VAN BAEL & BELLIS

VBB on Belgian Business Law | Volume 2025, N° 2

February 2025

VBB on Belgian Business Law

Issue Highlights

ARTIFICIAL INTELLIGENCE

First Obligation under AI Act Involving AI Literacy Has Started to Apply

Page 3

COMMERCIAL LAW

Book 7 of New Civil Code on Special Contracts Is Re-submitted to Federal Chamber of Representatives

Page 8

COMPETITION LAW

Belgian Competition Authority Launches First Sector Inquiry into Price Revision and Indexation Mechanisms

Page 10

CORPORATE LAW

European Union Simplifies and Extends Use of Digital Tools in Matters of Corporate Law

Page 12

DATA PROTECTION

Belgian Data Protection Authority Spells Out Obligations in Corporate Transactions

Page 13

INTELLECTUAL PROPERTY

Ghent Court of Appeal Clarifies Scope of Copyright Protection and Liability for Use of Third-Party Content

Page 16

LABOUR LAW

Employer Contributions to Closure Fund Increase Significantly

Page 19

"Van Bael & Bellis' Belgian competition law practice [...] is a well-established force in high-stakes, reputationally-sensitive antitrust investigations."

Legal 500, 2019

Topics covered in this issue

ARTIFICIAL INTELLIGENCE 3
COMMERCIAL LAW 8
COMPETITION LAW 9
CORPORATE LAW 12
DATA PROTECTION 13
INTELLECTUAL PROPERTY 16
LABOUR LAW 19

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Table of contents

ARTIFICIAL INTELLIGENCE 3

First Obligation under AI Act Involving AI Literacy Has Started to Apply ... 3

European Commission Publishes Guidelines on AI Practices Prohibited by AI Act ... 4

European Commission Publishes Guidelines on Definition of 'AI System' ... 6

COMMERCIAL LAW 8

Book 7 of New Civil Code on Special Contracts Is Re-submitted to Federal Chamber of Representatives ... 8

COMPETITION LAW 9

New Federal Government Envisages Changes to and Intensive Use of Competition Rules ... 9

Belgian Competition Authority Clears Multipharma's Acquisition of Goed Pharmacies Under Conditions ... 10

Belgian Competition Authority Launches First Sector Inquiry into Price Revision and Indexation Mechanisms ... 10

CORPORATE LAW 12

European Union Simplifies and Extends Use of Digital Tools in Matters of Corporate Law ... 12

DATA PROTECTION 13

Belgian Data Protection Authority Spells Out Obligations in Corporate Transactions ... 13

Court of Justice of European Union Delivers Judgment on Calculation of Fines under General Data Protection Regulation ... 14

INTELLECTUAL PROPERTY 16

Ghent Court of Appeal Clarifies Scope of Copyright Protection and Liability for Use of Third-Party Content ... 16

According to Advocate General Biondi Extending Patent Rights Through Trade Marks is Not *Per Se* Indicative of Bad Faith ... 17

LABOUR LAW 19

Employer Contributions to Closure Fund Increase Significantly ... 19

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First Obligation under AI Act Involving AI Literacy Has Started to Apply

The first obligation of Regulation (EU) 2024/1689 (the ***AI Act***) has started to apply on 2 February 2025. AI providers and deployers now face a first compliance obligation of ensuring appropriate AI literacy among their personnel involved with AI systems.

1. *Defining AI Literacy*

Article 3(56) of the AI Act defines AI literacy as "*skills, knowledge and understanding that allow providers, deployers and affected persons - taking into account their respective rights and obligations in the context of the AI Act - to make an informed deployment of AI systems, as well as to gain awareness about the opportunities and risks of AI and possible harm it can cause*."

Article 4 of the AI Act requires that organisations "*take measures to ensure, to their best extent, a sufficient level of AI literacy of their staff and other persons dealing with the operation and use of AI systems on their behalf*." This obligation applies to all AI systems regardless of their risk classification.

The AI Act does not specify what constitutes a "sufficient level of AI literacy" or list the measures that should be taken to ensure compliance. The deliberate flexibility in the wording allows organisations to tailor their approach based on their specific circumstances and needs. While the legal obligation rests specifically with providers (i.e., organisations that develop AI systems) and deployers (i.e., organisations that use AI systems), the definition's reference to "affected persons" suggests that any organisation in the AI ecosystem should implement AI literacy measures.

2. *Context-Specific Implementation Requirements*

The AI Act specifies that organisations must tailor their approach to AI literacy based on several factors including the technical knowledge and experience of relevant personnel, the educational and training background of staff members, the specific context in which AI systems will be deployed, and the characteristics of individuals or groups affected by the AI systems. Hence, the particular approach and measures might differ between personnel of the same organisation.

While Recital 20 and the definition in Article 3(56) of the AI Act suggest a potentially broader scope - extending literacy efforts beyond internal staff to all relevant actors in the AI value chain (including contractors and suppliers) - the current regulatory focus remains on ensuring appropriate knowledge among those directly involved in AI operation and deployment.

3. *Practical Approaches to Compliance*

First, conducting a comprehensive AI literacy assessment across the organisation will identify knowledge gaps among different teams and roles. This might include evaluating technical understanding, awareness of ethical implications, and familiarity with regulatory requirements.

Second, since not all employees will require the same level of AI literacy, role-specific training programmes should be developed. For example, technical teams might require a deeper understanding of AI systems' inner workings and potential technical biases, while HR teams might need training that is focused on how AI recruitment or performance evaluation tools can reinforce discrimination if not properly governed. Legal teams, meanwhile, will benefit from targeted regulatory education.

