can only decide not to analyse a specific market if it is clearly and unequivocally proven that there would be no significant competition concerns therein. However, the only clear finding that is contained in the decision is that the independent

competitor Fox News is active in the market, which does not exclude the market power of the merged entity.

On this basis, the General Court of the EU has upheld KPN's claims and annulled the Commission's decision.

As a consequence, the Commission will have to reassess the acquisition in accordance to the findings of the General Court's judgment.

The General Court of the EU confirms €20 million fine imposed on Marine Harvest for its failure to notify to the European Commission the acquisition of salmon producer Morpol *(Judgment of 26 October 2017 in Case T-704/14 Marine Harvest v Commission)*

In 2014, the Norwegian seafood company Marine Harvest was fined €20 million for failing to notify the acquisition of its competitor Morpol at the appropriate moment in time.

Marine Harvest bought 48.5% of Morpol on 12 December 2012 and closed the deal some days later. In compliance with Norwegian law, a mandatory public offer for Morpol's remaining shares was triggered and closed in March 2013. Although Marine Harvest had engaged in pre-notification contacts with the Commission since December 2012, it only filed the complete notification in August 2013.

The Commission then decided to clear the transaction subject to a divestment and to fine Marine Harvest for failing to file the deal before the first part of the transaction was implemented, *i.e.* in December 2012. The amount of the fine was set taking into account two infringements: the failure to notify the transaction prior to its completion and the implementation of the transaction prior to the Commission's clearance.

The Commission's decision was appealed before the General Court of the EU by Marine Harvest. The latter argued that in between the first and the second stage of the purchase, the shares' voting rights had not been used. Moreover, in the applicant's view, the Commission was punishing twice the same infringement, which would violate the *non bis in idem* principle.

The General Court of the EU has not upheld Marine Harvest's arguments and has confirmed the Commission's decision and corresponding fine.

In particular, it has found that the decisive moment, which triggers the obligation to notify, is the acquisition of control in the formal sense and not the exercise of such control.

However, the General Court of the EU has acknowledged that the current legal framework is unusual given that it foresees fines for the infringement of two provisions, where the infringement of the first one necessarily entails the violation of the second one. Despite this, these are the rules to which the Commission is bound. In addition, upholding Marine Hasvest's argument would lead to privilege undertakings infringing both provisions over those which have only disregarded one of them.

The Court of Justice of the EU clarifies antitrust exemption for agricultural associations (*Judgement of 14 November 2017 in Case C-671/15 President of the Autorité de la Concurrence v Association des producteurs vendeurs d'endives (APVE) and others*)

In 2012, the French Competition Authority fined endive producers €4 million for alleged anticompetitive behaviour implemented by producer organisations (POs) and associations of producer organisations (APOs) consisting in colluding to fix prices and quantities as well as exchanging commercially sensitive information.

The sanctioned organisations appealed this decision arguing that such practices would be covered by the Common Agricultural Policy (CAP). This dispute led the *Cour de Cassation*, before which the case is pending, to refer a preliminary ruling to the Court of Justice of the EU.

In its judgment, the Court has first underlined that, within the Treaty on the Functioning of the European Union (TFEU), the CAP has precedence over the objectives of competition. As such, POs and APOs may ensure that production is planned and adjusted to demand, which would entail concentrating supply and placing the products on the market as well as optimising production costs and stabilising producer prices.

This, however, shall not be translated into a total exemption from Competition Law rules. In this sense, the Court has clearly indicated that farmers may exchange information and coordinate quantities and prices as long as they do so within POs and APOs recognised by the State and which strictly pursue the CAP's objectives. By contrast, it is forbidden to coordinate their behaviour outside such organizations and they can never fix minimum sale prices; as such practice cannot be considered as proportionate to the objectives of stabilising prices and concentrating supply.

As a consequence of the above, agreements between several POs and/or APOs (and not within a PO or APO) would go beyond what is necessary.

The judgement has been delivered among a rather taut political atmosphere since French President Macron had recently announced future measures to fight abusively low prices and the imbalance between farmers' income and certain supermarket's high market power.

Settlements with the European Commission do not prevent further probes (*Judgment of 23 November 2017 in Case C-547/16 Gasorba SL, Josefa Rico Gil, Antonio Ferrándiz González v Repsol Comercial de Productos Petrolíferos SA*)

In 2006 the European Commission issued a decision to end a competition investigation related to the Spanish oil company Repsol and its agreements with gas stations.

More concretely, the Commission was concerned that such agreements, which in certain cases lasted for decades, could have a significant 'foreclosure effect' on the Spanish retail fuel and artificially increase prices.

The investigation came to an end with a commitment decision by which Repsol, *inter alia*, would avoid entering into long-term exclusivity agreements; offer all service station tenants concerned financial incentives for an early termination of their existing long-term supply agreements; and refrain for a certain period of time from buying any independent service stations for which it did not yet act as supplier.

After this, a dispute between Repsol and the owners of a gas station led the Spanish Supreme Court to refer a preliminary ruling to the Court of Justice of the EU to clarify whether a national court may declare the nullity of a supply agreement under EU Law, when the Commission has previously accepted a series of commitments on that same agreement.

In its judgment, the Court of Justice of the EU has firstly indicated that the application of EU Competition law is based on a system of parallel competences within which both the Commission and the national competition authorities and courts may apply EU competition rules.

A commitment decision cannot create a legitimate expectation in respect of the undertakings concerned as to whether their conduct complies with Competition rules; or in other words, a commitment decision cannot 'legalise' the market behaviour of the undertaking concerned, and certainly not retroactively.

However, national courts cannot overlook that type of decision, they shall take into account the preliminary assessment carried out by the Commission and regard it as an indication, if not *prima facie* evidence, of the anticompetitive nature of the agreement at issue.

Therefore, a commitment decision concerning certain agreements between undertakings does not preclude national courts from examining whether those agreements comply with the competition rules and, if necessary, declaring those agreements void pursuant to Article 101(2) TFEU.

Currently at GA_P

Sara Moya Izquierdo listed in the Top 500 influential women in Spain by the magazine Yo Dona

Our associate Sara Moya Izquierdo, based in our Brussels office, has been listed for the second consecutive year within the Top 500 influential women in Spain by the magazine Yo Dona, supplement to the newspaper El Mundo.

The full list is available here:

http://estaticos.elmundo.es/yodona/estaticas/documentos/2017/11/500masinfluyentes2017.pdf