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## Introduction

The Loyens & Loeff Belgium Newsletter keeps you up to date on recent tax and corporate law developments in Belgium. The Newsletter also covers developments in EU law. The Newsletter is issued quarterly. Please feel free to send us your questions, comments or suggestions. You can find our details on the back cover of the Newsletter. If you prefer to send an e-mail, please send your message to [simone.baeyens@loyensloeff.com](mailto:simone.baeyens@loyensloeff.com).

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## Private client

*Romina Abiuso / Marjolein Vanbrabant*

### Flemish inheritance tax: employment condition for tax exemption family companies incompatible with EC law

#### Decision of the European Court of Justice

The Flemish legislation provided until recently that, in order to benefit from the inheritance tax exemption for the transfer of family undertakings and companies, an employment condition must be fulfilled.

The European Court of Justice (hereafter “ECJ”), in its decision of 25 October 2007 following a preliminary ruling of the Court of First Instance of Hasselt (hereafter “the Court”), holds that such condition is incompatible with the European principle of freedom of establishment (ECJ 25 October 2007, C-464/05, Geurts-Vogten). The Flemish legislator amended its legislation in order to comply with the decision.

### Employment in the Flemish Region

Article 60bis of the Inheritance Tax Code, as applicable in the Flemish Region, provides an inheritance tax exemption for the transfer of family undertakings and companies established within the European Economic Area (i.e. the EU Member States and Norway, Iceland and Liechtenstein) (hereafter the “EEA”). This exemption applies both to the assets which are invested in a family undertaking by the deceased and to the shares which are held by the deceased in a family company. The exemption is only applicable upon the fulfillment of certain conditions, amongst which the employment condition.

The employment condition provided, until recently, that the undertaking or the company had to employ at least five employees in the Flemish Region. This condition had to be complied with during the three years preceding the decease. The employment had to be maintained during five years after the decease.

### Facts: employment in the Netherlands

The procedure submitted to the Court concerned the estate of a Dutch citizen who at the time of his decease had resided for 13 years in the Flemish region. The Flemish inheritance tax applies to his estate.

The deceased, together with his wife, held all the shares in the capital of Dutch companies which each employed more than five employees in the Netherlands.

The Flemish Tax Administration refused to grant to the heirs the inheritance tax exemption on the basis that the employment was not located in the Flemish region but in the Netherlands.

The Court submitted the following preliminary ruling to the ECJ: Does the Flemish employment condition comply with the European principle of freedom of establishment (art. 43 EC Treaty) and the European principle of free movement of capital (article 56 EC Treaty)?

### Incompatibility with the European principle of freedom of establishment

The ECJ decided that the Flemish employment condition is incompatible with the European principle of freedom of establishment in case the inheritance tax exemption is not granted to undertakings or companies which employ at least five employees in another Member State. According to the ECJ this condition constitutes an indirect discrimination with respect to tax obligations depending on the place of employment of a defined number of employees.

### New legislation in compliance with EC law

Following the decision of the ECJ, the Flemish legislator replaced the obligation of employment in the Flemish Region by employment in the EEA.

The condition that the undertaking or the company had to employ at least five employees has been replaced. Instead, the Flemish inheritance tax legislation provides that the undertaking or the company must have paid salaries in the amount of at least EUR 500,000 during the three years preceding the decease. During the five years following the decease, the undertaking or the company must pay an amount of salaries which is at least equal to 5/3rds of the salaries paid during the three years preceding the decease.

The new legislation applies retroactively to inheritances as of 1 November 2007.

### Conclusion

With the retroactive introduction of the new legislation, the Flemish legislator has succeeded in ensuring legal certainty for inheritances as of 1 November 2007.

For inheritances prior to 1 November 2007, the question arises as to whether the Tax Administration will continue to apply the infringing employment condition.

The European principle of freedom of establishment belongs to primary community law and prevails over the national law of the Member States, setting aside infringing national law.

If the Tax Administration would nevertheless apply the infringing employment condition to an inheritance prior to 1 November 2007, the heirs can claim the exemption in judicial proceedings. Belgian courts confronted with the same question as the one in the matter at hand, will be compelled to follow the interpretation of the ECJ.

Finally, one may wonder whether heirs can claim the refund of the inheritance tax they have paid on the basis of the infringing legislation.

## Commercial Law

*Etienne Kairis / Wendy Habsch*

### Belgian Unfair Trade Practices Law substantially modified

On 1 December 2007, the Law of 5 June 2007 amending the Law of 14 July 1991 relating to trade Practices and the Information and Protection of the Consumer (the "Law") (*Wet van 14 juli 1991 betreffende de handelspraktijken en de voorlichting en bescherming van de consument / Loi du 14 juillet 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur* – the "Unfair Trade Practices Law") entered into force.