Third, the integration of AI literacy into existing governance frameworks is another effective approach. Organisations with established data protection or cybersecurity training can incorporate AI literacy modules that highlight the intersection between these domains. This approach capitalises on existing compliance programmes rather than creating entirely new processes.

Fourth, documentation of literacy measures is key. Organisations should maintain records of training programmes, participation rates, and competency assessments to demonstrate compliance efforts if questioned by regulators. This documentation should also capture how literacy requirements are tailored to specific roles and contexts.

The European AI Office has launched a repository of AI literacy best practices gathered from AI Pact signatories. This evolving repository aims to foster learning and exchange on AI literacy practices. Additionally, Recital 20, AI Act notes that the EU AI Board should support the Commission in promoting AI literacy tools and measures, highlighting the importance of this requirement in the overall regulatory framework.

While adopting these practices does not ensure compliance, they provide valuable reference points for developing appropriate literacy programmes. The repository serves as a knowledge-sharing tool to support organisations in improving AI literacy in practical ways.

Even though Article 4 of the AI Act lacks specific enforcement penalties, non-compliance could influence regulatory responses to other potential violations. Moreover, insufficient AI literacy among staff creates operational and reputational risks that extend beyond regulatory concerns, potentially leading to improper AI implementation, unintended biases, or failure to identify AI-related issues.

Organisations should view AI literacy not merely as a compliance exercise but as an essential component of responsible AI governance. Forward-thinking organisations are treating this requirement as an opportunity to strengthen their overall AI capabilities and risk management practices. Frequent monitoring and updating of AI literacy programmes will be required, given evolving regulations and technologies.

For a more comprehensive understanding of the AI Act's scope and application, please refer to VBB's earlier contribution (here).

European Commission Publishes Guidelines on AI Practices Prohibited by AI Act

On 4 February 2025, the European Commission (the ***Commission***) published guidelines (the ***Guidelines***) clarifying artificial intelligence practices prohibited by Article 5 of Regulation (EU) 2024/1689 (the ***AI Act***). While not binding, the Guidelines offer a practical interpretation of the prohibitions to ensure their consistent application across the EU.

1. Eight Prohibited Practices Outlined

Article 5 of the AI Act prohibits 8 practices. The Guidelines elaborate on these prohibited practices, providing concrete examples and clarifications:

Manipulation and Deception: The prohibition targets AI systems deploying subliminal techniques, purposefully manipulative or deceptive techniques that distort behaviour, causing significant harm. The Commission clarifies that lawful persuasion practices remain permitted, and harm must reach a threshold of "significance" assessed through severity, context, and impact.

Exploitation of Vulnerabilities: Systems exploiting vulnerabilities of persons due to age, disability, or specific socio-economic situations face prohibition when distorting behaviour in harmful ways. Children, older persons, and disadvantaged groups receive specific protection, though systems benefiting these groups remain allowed.

Social Scoring: AI systems evaluating social behaviours that result in detrimental treatment in unrelated contexts or disproportionate to the behaviour cannot operate legally. The Guidelines differentiate between prohibited social scoring and legitimate evaluation practices, such as lawful credit scoring within relevant regulatory frameworks.

Individual Crime Prediction: The prohibition applies to AI systems that assess or predict the risk of a person committing a crime based solely on profiling or

personality traits. By contrast, systems supporting human assessment based on objective, verifiable facts linked to criminal activity and location-based crime predictions remain permitted.

Untargeted Facial Image Scraping: AI systems creating or expanding facial recognition databases through untargeted scraping of facial images from the internet or CCTV violate the Act. By contrast, the targeted collection of specific individuals' images remains outside the prohibition's scope.

Emotion Recognition: These systems face prohibition in workplaces and educational institutions, with exceptions for medical or safety reasons. The Guidelines indicate that emotion recognition in other contexts, such as commercial settings, remains outside the scope of this prohibition.

Biometric Categorisation: Systems categorising individuals based on biometric data to deduce sensitive characteristics like race, political opinions, or sexual orientation cannot be deployed. But the Guidelines clarify that the labelling or filtering of lawfully acquired biometric datasets is not considered a prohibited practice under this provision.

Real-time Remote Biometric Identification: The use of these systems in publicly accessible spaces for law enforcement face prohibition subject to three limited exceptions: searching for specific victims or missing persons, preventing imminent threats to life or terrorist attacks, and identifying suspects of certain serious crimes. Member States must adopt national legislation to authorise such uses and implement strict safeguards such as a Fundamental Rights Impact Assessment (FRIA).

2. Key Elements for Interpretation

The Guidelines indicate that prohibitions apply to the placing on the market, putting into service, or use of AI systems. Both providers and deployers bear responsibility, though specific obligations differ based on their role and control over system design and use.

For AI systems with manipulative or deceptive techniques, the Guidelines emphasise that intent is not required - the "*effect*" of causing material distortion suffices. Similarly, for systems exploiting vulnerabilities, the guidelines explain how to assess whether harm is "*significant*" based on severity, context, scale, intensity, duration, and reversibility.

3. Exclusions from Scope

The Guidelines describe several exclusions from the AI Act's scope. Systems used exclusively for military, defence, or national security purposes are outside the Act's remit. Research and development activities prior to market placement also fall outside the scope. The guidelines specify that "research and development" encompasses scientific investigation, technological exploration, and prototype testing conducted in controlled environments without public deployment. However, the Commission emphasises that this exception applies only to genuine research and development activities and cannot be used as a loophole to circumvent prohibitions. As a result, activities presented as "research" but involving real-world deployment that impacts individuals will not qualify for this exception.

