May 2024

VBB on Belgian Business Law

Issue Highlights

"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

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ARTIFICIAL INTELLIGENCE

Artificial Intelligence Act Is Formally Published

On 21 May 2024, the Council of the European Union (the ***Council***) unanimously adopted the European Artificial Intelligence Act (***AI Act***). The approved version of the legislative text is that of the political agreement reached by the Council and the European Parliament (the ***EP***) following trilogue negotiations with the European Commission (***Commission***). The EP had already approved the proposal in March 2024. The AI Act was formally published in the *Official Journal of the EU* on 12 July 2024.

The AI Act constitutes the first-ever regulatory framework governing artificial intelligence (AI). It is characterised by a risk-based approach towards AI systems, dividing these in various categories as follows:

- First, prohibited AI applications, because of their significant threat to fundamental rights. These include biometric categorisation systems processing sensitive characteristics or social scoring systems. There are specific exceptions for law enforcement purposes.

- Second, high-risk AI applications, due to their potential to harm health, safety, fundamental rights, the environment, democracy, or the rule of law. To gain access to the EU market, these systems will only be authorised subject to a set of requirements and obligations.

- Finally, limited and minimal or no-risk AI applications (such as chatbots). These systems will only have to adhere to certain transparency obligations.

Compared to the initial Commission proposal, the AI Act also addresses general-purpose AI models, widens the scope of prohibited AI applications (while introducing a new, limited exception for remote biometric identification by law enforcement authorities), revises the system of governance, and requires deployers of high-risk AI systems to conduct fundamental rights impact assessments. The Commission published a useful Q&A document which provides insights into the substantive content of the AI Act in an easily intelligible format (available here).

The timeline for the applicability of the AI Act is staggered. The majority of its provisions will become applicable on 2 August 2026, leaving stakeholders just over two years to familiarise themselves with the new obligations and prepare for compliance. However, the prohibition of specific AI applications and the obligations for general-purpose AI will apply sooner: namely on 2 February 2025 and 2 August 2025, respectively.

While the adoption of the AI Act is a significant achievement, its implementation will now become the real challenge. Supporters hailed the AI Act as crucial to ensuring that AI is ethical and safe, while contributing to Europe as a leader in the field. By contrast, critics fear its possibly chilling effect on innovation and deplore the alleged loss of attractiveness of the EU to AI developers.

COMPETITION LAW

Belgian Competition Authority Concludes Preliminary Review of Batopin Cash Dispenser Network

The Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) announced on 2 May 2024 that it had concluded its preliminary review of the agreement among Belgium's four major banks to create a common network of automatic cash dispensers run by a joint venture company called Batopin.

The BCA had opened its inquiry in December 2022 over concerns that the banks' decision to pool their cash dispensers rather than engage in competition to provide consumers this financial service would result in reduced access to cash. The fear was that this diminished access possibility would not only result in fewer cash dispenser points but also in longer lines at the points that remained in operation. (*See*, this Newsletter, Volume 2022, No. 12).

Batopin was not only drawn into a competition inquiry, but it was also met with fierce political opposition. This prompted industry association Febelfin to conclude an agreement with the federal government in March 2023 promising to expand the number of cash dispenser locations.

However, that agreement did not stop the BCA from pursuing its investigation and did not alleviate its concerns, as the BCA still pointed out the reduction in the number of cash dispensers, their diminished accessibility and the reduced service offered to consumers.

In publishing its press release before concluding its investigation, the BCA was apparently keen on showing that it took decisive action to protect consumers in a file that seems to be of concern to a broad segment of society. In only a few months, the BCA flexed again its muscles in a stand-off with the banking sector. It had already done so at the end of October 2023 when it published its assessment of the lack of competition in the retail banking sector and identified market deficiencies reflected in the low remuneration of savings accounts against the backdrop of increased key rates applied by the European Central Bank (*See*, this Newsletter, Volume 2023, No. 12). The BCA's 2023 opinion targeted the very same alleged oligopoly formed by the shareholders of Batopin (Belfius, BNP Paribas Fortis, ING and KBC) and offered a series of suggestions to remove a range of market rigidities.

The question is now whether the BCA will succeed in exacting concessions from the Batopin shareholders that exceed the commitments which they signed up to when concluding their 2023 agreement with the federal government.

Belgian Competition Authority Closes Investigation into Telenet's Exclusive Cyclocross Broadcasting Rights

In a press release dated 22 May 2024, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) announced the closure of an investigation against cable operator Telenet's acquisition of exclusive live broadcast rights for cyclocross races, following its acceptance of Telenet's commitments.