The Law implements Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (the "Directive").

The Directive's focal point is to boost consumer confidence and to make it easier for business to carry out cross border trading. In view of this objective, it establishes a general ban on unfair commercial practices and outlines rules on misleading and aggressive commercial practices.

The Law significantly overhauls the structure of the Unfair Trade Practices Law. The existing distinction between unfair trade practices and misleading advertising only remains intact in the relations between traders. With respect to business-to-consumer relations, the rules on unfair trade practices and those on misleading advertising have been bundled in one chapter dealing with unfair commercial practices.

#### Unfair, misleading and aggressive commercial practices

The chapter on unfair business-to-consumer commercial practices contains a general ban on unfair commercial practices; based on professional diligence and material distortion of the average consumer's economic behaviour. Furthermore, the Law defines in more detail the two main categories of unfair commercial practices, i.e. "misleading (actions and omissions)" and "aggressive" practices. Finally, the Law introduces "blacklists" containing those "misleading" and "aggressive" practices which shall, in all circumstances, be regarded as unfair and thus banned – covering *inter alia* bait advertising, fake "free" offers, direct exhortations to children, advertorials.

#### Stricter sanctions

The Law also reinforces the sanctions in case of infringement. The Law provides for criminal sanctions for all unfair trade practices. In addition, an important civil sanction is introduced in order to guarantee the immediate protection of the consumer: the latter can claim reimbursement of all amounts paid to the trader without having to return the goods or services purchased as a result of the unfair commercial practice.

# Competition law

Yves Van Couter / Marie-Caroline Morelle

## The Microsoft saga: the end of the story or the beginning of a new one...

The Microsoft case originated with a December 1998 complaint from a competitor. The investigation resulted in a Commission decision finding that Microsoft had infringed Article 82 of the EC Treaty by abusing its dominant position.

### Background: the 2004 Commission decision

In its 24 March 2004 Decision the Commission found that Microsoft had abused its dominant position in the PC operating system market by:

- refusing to supply competitors in the work group server operating system market interface information necessary for their products to interoperate with Windows, and hence to compete viably in the market;
- harming competition through the tying of its separate Windows Media Player product with its Windows PC operating system.

In order to remedy the abuse the Commission ordered Microsoft to:

- disclose complete and accurate interface information allowing non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers, and to make that information available on reasonable terms;
- offer for sale a version of its Windows operating system without Windows Media Player.

The Commission furthermore imposed a fine of approximately €500 million on Microsoft.

Microsoft lodged an action for annulment of the Decision with the Court of First Instance (CFI) as well as an interim measures application for the Decision's remedies to be suspended pending the outcome of its main appeal.

In an Order of 22 December 2004 the President of the CFI rejected Microsoft's request to suspend the Decision's remedies. An additional fine in excess of €280 million was imposed by the Commission for Microsoft's failure to properly implement the remedy concerning interoperability information.

### Appeal: the CFI's judgment

The CFI delivered its judgement on 17 September 2007, upholding the finding of abuse in the Commission's decision and the amount of the fine. Microsoft did not appeal.

#### Refusal to supply interoperability information

The CFI considered that the Commission had been right to conclude that the work group server operating systems of Microsoft's competitors must be able to interoperate with Windows domain architecture on an equal footing with Windows operating systems to be able to compete in the market.

The CFI applied existing case law (*IMS Health /Magill*) according to which the refusal by a dominant company to license a third party to use a product covered by an intellectual property right is an **abuse only in "exceptional circumstances"** and considered that the criterion of exceptional circumstances was satisfied in the case of Microsoft:

1. the refusal relates to a product or service **indispensable** to the exercise of an activity on a neighbouring market; the interoperability information is a *condition sine qua non*, not only to act on a neighbouring market of the "work group server operating systems", but also in order to make this activity economically viable for the competitors' operating systems and avoiding that Microsoft reinforces its competitive position on the work group server operating systems market, particularly because it induces consumers to use its work group server operating system by preference to its competitors', although its competitors' operating systems offer features to which consumers attach great importance.

2. the refusal is of such a kind as to **exclude** any effective competition on that market; only a *risk* that competition would be eliminated on the work group server operating systems market suffices.
3. the refusal prevents the appearance of a **new product** for which there is potential consumer demand; this criteria is met not only when the appearance of a *new product* in a different product market is prevented – which did not happen in this case – but also as soon as the *technical development* of an already existing product is limited.
4. the refusal to grant a licence is **not objectively justified**. It is not sufficiently established that if it was required to disclose the interoperability information that would have a *significant negative impact* on its *incentives to innovate*.