The AI Act does not apply to natural persons using AI systems for purely personal, non-professional activities. Likewise, AI systems released under free and open-source licences do not fall under the scope of the AI Act, unless they constitute prohibited practices or high-risk systems.

The Guidelines clarify that the AI Act does not replace existing EU legislation. For example, an AI system not prohibited under the AI Act might still violate data protection law, consumer protection rules, or non-discrimination provisions.

4. Enforcement and Penalties

Non-compliance with Article 5 prohibitions carries the highest penalties under the AI Act reaching up to EUR 35 million or 7% of global annual turnover for businesses. EU institutions violating these prohibitions may face administrative fines of up to EUR 1.5 million.

The Guidelines also shed light on the phased implementation timeline. While the prohibitions started to apply on 2 February 2025 to all AI systems regardless of when they entered the market, the governance, enforcement, and penalties chapters only become applicable on 2 August 2025. This creates an interim period when prohibitions have a direct effect, enabling affected parties to seek interim injunctions in court, despite the absence of market surveillance authorities to monitor compliance.

The Guidelines can be consulted here.

European Commission Publishes Guidelines on Definition of 'AI System'

The European Commission (the ***Commission***) recently published guidelines on the definition of Artificial Intelligence (***AI***) systems (the ***Guidelines***). The Guidelines are intended to assist providers and other relevant parties in determining whether a software system should be considered as an 'AI system' that falls within the scope of Regulation (EU) 2024/1689 (the ***AI Act***). The term is defined in Article 3(1) of the AI Act as:

> *"a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments."*

1. Content of Guidelines

To clarify the nature of an AI system, the Guidelines identify seven elements that such software must exhibit in either of two phases: the pre-deployment phase and the post-deployment phase. These elements serve as essential criteria to determine whether a given software system falls within the AI Act's scope.

The seven elements of the definition of Article 3(1), AI Act are as follows : (1) a machine-based system; (2) that is designed to operate with varying levels of autonomy; (3) that may exhibit adaptiveness after deployment; (4) and that, for explicit or implicit objectives; (5) infers, from the input it receives, how to generate outputs (6) such as predictions, content, recommendations, or decisions (7) that can influence physical or virtual environments.

Specifically, AI systems must be machine-based, meaning that they require both hardware and software to function.

Additionally, AI systems must possess a degree of autonomy, implying that they cannot rely entirely on manual human intervention.

Other key features of AI systems are adaptability and development, at least during the pre-deployment phase.

Furthermore, these systems must be designed to operate according to clearly defined objectives, whether explicit or implicit.

A further essential feature of AI systems is the ability to infer how to generate outputs from the inputs received. This capability must be demonstrated in the post-deployment phase and excludes systems that rely solely on pre-defined rules set by humans to carry out automated operations. Examples of AI techniques that enable such inferences include machine learning approaches like supervised learning, unsupervised learning, self-supervised learning, reinforcement learning, deep learning, and logic- and knowledge-based methods.

The capacity of an AI system to generate outputs and the type of output which it produces are crucial to understand both its functionality and its potential impact. These outputs may include predictions, content, recommendations or decisions. Additionally, AI system outputs can influence both physical and virtual environments, such as manipulating a robotic arm or impacting a digital space.

ARTIFICIAL INTELLIGENCE

Finally, the Guidelines exclude specific systems from the definition of AI systems. For instance, systems used solely for mathematical optimisation, basic data processing, systems based on classical heuristics and simple prediction systems are all excluded and should not be considered as "AI systems" within the meaning of the AI Act.

2. Observations and conclusions

The Commission designed the Guidelines to remain adaptable to practical experiences, emerging questions and new use cases. The definition of AI is broad enough to encompass a wide range of AI-based technologies and does not provide an exhaustive list of inclusions or exclusions.

The Guidelines are not legally binding and do not impose any mandatory obligations on stakeholders. Rather, they serve as a practical tool to assist providers and other relevant parties in interpreting and applying the definition of an AI system of the AI Act.

The Guidelines can be consulted here.

COMMERCIAL LAW

Book 7 of New Civil Code on Special Contracts Is Re-submitted to Federal Chamber of Representatives

On 20 February 2025, private members' bill 56K0743 providing for the insertion of book 7 "Special contracts" in the Civil Code (*Wetsvoorstel houdende invoeging van boek 7 "Bijzondere contracten" in het Burgerlijk Wetboek / Proposition de loi insérant le livre 7 "Les contrats spéciaux" dans le Code civil* – ***Revised Book 7***) was submitted to the Chamber of Representatives.

Book 7 was already submitted to the Chamber of Representatives in the previous legislative period in the form of private members' bill 55K3973 of 16 April 2024 (See, this Newsletter, Volume 2024, No. 4). However, the text was subsequently revised to reflect the results of a public consultation organised by the Minister of Justice.

One revision relates to the transfer of risk in service agreements (*dienstencontracten / contrats de service*). Revised Book 7 provides that, for service agreements pursuant to which an enterprise sends tangible movable goods to a consumer, the risk will transfer to the consumer at the time of the physical delivery of the goods to the consumer or a third party designated by the consumer (excluding the carrier). However, if the goods are handed over to a carrier chosen independently by the consumer and not proposed by the service provider, the risk will transfer to the consumer at the moment the goods are handed over to that carrier (Article 7.4.25, Revised Book 7). These new consumer protection rules will be part of mandatory law.

Revised Book 7 is available here.