The investigation had started in September 2015, when incumbent telecommunications operator Proximus filed a complaint against the exclusive rights agreement concluded by Telenet, SBS Belgium NV and the V.Z.W. Verenigde Veldritorganisatoren. Proximus also lodged a request for interim measures, which was granted in November 2015 (*See*, this Newsletter, Volume 2015, No. 12) and confirmed by the Brussels Court of Appeal (*Hof van Beroep te Brussel / Cour d'appel de Bruxelles*) in September 2016 (*See*, this Newsletter, Volume 2016, No. 9). Proximus and Telenet then agreed to obtain non-exclusive rights to broadcast (the same) eight of the 16 cyclocross races, while Dutch-language State-owned broadcaster VRT secured exclusive rights for the remaining eight races.

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Analysing Proximus' complaint, the BCA first defined the relevant markets as (i) the Belgian retail market for the provision of television services in Telenet's service area to end-users; and (ii) the market (at most Belgian in scope) for licences for live broadcasting rights of cyclo-crossing.

The BCA focused on Proximus' allegation of the existence of an anticompetitive agreement and, because of limited resources, chose not to investigate the accusation of the abuse of a dominant position. The BCA found that the exclusivity obtained by Telenet for a long period of time – five years – would have the effect of excluding its competitors from the market for cyclo-crossing broadcasting rights, and thus limit competition for the supply of television services to end-users.

In February and April 2019, Telenet tried to accommodate these objections by offering the following commitments which were refined in July 2022 and March 2024 and will apply until the end of the 2026-2027 cyclocross competition season:

- Telenet will acquire exclusive broadcasting rights for the Superprestige, the UCI World Cup or the X2O Baths Trophy only if these rights are sold "through an open, transparent and non-discriminatory tendering procedure". If such a procedure is not followed, Telenet will only acquire non-exclusive rights.

- Telenet will limit any exclusive agreement regarding the broadcasting rights for the Superprestige, the UCI World Cup or the X20 Bathrooms Trophy to a maximum of four years.

- Telenet will never simultaneously acquire the exclusive broadcasting rights to more than 75% of cyclocross races taking place during the same cyclo-cross season.

The BCA found these commitments to be proportionate and sufficient to alleviate any competition law concerns and therefore made them binding and closed its investigation.

CONSUMER LAW

Law Transposing Directive on Representative Actions Enters into Force

On 31 May 2024, the Belgian Official Journal published the Law of 21 April 2024 (the ***Law***) amending Books I, XV and XVII of the Code of Economic Law (***CEL***), and transposing Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (***Representative Actions Directive***). The Law seeks to align the existing Belgian rules governing actions for collective redress with the Representative Actions Directive.

We discussed the Law in greater detail in the March 2024 issue of this Newsletter (*See,* this Newsletter, Volume 2024, No. 3).

The Law only applies to new actions initiated from the date of its entry into force, *i.e.*, 10 June 2024. Actions already pending on that date will continue to be governed by the rules of Book XVII, CEL as applicable on the date of their initiation.

The Law is available here (in Dutch) and here (in French).

CORPORATE LAW

New Law Relating to Governance of Listed Firms Enters into Force

On 21 March 2024, the federal Chamber of Representatives approved bill 55K3728 relating to the digitisation of justice and containing miscellaneous provisions I*bis* (*Wetsontwerp houdende bepalingen inzake digitalisering van justitie en diverse bepalingen I*bis / *Projet de loi portant dispositions en matière de digitalisation de la justice et dispositions diverses I*bis). The resulting Law (the ***Law***) is an amalgamation of legislative provisions, including amendments to the Companies and Associations Code (*Wetboek van vennootschappen en verenigingen / Code des sociétés et des associations*) that bring about changes to the governance of listed firms.

The Law was published in the Belgian Official Journal (*Belgisch Staatsblad / Moniteur Belge*) of 29 March 2024 (a rectifying notice, indicating that the Law is dated 28 March 2024 instead of 27 March 2024, took place on 4 April 2024). The key novelties for listed firms are as follows:

- A 50% shareholder majority will be required in case the board of directors envisages selling at least 75% of the assets of the listed entity (there is no *quorum* required and the decision can be approved by a simple majority of the votes cast). Under the previous rules, the sale of "crown jewels" (and asset deals in general) fell under the exclusive competence of the board (exceptionally, even under the old rules such a sale was subject to shareholders' approval during a public takeover bid).