#### **Tying: the bundling of the Windows client PC operating system and Windows Media Player**

On the bundling of Windows Media Player to the Windows operating system, the CFI endorsed the Commission's conclusion that there was abusive tying and that it would lead to a weakening of competition.

The CFI reiterated the classical position on tying abuses and agreed with the Commission's application of four factors in its assessment of such abuses:

1. the undertaking concerned must have a **dominant position** on the market for the tying product ;
2. the tying product and the tied product must be **two separate products**;
3. consumers must **not** have a choice to obtain the tying product without the tied product;
4. the practice must **foreclose competition**.

The CFI found that the Commission's decision was well founded and that **no objective justification** for the bundling was brought forth by Microsoft and that the remedy imposed by the Commission was proportionate.

#### **The future: a new Microsoft case?**

In the future it would not be surprising to see this story repeated for Microsoft as a Norwegian software company Opera has recently (14 December 2007) filed another complaint with the Commission against Microsoft.

According to Opera which provides a series of small devices with a connection to the Web, Microsoft deprives consumers of a real choice in internet browsers by tying its Internet Explorer product to its monopoly Windows operating system and by refusing to implement in good faith industry-accepted open standards. The Commission is currently examining the complaint under its antitrust regulation. To be continued...

## Competition law

*Koen Platteau*

### **Belgian Competition Council adopts new leniency programme**

After a round of public consultation, the Belgian Competition Council has issued a new leniency programme<sup>1</sup>. The new programme has entered into force on 22 October 2007 and replaces an earlier leniency programme adopted in 2004.

Two elements have prompted the introduction of a new Belgian scheme. The 2006 Belgian Competition Act provided a legal basis for leniency applications and introduced new procedural rules applying in the context of leniency. In addition, there was a need to modernise the existing programme in view of the developments at the EU level that culminated in the adoption of the EU leniency programme in 2006. Overall, the new Belgian programme closely follows the ECN model leniency programme that was issued precisely with the aim to streamline the leniency programmes of the EU Member States.

<sup>1</sup> *Belgian State Gazette, 22 October 2007, p. 54708.*

The new Belgian leniency programme only applies to cartels. Other types of horizontal practices and vertical agreements do not fall within the scope of the programme. Interestingly, the Belgian programme provides that not only undertakings, but also associations of undertakings are entitled to file leniency applications.

As under the ECN model leniency programme and in almost identical terms, the new Belgian programme provides for two types of immunity (Type 1A and Type 1B). In addition, it provides for the possibility to obtain a reduction of fines (Type 2).

- Type 1A immunity is granted to an undertaking or association of undertakings that is the first to submit evidence that will enable the Belgian Competition Authority to carry out targeted inspections in connection with the alleged cartel.
- Type 1B immunity is available when no Type 1A immunity has been granted, and an undertaking or association of undertakings is the first to submit evidence which enables the finding of an infringement of Article 2 of the Belgian Competition Act and possibly Article 81 of the EC Treaty.
- Finally, undertakings or associations of undertakings that do not qualify for immunity may benefit from a reduction of fines (Type 2) if they provide evidence representing significant added value when compared with the evidence already in the possession of the Belgian Competition Authority at the time of the application. The first undertaking or association of undertakings submitting evidence with a significant added value may obtain a reduction of 30% to 50% of the fine. The undertakings or associations of undertakings that subsequently submit such evidence may obtain reductions ranging from 10% to 30%.

The notice sets out in detail the type of information that applicants should submit in order to qualify for immunity. As under the EU programme, immunity is not available to applicants that took steps to coerce other parties to participate in the cartel.

In addition to the specific conditions relating to the various types of leniency applications, the applicant must satisfy a number of general conditions in order to qualify for leniency, such as (i) prior to making the application, the applicant must not have destroyed, falsified or concealed evidence and must keep the intention to make the application and its content secret; (ii) the applicant must end its involvement in the cartel at the latest at the moment of the application, except if continued involvement would be reasonably necessary to preserve the effectiveness of the inspections; and (iii) the applicant must cooperate genuinely, fully, on a continuous basis and expeditiously with the Belgian Competition Authority until the conclusion of the case. The latter obligation is defined in more detail in the notice and includes, e.g., a continuous secrecy obligation.