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New Federal Government Envisages Changes to and Intensive Use of Competition Rules

The incoming federal government which became operational on 3 February 2025 is determined to increase "fair and healthy competition". This is apparent from the governmental agreement (***GA***) of 31 January 2025. The GA establishes several broad principles but also envisages specific competition-enhancing measures designed to apply either across the economy or to defined industries.

The GA includes the following significant measures which, depending on the nature of the measure, will be implemented by Parliament, by the federal government, or by agency action:

- *Structural market reform* – The GA provides for a new statute that will allow the Minister of Economic Affairs (*Minister van Economie / Ministre de l'Economie* – the **Minister**) to take action in industries that lack competition or are subject to long-term excessive margins. These are defined as margins that reflect a lack of proportion between the consumer price and the quality and value of the furnished services.This principle should presumably also apply to goods. The Minister will rely on objective findings of the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – ***BCA***) or the Pricing Observatory (*Prijzenobservatorium / Observatoire des prix* – ***PO***). The goal will be for the Minister to "guarantee a proper functioning of markets and protect the buying power of citizens and businesses". The proposed statute is reminiscent of the New Competition Tool which competition authorities around Europe, including the BCA, have been calling for (*See*, this Newsletter, Volume 2024, No. 10).

- *Consumer protection and buying power* – According to the GA, a strong and efficacious competition policy will benefit the consumer and increase his/her buying power. This, in turn, requires a strengthened BCA and closer cooperation between the BCA, the PO, and the economic inspection service. For its part, the PO should be able to rely on the assistance of sector regulators (the GA most likely has regulators for sectors such as energy and telecommunications in mind).

- *Financial services* – The GA seeks to increase competition in banking and insurance. The GA will try and enhance customer mobility between banks,relying in part on work undertaken by the BCA – *See*, this Newsletter, Volume 2024, No. 5; ensure that citizens have sufficient access to cash (id.); study the possibilities for an easier termination of insurance contracts; and examine the decoupling of mortgages and insurance agreements for the financing of real estate.

- *Beverage supply chain* – The GA indicates that the federal government will seek an adaptation of the 2015 code of conduct governing the business relationships between beverage suppliers, beverage wholesalers, and horeca retailers. It adds that unbalanced relationships with horeca retailers should end. For that purpose, the list of unfair contract clauses will be expanded and will outlaw the possibility for the supplier to end the concomitant lease agreement for reasons extraneous to the lease that are linked to other issues such as a minimum purchase obligation for beverages.

- *Agriculture* – In the same vein, the federal government will also protect farmers by supporting prices (the precise mechanisms are not spelled out but, predictably, the BCA, the PO, and the economic inspection service will again be given a role to play); prohibiting restrictive clauses in contracts with foodstuff companies; and directing farmers towards the exemptions from the competition rules that were created for their benefit.

COMPETITION LAW

- *Telecommunications* – The GA promises infrastructure competition where possible, competition in services, and lower prices. In the GA, the focus is on the Belgian Institute for Postal Services and Telecommunications, even though the BCA is currently pursuing major procedures in this sector (see e.g., regarding infrastructure competition, this Newsletter, Volume 2024, Nos. 6-7).

The GA clearly does not address every significant current competition topic. For example, it does not discuss the possibility of conferring on the BCA the power to "call in" and review mergers that would not normally qualify for competition scrutiny because they do not satisfy the financial thresholds required. However, since this power is high on the wish list of the BCA (*See*, this Newsletter, Volume 2024, No. 10), it may become a reality when other statutory changes to the competition rules are being considered.

Belgian Competition Authority Clears Multipharma's Acquisition of Goed Pharmacies Under Conditions

On 4 February 2025, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – ***BCA***) conditionally cleared the acquisition by Multipharma, a cooperative company which operates 279 pharmacies in Belgium, of 92 pharmacies and other pharmaceutical activities from Goed Farma.

The BCA examined the transaction's impact on prices, quality and accessibility of pharmaceutical products and services. It concluded that, in Mechelen and Willebroek, Multipharma's market power post-transaction would raise competition law issues.

Multipharma nevertheless obtained the BCA's clearance by offering to divest six pharmacies in the problematic areas. It also committed not to apply for new operating licences and not to acquire existing licences without the BCA's prior authorisation in Mechelen and Willebroek, for a period ranging from five to ten years.

Belgian Competition Authority Launches First Sector Inquiry into Price Revision and Indexation Mechanisms

On 6 February 2025, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – ***BCA***) launched its first sector inquiry and targeted price revision and indexation mechanisms. The BCA had been gearing up for sector inquiries for quite a while (*See*, this Newsletter, Volume 2024, No. 10). This launch therefore came as no surprise even though its focus was unexpected.

The term "sector inquiry" is somewhat of a misnomer because the BCA's investigation will not be limited to a specific industry or line of economic activity but instead will cover the entire Belgian economy. In its decision to open the investigation, also published yesterday (the ***Decision***), the BCA contended that profit margins increase faster in Belgium than in neighbouring countries and that prices remain high despite a decrease in energy prices. The BCA suspects that the various sectoral price revision and indexation mechanisms prevalent in many sectors of the Belgian economy may contribute to inflation, which the BCA notes is particularly high in Belgium.

In the Decision, the BCA observed that, while a Law of 1976 prohibits indexation based on general price indexes, there are many exceptions to this rule. The BCA cited as examples notary fees and expenses, housing rents, public procurement price indexes, gas and electricity prices, and construction contracts.

In practice, the BCA intends to list the various price revision and indexation mechanisms applied in Belgium and identify those that could be questionable from a competition perspective before issuing "concrete conclusions and recommendations to stakeholders".