One of the procedural novelties at the Belgian level is that in the context of immunity applications, the applicant may apply for a marker protecting the applicant's place in the queue for a specified period of time. The competition prosecutor has discretion as to whether or not granting a marker. Where a marker is granted, the competition prosecutor determines the period within which the applicant has to perfect the marker by submitting the required information.



The Belgian notice provides for formal and summary applications. The formal application consists of a statement with supporting evidence. As under the EU programme, the statement may be provided orally. Access to the statements is restricted and the parties having obtained access must commit to use the information in the statement solely in the procedure concerned. The option to file a summary application is reserved to Type 1A immunity applicants that have or are in the process of filing an immunity application with the European Commission, and where the latter is particularly well placed to handle the case. Summary applications are useful in cases where a reallocation to the national level cannot be excluded. The summary application will have to be turned into a full submission once the College of competition prosecutors decides to act upon a case.

On the basis of a review of the leniency application, the competition prosecutor general will request a chamber of the Competition Council to render a statement confirming its intention to grant leniency (in case of a summary application, the statement will only be issued once College of competition prosecutors has decided to act). The chamber of the Competition Council will strive to issue such a statement within 20 working days after receipt of the report from the competition prosecutor general (interestingly, the notice does not contain a time-limit for the investigation phase). The applicant will have the opportunity to comment upon the findings of the competition prosecutor general. The statement issued by the chamber of the Competition Council will not be published. If the chamber of the Competition Council establishes that the specific conditions for obtaining immunity are not fulfilled, the applicant may withdraw its application.

In its end decision, the chamber of the Competition Council will review the applicant's compliance with all the conditions for granting leniency, and eventually it will grant an immunity or reduction of fines.

## Corporate law

*Pietro Menis*

### Golden Shares under EC law: the Volkswagen Case

The European Court of Justice (the "ECJ") recently issued its decision in the case *Commission v. Germany* (C-112/05, 23 October 2007), also known as the "Volkswagen Case". The ECJ stated that a law specifically relating to Volkswagen (the "VW Law"), which provides special privileges to public authorities acting as shareholders in Volkswagen, breaches the principle of free movement of capital provided in the EC Treaty.

Three provisions of the VW Law raised concerns: the limitation of voting rights to 20% of the share capital; the fact that any resolution can only be adopted with a majority of more than 80%, whereas the German Law on public limited companies provides for a majority of at least 75%; and the right of the Federal Republic of Germany and the Land of Lower Saxony to appoint two members of the supervisory board of the company.

By declaring these provisions unlawful, the Court confirms its previous case law regarding golden shares. Indeed the ECJ has repeatedly stated that national measures liable to deter direct investors from other Member States from investing in the capital of specific companies infringe the EC Treaty.

### The right to appoint two representatives to the supervisory board

The VW Law provides for the right for the Federal State and the Land of Lower Saxony, on condition that they are shareholders in the company, to each appoint two representatives to the supervisory board. It follows that they enjoy the right of appointment irrespective of the level of their shareholding. Such provision thus gives these public authorities the opportunity of exercising influence which may exceed their levels of investment. As a corollary, the influence of the other shareholders may be reduced below a level commensurate with their own levels of investment.

In other words, the VW Law gives public authorities specific rights, which derogate from the general law. Such special treatment that can also be found in the earlier golden share cases<sup>1</sup> breaches the EC Treaty.

Some of the golden shares had the characteristic of granting specific rights to public authorities exclusively. In *Commission v Portugal*<sup>2</sup>, the legal provision at stake stated that the acquisition of shares representing more than 10% of the voting capital would require the prior authorisation of the Minister for Financial Affairs. In *Commission v Netherlands*<sup>3</sup> a special right for the public authority of prior approval of decisions of the organs in two companies was at issue. In these two golden share cases, and in other free movement of capital cases<sup>4</sup>, the Court used the language “*likely to dissuade*” or “*likely to deter*” the exercise of the free movement right: a specific right granted to public authorities which is likely to dissuade a EU company to penetrate a national market breaches the EC Treaty (the “market access approach”). In each of these cases, a specific right was granted to the Member State (e.g. prior authorisation procedure, stamp duties payable by both domestic and EU companies on loans with a non-resident company, the prohibition to register a mortgage in a foreign currency).

### The capping of voting rights at 20% and the fixing of the blocking minority at 20%

In the VW case, the Court goes further in the “market access approach”, insofar as the two other State measures at issue do not grant any specific right to the public authority. The capping of voting rights and the blocking minority identically affect public and private investors: “*these provisions may operate both to the benefit and to the detriment of any shareholder in the company*”.