The BCA has several types of problematic situations in its sights. For example, some price increases could result from anticompetitive practices, such as in the *VEBIC* case. VEBIC is an association of bakeries which,

in 2008, was found to have encouraged its members to increase their prices based on a bread price index. This bread price index was calculated by VEBIC and was not linked to actual costs. The BCA also referred to an opinion issued in 2014 by the French Competition Authority (***FCA***), in which the FCA found that the exceptional net profitability of highway concessionaires, unrelated to costs or risks taken by them, could be likened to an income derived from the continuous increase in toll rates.

The BCA added that even indexation mechanisms based on cost indexes can lead to excessive price increases, when these increases are too frequent or based on irrelevant cost parameters. The BCA also noted that trade associations may "*create conditions conducive to (tacit or explicit) collusion*" by facilitating transparency on the market or sharing detailed sensitive information (which may lead to anticompetitive "signalling"). The BCA referred to a 2010 decision in which the institute of real estate agents was found to have infringed the competition rules by issuing minimum recommended rates. It also mentioned a 2016 decision in which the BCA held that producers and distributors of industrial batteries had illegally agreed on a lead surcharge.

The BCA expects its investigation to last 13 months, including at least two months of public consultation, with completion expected in early 2026.

CORPORATE LAW

European Union Simplifies and Extends Use of Digital Tools in Matters of Corporate Law

Directive (EU) 2025/25 amending Directives 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law (the ***Directive***) entered into force on 30 January 2025. The Directive aims to ensure that authorities and other stakeholders have access to reliable, up-to-date and accurate digital company information that can be used in a cross-border context without burdensome formalities. The Directive focuses on simplification, and while certain formalities will disappear, some new concepts will be introduced.

The main changes introduced by the Directive are as follows:

- Digital EU power of attorney: The Directive will abolish the need for translations and apostilles by creating a digital EU power of attorney. The digital EU power of attorney will be based on a multilingual common European template which companies can choose to use to authorise a person to represent the company in specific procedures with a cross-border dimension within the scope of the Directive. This would cover (i) incorporation of companies, (ii) registration or closure of branches, (iii) cross-border conversion, and (iv) mergers and demergers.

- Connected registers: The Directive will simplify access to company information by connecting already functioning connected registers that exist in the EU. It will connect BRIS (the Business Registers Interconnection System connecting the business registers of each Member State to a 'European Central Platform') with BORIS (*Beneficial Ownership Register Interconnection System*) and with IRISI (*Insolvency Registers Interconnection Search Interface*).

- Reliability: The Directive establishes several new obligations to ensure that the information in national registers remains up-to-date, reliable and accurate, and can be relied upon by third parties. This means that companies will have to publish changes in company documents without delay. For their part, the registers will have to reflect these changes in a timely manner.

- Once-only principle: To help companies, particularly SMEs, to expand their cross-border business activities, the once-only principle will also apply to the registration of a branch office in another Member State. As is already the case for the cross-border creation of a subsidiary, it will be possible to retrieve electronically from the connected registers the information regarding the company registering the cross-border branch.

The Member States are obliged to implement the Directive by 31 July 2028.

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DATA PROTECTION

Belgian Data Protection Authority Spells Out Obligations in Corporate Transactions

On 15 January 2025, the Belgian Data Protection Authority (the ***DPA***) issued a reprimand and a compliance order against Mediahuis NV (***Mediahuis***) for failing to establish a valid legal basis and ensure transparency when transferring Jobat, an employment listing and recruitment platform, to the joint venture company, House of Recruitment Services BV (***HORS***). This decision shows the need for businesses to conduct a thorough analysis and maintain proper documentation of data processing activities before transferring personal data on the occasion of a merger, acquisition, or establishment of a joint venture.

Background

As part of an asset deal, Mediahuis transferred Jobat's business activities, including personal data of users and subscribers, to HORS. A complainant alleged that this transfer had occurred without a legal basis or adequate notice to affected individuals, prompting an investigation by the DPA.

DPA Decision

First, the DPA ruled that transferring personal data to a joint venture company constitutes a distinct processing activity, requiring its own legal basis under Article 6 of the General Data Protection Regulation (***GDPR***). It clarified that companies cannot assume that the original legal basis for processing remains valid after a corporate transaction. Since Mediahuis had not regarded the transfer of personal data of data subjects as a separate processing, it had failed to identify a legal basis under Article 6 GDPR.

In its defence, Mediahuis argued that the transfer was justified under legitimate interests (Article 6(1)(f) GDPR). The DPA conducted a legitimate interest assessment and recognised that transferring personal data during a corporate transaction, such as transferring assets to a joint venture company, could be necessary to safeguard a company's legitimate interest to operate a successful corporate transaction.

The DPA confirmed that the balancing test for relying on legitimate interests was met, as Mediahuis had referenced corporate transactions, including the potential establishment of a joint venture company, in its privacy notice. Additionally, the nature and extent of processing activities and formalities were only minimally impacted by the asset deal. However, the DPA added that this conclusion does not automatically apply to all corporate transactions, and that each case requires a thorough prior analysis to ensure compliance.

Because Mediahuis had failed to conduct and document a prior analysis before transferring personal data to HORS, the DPA considered that it had violated the requirements of Article 6(1)(f) GDPR and the accountability principle under Article 5(2) GDPR.

Transparency Requirements

The DPA found that Mediahuis had failed to provide adequate information to data subjects. While its privacy policy mentioned potential data transfers to joint venture companies, users were not specifically informed in advance about the transfer to HORS, preventing them from exercising their rights (e.g., the right to object).