1 See for example Case C-367/98 *Commission v Portugal* [2002] ECR I-4731; Case C-483/99 *Commission v France* [2002] ECR I-4781; Case C-503/99 *Commission v Belgium* [2002] I-4809; Case C-463/00 *Commission v Spain* [2003] ECR I-4581, Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641 and Case C-282/04 and C-283/04 *Commission v Netherlands* [2006] ECR I-9141.

2 Case C-367/98 *Commission v Portugal* [2002] ECR I-4731.

3 Case C-282/04 and C-283/04 *Commission v Netherlands* [2006] ECR I-9141.

4 Case C-302/97 *Konle*, [1999] ECR I-3099, case C-439/97 *Sandoz* [1999] ECR I-7041, case C-222/97, *Trummer and Meyer*, [1999] ECR I-1661.

Nonetheless, the ECJ found that, by capping voting rights at the level of 20%, “*the VW Law supplements a legal framework which enables the Federal and State authorities to exercise considerable influence on the basis of such a reduced investment*”.

Furthermore, it held that the 80% required majority in general meetings “*creates an instrument enabling the Federal and State authorities to procure for themselves a blocking minority allowing them to oppose important resolutions, on the basis of a lower level of investment than would be required under general company law*”.

In the VW case, the ECJ stated that free movement of capital rules are infringed, as mentioned in paragraph 54, because potential interest in acquiring a stake in the capital of the company is diminished. The Court thus laid down that “*As regards direct investors, it must be pointed out that, by creating an instrument liable to limit the ability of such investors to participate in a company with a view to establishing or maintaining lasting and direct economic links with it which would make possible effective participation in the management of that company or in its control, (...) the VW Law diminish[es] the interest in acquiring a stake in the capital of Volkswagen*”.

### Scope of the market access approach

It appears that the mere fact of making free movement of capital less attractive constitutes an infringement. One could argue that, even without any public authority’s shareholding, the limitations set out in the VW law would diminish the interest in acquiring a stake in the capital of Volkswagen. Indeed, any direct investor would be discouraged from acquiring a stake over 20%. In other words, the decision can be construed as stating that the provisions in the VW law are *per se* in breach of free movement of capital rules. Advocate general Ruiz-Jarabo Colomer suggests in paragraph 90 of his opinion that this “*situation, which is incompatible with Community law as a matter of fact, would not be remedied by the sale of the shares held by the Land, now the only public investor, because the measure which provides for the situation serves to perpetuate the control exercised by the German regional authority, as has been evident over the last 40 years*”.



On the other hand, it could be argued that a law imposing such cap is problematic only if it favours, *inter alia*, a public authority. The Court took into account in paragraph 49 that “*while the Federal State has chosen to part with its interest in the capital of Volkswagen, the Land of Lower Saxony, for its part, still retains an interest in the region of 20 %*”.

It seems that the Court tries to establish a link between the stake held by public authorities and the VW Law, sustaining that critical provisions were adopted in favour of public authorities: “*Paragraph 4(3) of the VW Law thus creates an instrument enabling the Federal and State authorities to procure for themselves a blocking minority allowing them to oppose important resolutions, on the basis of a lower level of investment than would be required under general company law*”.

In the light of the above, it is not clear whether a stake held by a public authority is an element of the violation of free movement rules, or if legislation like the VW law hinders or makes the exercise of free movement rules less attractive *per se*. In other words, would the assessment of the Court have been different in this case if public authorities had sold all their stakes?

Another interesting element to note is that, in the Court's and Commission's view, “*there is a difference between a power made available to shareholders, who are free to decide whether or not they wish to use it, and a specific obligation imposed on shareholders by way of legislation, without giving them the possibility to derogate from it*”.

Advocate general Ruiz-Jarabo Colomer suggests in paragraph 91 of his opinion that it cannot be established that “*if the measure concerned did not exist, the clauses of the articles of association with the same subject-matter as the validity of the provisions disputed in these proceedings would be called in question*”.

This implies that, within the context of a privatisation a Member State could obtain the same result without breaching EC law. Indeed, on the basis of a shareholders agreement, a public authority could obtain a blocking minority or agree on a voting rights cap of 20%. Then, by selling 80% of the shares, the same situation as in Volkswagen would be achieved, not by way of a specific law but by the adoption of a decision by the shareholders pursuant to general corporate law. Such situation could, in the light of the Volkswagen judgment, be compatible with the EC Treaty despite having the same restrictive effects. Indeed, such situation would not be created by a State measure, while free movement provisions in the EC Treaty contemplates State measures only.

### Possible justifications

Pursuant to previous case law, a national restriction on the free movement of capital can be justified by the reasons laid down in the Treaty or by the overriding reasons of the public interest, provided that there are no Community harmonising measures aimed at the protection of those interests and subject to the obligation of respecting the principle of proportionality.

The German government alleged that VW Law “*pursues a socio-political and regional objective, on the one hand, and an economic objective, on the other, which are combined with objectives of industrial policy*”. Such arguments have not been upheld.

# European Union

*Koen Platteau*

## Reform of the European Union: the Lisbon Treaty

The Lisbon Treaty, signed on 13 December 2007<sup>1</sup>, is designed to give the European Union (“EU”) a sound institutional and political basis for years to come. The new Treaty is the end point of a long debate on institutional reforms within the EU. One of the factors driving the process was the enlargement process, which led to an increase in the number of Member States from 15 to 27. These enlargements made the call for a reform of the institutions all the more pressing.

The Lisbon Treaty is much less ambitious than the 2004 Treaty establishing a Constitution for Europe which did not survive the negative outcome of referendums in France and the Netherlands. Eventually, the European Council agreed to relaunch negotiations on a more limited Reform Treaty in June 2007. These negotiations culminated in the Lisbon Treaty. The goal is to have the Lisbon Treaty ratified by the 27 Member States before the European Parliament elections in June 2009.

The Lisbon Treaty reforms the EU’s two core Treaties, i.e. the Treaty on European Union and the Treaty establishing the European Community. In the future, the term “European Community” will disappear, and the latter Treaty will be called the Treaty on the Functioning of the European Union. This will put an end to the current confusing terminology relating to the various policies and institutions of the EU.

The Lisbon Treaty contains a long list of changes to the current Treaties. The substantive provisions of important chapters such as free movement and competition remain unaltered. However, competition policy is not any longer identified as one of the driving forces of the EU.

Article 2 of the new Treaty on European Union merely mentions the establishment of an internal market as an objective and further refers to “a highly competitive social market economy”. In a separate Protocol, the Member States confirm that the notion of the internal market includes a system ensuring that competition is not distorted. It remains to be seen whether this change will have an impact on future EU competition policy.

Below, a number of the more important reforms of the Lisbon Treaty are highlighted.

### Changes to the institutional system

- The European Council, i.e. the institution where the Heads of State or Government of the EU Member States meet, will no longer be presided by a rotating presidency. The European Council will elect a permanent President, for a term of two and a half years. This term is renewable once. The President of the European Council, who shall not hold a national office, is deemed to play an important role in the new institutional structure. The President will chair and drive forward the work of the European Council, and ensure the preparation and continuity of the work of this institution.
- The current system of rotating presidency will also be abandoned at the level of the Foreign Affairs Council. Here, it will be the High Representative of the Union for Foreign Affairs and Security Policy who will preside over the meetings on a permanent basis. For the other Council meetings, the current system of each Member State presiding in turn on a six month basis will be maintained.
- The extension of qualified majority voting at the level of the Council of Ministers will make the decision-making process more effective. As from November 2014, the way to calculate a qualified majority will be simplified.
- The number of Members of the European Parliament will be limited to 750 plus the President.

<sup>1</sup> O.J. 2007, C306/1; see also [www.europa.eu/lisbon\\_treaty/index\\_en.htm](http://www.europa.eu/lisbon_treaty/index_en.htm).

- As from November 2014, the European Commission will no longer count one member from each Member State. The number of Commissioners will be limited to two thirds of the number of Member States. On the basis of the current number of Member States, this will lead to a reduction from 27 to 18 members. This number includes the President and the High Representative of the Union for Foreign Affairs and Security Policy, who will become one of the Commission's Vice-Presidents. When the number of Commission members will be reduced, the members will be chosen from among the nationals of the Member States on the basis of a system of strictly equal rotation.
- The Lisbon Treaty broadens the scope of the Court of Justice, especially as regards police and judicial cooperation in criminal matters. The Court of First Instance will be renamed into the General Court, thus reflecting the status it acquired as a result of gradual extensions of its jurisdiction.

#### Enhancement of the democratic element

- The more extensive use of the co-decision procedure, including in the freedom, security and justice policy areas, will increase the power of the European Parliament.
- The "citizens' initiative" introduces an element of direct democracy. On this basis, at least one million citizens who are nationals of a significant number of Member States can invite the European Commission to bring forward a legislative proposal.
- The Lisbon Treaty also defines a number of ways of more closely involving national parliaments in the work of the EU institutions. For instance, the latter should communicate draft legislative acts to national parliaments. National parliaments will also take part in the evaluation mechanisms for the implementation of policies in the area of freedom, security and justice, and will monitor the EU institutions observing the subsidiarity principle.