Although Mediahuis issued a general pop-up notification, the DPA considered this insufficient as users might not have seen this before the transfer. A generic privacy policy update also fell short. Instead, the DPA ruled that Mediahuis should have made direct, proactive notifications by email or another form of targeted communication. As a remedy, the DPA ordered Mediahuis to conduct an active communication campaign within four months to inform all Jobat users about the new data controller, their rights, and how to exercise them.

DATA PROTECTION

Takeaways

This decision contains several considerations for businesses involved in corporate transactions:

- Transfers of personal data to a new entity constitute a separate processing activity under the GDPR, which requires a distinct valid legal basis.
- A prior assessment and documentation of the legal basis, especially when relying on legitimate interests, are mandatory. The assessment should be fact specific.
- Data subjects must be informed in advance of any transfer, including the identity of the new data controller, the legal basis for processing, and how to exercise their rights.
- Passive or general notifications (e.g., pop-ups or privacy policy updates) are insufficient, businesses must issue active notifications before the transfer.

The full decision of the DPA can be consulted here (in French).

Court of Justice of European Union Delivers Judgment on Calculation of Fines under General Data Protection Regulation

On 13 February 2025, the Court of Justice of the European Union (the ***CJEU***) delivered a judgment in response to a request for a preliminary ruling from the High Court of Western Denmark (the ***Referring Court***). The case concerned infringements of the General Data Protection Regulation (***GDPR***) by ILVA A/S (***ILVA***), a furniture retailer, and the calculation of the resulting fine. The judgment confirms that the interpretation of "undertaking" in the GDPR is in line with EU competition law principles.

Background

ILVA A/S is part of the Lars Larsen Group. In 2016/2017, the total group turnover amounted to EUR 881 million and ILVA's turnover amounted to almost EUR 241 million. ILVA was charged with failing to comply with GDPR obligations related to data retention of at least 350,000 former customers. On the recommendation of the Danish Data protection authority, the Public Prosecutor's Office sought the imposition of a fine of EUR 201,000 on the controller. The calculation of that amount was based not only on the turnover of the controller, but also on the overall turnover of the undertaking. However, the Aarhus District Court imposed a significantly lower fine of EUR 13,400, holding that only ILVA's turnover should have been considered since the case had been brought against ILVA alone.

The Public Prosecutor's Office appealed to the Referring Court, arguing that the term 'undertaking' in Article 83(4) to (6) of the GDPR must be understood, for the purposes of setting a fine on account of an infringement of the GDPR, as the group of which the offending company forms part of. According to the Public Prosecutor's Office, it follows from Recital 150 of the GDPR that that term must be understood in accordance with Articles 101 and 102 of the Treaty on the Functioning of the EU (***TFEU***). ILVA countered that only its individual turnover should be regarded as relevant. The Referring Court sought clarification from the CJEU.

Judgment: Calculating Maximum Fine

The CJEU first noted that the concept of an *undertaking* under Articles 101 and 102 TFEU does not determine whether and under what conditions a fine may be imposed on a controller pursuant to Article 83 of the GDPR, since that question is governed solely by Article 58(2) and Article 83(1) to (6) of the GDPR. The concept of an undertaking is relevant only for the purpose of determining the amount of the administrative fine imposed under Article 83(4) to (6) of the GDPR. It is in this specific context that the reference to the concept of 'undertaking' in recital 150 of the GDPR, should be understood within the meaning of Articles 101 and 102 TFEU.

Accordingly, "undertaking" covers any entity engaged in an economic activity, irrespective of the legal status of that entity and the way in which it is financed. It designates an entity as an economic unit even if in law it consists of several persons, natural or legal, when that economic unit consists of a unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis. The CJEU determined that, according to Articles 83(4) to (6) of the GDPR, when an administrative fine is imposed on an entity that is part of an undertaking as defined by Articles 101 and 102 TFEU, the relevant factor for calculating the maximum fine is the undertaking's total worldwide annual turnover from the previous business year (judgment of 5 December 2023, *Deutsche Wohnen*, C 807/21, EU:C:2023:950, paragraph 57).

Judgment: Calculating Actual Amount of Fine

However, the CJEU added that the determination of that maximum amount must be distinguished from the actual calculation of the amount of the fine due.

Pursuant to Article 83(1) GDPR, data protection authorities must ensure that administrative fines are in each individual case effective, proportionate and dissuasive. Furthermore, Article 83(2) outlines key factors that authorities must consider when determining whether to impose a fine and the amount of the fine imposed.. These factors include:

- the nature, gravity, and duration of the infringement;
- the number of affected data subjects, and
- whether the violation was intentional or the result of negligence.

Although these factors do not explicitly reference the concept of an undertaking as defined under Articles 101 and 102 TFEU, the CJEU again reaffirmed a position taken in the Deutsche Wohnen judgment. In that case the CJEU held that only a fine which takes into account not just all of the relevant factors, but also, when appropriate "*the actual or material economic capacity of the person on which the fine is imposed*" is capable of satisfying the conditions set out in Article 83(1) GDPR (namely to be effective, proportionate, and dissuasive).

Key takeaways

The CJEU's ruling was expectedgiven its prior judgment in *Deutsche Wohnen*, which established that the maximum fine should be calculated based on a percentage of the total worldwide annual turnover of the undertaking (Case C-807/21, *Deutsche Wohnen*, para. 57). Nonetheless, the CJEU specified that data protection authorities must also consider the economic reality of the entity when determining the final amount of the fine to ensure that the fine is effective, proportionate, and dissuasive.

The full CJEU judgment can be found here.

INTELLECTUAL PROPERTY

Ghent Court of Appeal Clarifies Scope of Copyright Protection and Liability for Use of Third-Party Content

On 20 January 2025, the Court of Appeal of Ghent (the ***Court***) delivered a judgment in which it clarified the scope of copyright protection and liability for media companies using third-party content.

The case concerned Mr. Langley, an American photographer specialised in travel landscape and architectural photography, and Roularta Media Group NV (***Roularta***), a multimedia company and owner of the website "femmesdaujourdhui.be". Mr. Langley claimed that Roularta had infringed Article XI.165, §1 Code of Economic Law (***CEL***) by reproducing and publishing his picture without his prior consent. In October 2020, Mr. Langley sent a cease-and-desist letter requesting the removal of the image and a compensation of EUR 19,656. Roularta complied with Mr. Langley's request to take down the picture and responded that the picture had been offered to Roularta through "AWL Images", a database for pictures, and that it was unaware of any copyright infringement. Roularta objected to the claimed damages.

In response, Mr. Langley brought an action before the Enterprise Court of Ghent, which in 2022 ruled in favour of the photographer, but awarded a significantly reduced compensation of EUR 478.92. Dissatisfied with the damages awarded, Mr. Langley appealed the judgment to the Court.

The Court first confirmed that Mr. Langley's copyrights had been infringed. The Court found that Mr. Langley's works were sufficiently original to qualify for copyright protection and rejected Roularta's argument that it had acted in good faith, noting that media companies bear responsibility for verifying content rights before publication.

As regards the calculation of the damages for the use of copyright protected works, the Court relied on several cases of the Court of Appeal of Antwerp. The Court found that it was not possible to determine the actual damage suffered by Mr. Langley and that therefore, in accordance with article XI.335, §2 CEL, the compensation must be determined *ex aequo et bono* (i.e., in a fair and reasonable manner). The Court further observed that the compensation for damage can be increased based on the fact that the picture had been on the website for several months and took into account the applicable tariffs posted on the website of SOFAM, a Belgian copyright organisation. The Court therefore set the damages at EUR 598.65.

However, Roularta argued that it had been the victim of copyright trolling and an abuse of rights, asserting that PIXSY, rather than Mr. Langley, was the driving force behind the action for damages. PIXSY is an internet company that collects payments from photographers in exchange for the right to detect copyright infringements and collect compensation. In this regard, the Court held that detecting infringements and bringing an action with the primary aim of stopping the infringement and securing a licensing fee for the copyright holder does not constitute an abuse of rights. However, it added that the manner in which the rights are enforced could give rise to an abuse of rights. According to the Court, this may occur if the obligations regarding substantiation in formal notices are not met, if no reasonable deadlines are set when asking to cease the infringement, and if excessive compensation is being demanded. Moreover, the Court also acknowledged that Roularta had acted in good faith which it showed by its willingness to settle the matter amicably. The Court therefore concluded that Mr. Langley had not acted as a reasonably prudent person would have acted in the same circumstances and had therefore abused his rights. As a consequence, the Court reduced the compensation by 20% and awarded a final compensation of EUR 478.92, which is the same amount granted in first instance.

This case is one of many involving PIXSY and OnLineArt and shows a consistent approach of the courts. Furthermore, it demonstrates that good faith is recognised and taken into account when damages resulting from copyright infringements are determined.

The judgment is available here.

INTELLECTUAL PROPERTY

According to Advocate General Biondi Extending Patent Rights Through Trade Marks is Not Per Se Indicative of Bad Faith

On 6 February 2025, Advocate General Andrea Biondi (***AG***) delivered his opinion in *CeramTec* (C-17/24), a case resulting from a request for a preliminary ruling from the French Supreme Court concerning the interpretation of Regulation 207/2009 on the Community trade mark. The Opinion concluded that extending patent rights through trade marks is not per se indicative of bad faith (the ***Opinion***).

Background

CeramTec is a German company specialising in the development, manufacture and distribution of ceramic components for medical applications, in particular orthopaedic implants. Following the expiry of its patent, on 23 August 2011, CeramTec registered three EU trade marks for the pink colour of its product. On 13 December 2013, CeramTec brought an action against Coorstek, a US company competing in the ceramic implant market, for using CeramTec's pink colour. In its defence, Coorstek lodged an invalidity counterclaim against CeramTec's trade marks, arguing that they were functional and had been filed in bad faith. On 22 February 2018, the Paris First Instance Court ruled in favour of Coorstek, invalidating CeramTec's trade marks on the grounds of bad faith. This judgment was upheld on 25 June 2021 by the Paris Court of Appeal which confirmed that CeramTec's filings had aimed to extend its monopoly beyond the expiration of its patent by maintaining exclusive rights over the pink colour in the ceramic implant market. CeramTec appealed that judgment to the French Supreme Court (the ***Court***).

The Court referred three questions to the Court of Justice of the European Union (the ***CJEU***) for a preliminary ruling on the interpretation of Regulation (EU) No 207/2009 on the Community trademark (***TMR 2009***), the applicable Regulation at the time of the facts. This Regulation has since been replaced by Regulation (EU) No 2017/1001 (***TMR 2017***). The first question was whether the grounds for invalidity based on the registration of a trade mark in violation of Article 7, TMR 2009 and those based on the applicant's bad faith when filing the application, as referred to in Article 52 (1) (a) and (b) TMR 2009, are entirely independent from each other or whether there is an overlap between them. The second and third questions sought to determine whether the intention to prolong the effects of an expired patent by filing a trade mark is likely to constitute evidence of bad faith, even if the trade mark in question does not cover a technical solution.