#### A citizens' Europe

- The Lisbon Treaty introduces the Charter of Fundamental Rights of the EU into primary law and gives its provisions binding legal force (on this particular item, Poland and the United Kingdom opted out). The Lisbon Treaty also opens the way for the EU to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.
- The EU will get an extended capacity to act on freedom, security and justice, which should bring direct benefits in the fight against crime and terrorism. The Lisbon Treaty also introduces new provisions on civil protection, humanitarian aid and public health.
- On the basis of the solidarity mechanism, the EU and its Member States will act in a spirit of solidarity in case of a terrorist attack or a natural or man-made disaster. The new chapter on energy policy also refers to the solidarity principle.

#### The EU on the global stage

Finally, the Lisbon Treaty seeks to enhance the effectiveness of the EU's external action. Two important institutional innovations have been introduced to that effect: the "permanent" President of the European Council and the new High Representative for Foreign Affairs and Security Policy. The latter will be a member of the European Commission and have the task to ensure consistency and to increase the impact and the visibility of the EU's external action.

The High Representative will be assisted by a newly created European External Action Service. This Service will work in cooperation with the diplomatic services of the Member States and comprise officials from the EU institutions and staff seconded from the national administrations.

# Employment law

*Louis-Hubert Pacco*

## Organisation of social elections in May 2008 and inter-professional agreement on social dialogue

Social elections are held in Belgium every four years. Their purpose is to establish or to renew the employees' representative bodies within the undertakings. In Belgium, the next social elections will take place in May 2008. The electoral procedure was initiated on 7 December 2007.

In 2008, the elections will concern some 6,000 undertakings and the establishment or the renewal of nearly 9,000 representative bodies (3,000 Works Councils and 6,000 Committees for Prevention and Protection at Work). A little more than 1.3 million employees will go to the polls in order to elect their representatives.

The organisation of the 2008 social elections has however been disturbed. Two elements were particularly unsettling for the organisation of the elections.

First, in March 2007, Belgium was convicted by the European Court of Justice for not transposing a Directive on the representation and the consultation of employees in small and medium undertakings into Belgian law. This Directive provides that all Member States must launch a social dialogue scheme in the undertakings employing at least 20 employees. Today, social elections must be organised in Belgian undertakings employing at least 50 employees for the Committee for Prevention and Protection at Work (CPPW) and 100 employees for the Works Council (WC). This thorny bone of contention between employers and trade unions increased during the negotiations and the parties were compelled to reach an agreement.

Secondly, the fact that the Belgian government had resigned and was in charge of current affairs only since 11 June 2007 prevented the organisation of the 2008 social elections being made official by Royal Decree as is normally the case. Indeed, every four years, at each electoral term, a Royal Decree provides for the precise rules to be complied with for the organisation of the elections in undertakings (electoral procedure, conditions to be candidate, calendar, practical provisions, etc.)

After the parliamentary elections of 10 June 2007, Minister Vanvelthoven submitted a draft Royal Decree to the government providing for the organisation of elections and for decreasing the number of employees for the organisation of these elections in order to comply with the provisions of the previously mentioned European Directive. However, it was considered that such ministerial initiative did not fit with the current affairs to which the activity of the government was limited.

As a consequence, it is by means of a legislative act that the 2008 social elections had to be organised.

### The organisation of the 2008 social elections will follow the same rules as those of 2004

Since they could not reach any agreement on the way to transpose the European Directive into Belgian law, the social partners (negotiation group bringing together representatives of the employers' organisations and of the trade unions) strived for the following consensus:

- the 2008 social elections will be organised in accordance with the same rules as in 2004;
- the question of transposing the European Directive will be handled separately so that this question does not, once again, delay the organisation of the next social elections.

Hence, two legislative acts have laid down the rules applicable to the next social elections. They recap, almost integrally, the provisions of the 2003 Royal Decree relating to the 2004 elections (the last ones).

These two Acts dated 4 December 2007 were published in the Belgian Official Gazette on 7 December 2007. This was just in time to allow the undertakings initiating the election process since 7 December was also the first deadline in the election program.

**The social partners reached an agreement on transposing the European Directive relating to the representation and consultation of employees in small and medium undertakings.**

The institutional representation of the employees in Belgian undertakings is only provided for as of the employment of 50 employees (election of a CPPW). In this respect, the problem lies in the fact that the European regulations now provide that all Member States must organise a social dialogue scheme (representation, advising and/or consultation) as of a 20 employees' threshold. Employers were obviously quite wary of this novelty.