Analysis

The AG first notes that the grounds for absolute invalidity under Article 52 (1), (a) and (b) TMR 2009 are autonomous and independent. As a result, a trade mark may be declared invalid because of the applicant's bad faith, even if it does not contravene the absolute grounds for refusal listed in Article 7 (1). Conversely, the AG observes that a trade mark may be revoked for infringing the absolute grounds of Article 7, regardless of the applicant's intent.

Second, the AG analyses how bad faith should be assessed, particularly in relation to the expiration of a prior patent. According to the AG, what matters most is the intent of the application at the time of the registration: if the application attempted to extend artificially a monopoly by preventing market entry by competitors, then bad faith could be established. In addition, the AG explained that examining the competitive and economic environment as well as public opinion is crucial. A misuse of trade mark law may occur if the registered trade mark unjustly keeps other competitors out of the market or confuses consumers about the product's availability.

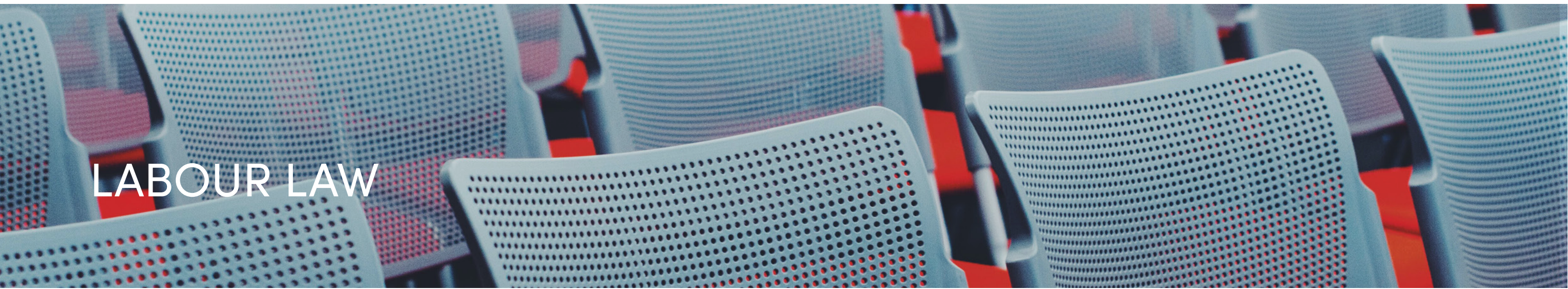
Third, the AG highlights the need to allow national courts discretion in assessing bad faith, in particular the need to examine all relevant circumstances to determine whether the trade mark application was

legitimately intended to distinguish products or aimed to hinder competition. The burden of proof rests on the party alleging bad faith and must be demonstrated clearly and convincingly.

Comment

Initially, the CJEU viewed the concept of bad faith in a restrictive manner. Over time, the CJEU has expanded this scope significantly, broadening it to encompass any dishonest use of the trade mark system, especially actions misaligned with the system's intended purpose.

Several examples illustrate how creativity in trade mark misuse has prompted legal responses. For instance, some applicants circumvented the genuine use requirement by re-filing trade marks every five years. Since a trade mark must be used within five years to avoid cancellation, the re-filing tactic aimed to keep the mark indefinitely alive without any indication of genuine use. When assessing bad faith, all relevant factors are considered. For instance, was the applicant's goal solely to remove the other product from the market, thereby stifling competition, or did the applicant have a legitimate objective? In the context of Article 7(1)(e) of TMR 2017, while it primarily applies to shapes, the principle can be extended to argue against using trade marks to prolong monopolies on past technical innovations. However, if the CJEU sides with the reasoning of the AG, the ultimate judge will be the court trying the facts.



Employer Contributions to Closure Fund Increase Significantly

The Closure Fund (*Sluitingsfonds / Fonds de fermeture*) provides financial compensation to employees affected by the closure, bankruptcy or insolvency of their employer (Law of 26 June 2002 on the closure of companies (*Wet van 26 juni 2002 betreffende de sluiting van de ondernemingen / Loi du 26 juin 2002 relative aux fermetures d'entreprises*)).

To finance the Closure Fund, every employer is required to pay a base contribution. In addition, the Closure Fund partially covers the costs of the unemployment benefits paid by the National Employment Office (*Rijksdienst voor Arbeidsvoorziening / Office National d'Emploi*) to employees whose employment contracts are suspended due to temporary unemployment. This is financed through a special contribution to the Closure Fund which is due by the employer to all of its employees under the temporary unemployment scheme.

On 31 January 2025, the employer contributions for 2025 increased significantly for employers with a commercial or industrial activity. The new contributions apply with retroactive effect from 1 January 2025.

The base contribution to the Closure Fund is a percentage of the employees' gross salaries in 2025 and is higher for employers with at least 20 employees compared to employers with less than 20 employees during the reference period (i.e., the fourth quarter of 2023 until and including the third quarter of 2024). However, some exemptions or alternative calculation methods apply to a limited number of industries (e.g., harbour employees).

The special contribution to cover situations of temporary unemployment is due regardless of whether a base contribution is due, and regardless of the number of employees.

Finally, the annual employer contributions to the Closure Fund for organisations without a commercial or industrial activity (i.e., non-profit organisations) remain unchanged at 0,01%.

Type of contribution	% in 2024	% in 2025
Closure fund base contribution – companies with commercial or industrial activity (20+ employees)	0,11	0,22
Closure fund base contribution – companies with commercial or industrial activity (< 20 employees)	0,06	0,17
Closure fund base contribution – companies without a commercial or industrial activity	0,01	0,01
Special contribution to the Closure Fund	0,09	0,16

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