Besides the adoption of the Acts concerning the organisation of social elections, the social partners meeting within the group of 10 finally reached a consensus on the future transposing of the European Directive into Belgian law (23 November 2007).

Since it does not change the institutional organisation of the employees' representation within undertakings, this agreement obtained the support of the employers' representatives. Hence, no additional representative bodies will be established and there will be no additional protected employees. The agreement reached can be synthesised as follows:

**First new rule:**

In undertakings occupying between 50 and 100 employees, the functions of the Committees for Prevention and Protection at Work will be significantly extended. In the future, CPPW's will also receive economic and social information. They will be consulted on every important decision concerning work organisation and employment contracts, information which must normally be communicated to Works Councils.

**Second new rule:**

In undertakings employing less than 50 employees, the functions of all Trade Union delegations will be extended. Beyond their right to be informed about the social evolution of the undertaking, the delegation will, from now on, be entitled to receive information and be consulted on the human resources policy within the undertaking, on professional training and on all working conditions and on the work environment. Furthermore, they will also receive economic information concerning the results, the accounts and the balance sheets of their undertaking.

**Third new rule:**

In sectors which do not provide for a trade union delegation in undertakings employing less than 50 employees (there are only a few), a consultation will have to be organised in order to determine how such social and economic information could be communicated to the employees in undertakings employing at least 20 employees.

**Minister Vanvelthoven submits a bill**

At the Council of Ministers of 7 December 2007, the agreement between the social partners was laid down in a bill.

The Employment Minister, Peter Vanvelthoven, indicated that he would like the legislative procedure to be quick in order to implement these measures as soon as possible. Concretely, by the time this bill is adopted and comes into force, the representative bodies, elected during the coming elections, will see their range of competences extended as mentioned above.

The voting of this bill by the Parliament will avoid the payment of huge fines by Belgium to the European Commission for not having transposed Directive 2002/14/EC that establishes a general framework for informing and consulting employees.

The results of the Belgian social elections will be known around 20 May 2008.

## Update

### Peter Callens to be the new Managing Partner of Loyens & Loeff Belgium from 1 January 2008.



Peter Callens is taking over the helm from Christian Chéry who, since 2000, has expanded the former fiscal consultancy firm of Loyens & Volkmaars to become one of the leading, multidisciplinary law firms on the Belgian market. Christian Chéry successfully integrated the addition of new partners and staff of the former firm De Bandt, van Hecke, Lagae & Loesch in 2001, Linklaters De Bandt and Bogaert & Vandemeulebroeke in 2003, Claeys & Engels in 2005 and NautaDutilh in 2006.

Peter Callens has been a lawyer at the Brussels Bar since 1982. He was previously an associate of the then Loeff Claeys Verbeke and was also associate in the firm of NautaDutilh. Callens held various mandates such as co-chairman of the commission on international trading of the International Bar Association (IBA), the chairmanship of the Vlaams Pleitgenootschap (Flemish law suits association) and he was also secretary of the Board of the Brussels Bar. Today, Peter Callens is chairman of the Belgian-Dutch Association in Brussels. Peter Callens works in the company law department of Loyens & Loeff Belgium headed by Grégoire Jakhian. Peter is recommended both for Corporate/M&A as well as for settlement of disputes by various legal directories including Chambers Global, Legal 500 and IFLR 1000.

## Profile

Loyens & Loeff is a leading, independent full service law firm offering integrated legal and tax advice. An international law firm, Loyens & Loeff counts more than 700 lawyers, tax advisors and civil law notaries in its offices throughout the Benelux and the world's major financial centres. In Belgium, Loyens & Loeff counts more than 120 lawyers in Antwerp and Brussels.

Loyens & Loeff offers a broad range of legal and tax services, mainly to corporate clients, in areas such as corporate law and M&A, tax law, commercial law, banking & finance law, real estate law, employment law, employee benefits, intellectual property law, European law, competition law and dispute resolution. Loyens & Loeff differs from other national and international providers of legal services in that it is able to combine these disciplines as equally important components.

Loyens & Loeff's expertise stretches across borders. In order to satisfy the international demand for advisory services, Loyens & Loeff cooperates closely with prominent law firms in Europe, Asia and the United States. With this combination, Loyens & Loeff can offer its clients top-level advice worldwide, and it is proficient in effectively and seamlessly structuring and handling domestic and international matters.

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- Automotive
- Life sciences

You can find more detailed description of our scope of services on our website at [www.loyensloeff.com](http://www.loyensloeff.com)

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