  The 75% asset threshold will be applied based on the most recently published annual accounts. This means that the book value of the assets (rather than their market value) will be decisive. Furthermore, if the listed company publishes consolidated accounts, the threshold must reflect the consolidated assets.

  There are no exceptions for routine transactions. However, transfers to a subsidiary are exempt, except if the natural or legal person controlling the listed entity also controls the subsidiary (because that person holds at least 25% of the share capital/ equity of the subsidiary or is entitled to at least 25% of the distributed profits).

  Approved transactions must be filed with the competent enterprise court (*Ondernemings rechtbank / Tribunal de l'entreprise*) and published in the Annexes to the Belgian Official Journal (*Bijlage van de Belgisch Staatsblad / Annexes du Moniteur Belge*). The transactions are not subject to review by the Belgian Financial Services and Market Authority (*Autoriteit voor Financiële Diensten en Markten / Autorité des services et marchés financiers*).

  Under penalty of nullity, the board of directors must justify the proposed transfer in a detailed report mentioned on the agenda of the shareholders' meeting and made available to the shareholders.

  Third parties are protected against the non-observance of these rules as the absence of shareholder approval will not affect the powers of representation of the board. Interested parties, including minority shareholders, will be able to seek relief in court.

- The board of directors of listed companies must be composed of at least three independent directors. The next annual general shareholders' meeting of a listed company must establish a validly composed board of directors (without prejudice to the validity of the composition (and hence the decision-making) of the board of directors up to that date). If, after this general meeting, the board of directors is not validly composed, all benefits, financial or otherwise, in connection with the directors' mandate will be suspended until the situation is rectified.

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Further, whenever the board of directors proposes the appointment of an independent director to the general meeting, it must expressly confirm that it has no indications for doubting the independence of the candidate or, if it does have such indications, explain what those indications are and why it believes that the candidate nevertheless qualifies as an independent director.

- Convicted directors and managers of listed entities (including members of the boards of directors, the supervisory board, daily management and other persons in charge of management) are prohibited from remaining active in the management of the listed entity.

The Law entered into force on 8 April 2024. However, firms will have more time to implement the requirement to have at least three independent directors. Listed entities with financial years starting on 1 January will have until 31 December 2025 to comply with this obligation.

DATA PROTECTION

Court of Justice of European Union Hints at Possibility that Sport Regulatory Bodies Must Comply with General Data Protection Regulation

On 7 May 2024, the Court of Justice of the European Union (***CJEU***) delivered a judgment in a case involving a national Anti-Doping Agency which had published a decision regarding an athlete who had been found guilty of violating anti-doping regulations. While the CJEU declared the request inadmissible, it confirmed that regulating sports is subject to the General Data Protection Regulation (***GDPR***) (case C-115/22, *SO, NADA, ÖLV and WADA*).

OS, an Austrian athlete, had been found guilty by the Austrian Anti-Doping Legal Committee (***ÖADR***) of using banned substances. The ÖADR annulled all the athlete's results and prizes and imposed a four-year ban to participate in any sports competitions. The decision was made publicly available online, listing the athlete's name, the ban's duration, and the reasons for the ban. The athlete challenged the public disclosure of the penalties, but the ÖADR rejected the athlete's claims. The athlete escalated the matter to the Independent Arbitration Committee (***USK***), which then sought a preliminary ruling from the CJEU.

In line with established case-law, the CJEU declared the case inadmissible, holding that only courts or tribunals are eligible to file requests for preliminary rulings. It determined that a sports arbitration committee like the USK does not qualify due to the lack of independence of its members to the standards expected from a court. Consequently, the CJEU did not assess the merits of the request.

Advocate General Capeta had argued that sports regulating bodies like the USK, when overseeing "sport as a sport," do not operate within the scope of EU law and are therefore not bound by the GDPR. While the CJEU did not discuss the Advocate General's position, the court noted in an *obiter dictum* that sports regulating bodies are national authorities and must comply with applicable EU law, thus suggesting that such bodies should comply with GDPR when processing personal data.

The CJEU judgment is available here.

Court of Justice of European Union Clarifies Concept of Anonymisation of Personal Data and Overturns Judgment of General Court

On 7 March 2024, the Court of Justice of the European Union (***CJEU***) delivered its judgment in case C-479/22 P *OC v Commission* which concerns the application and interpretation of Regulation (EU) 2018/1725 of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (***EU Data Protection Regulation - EUDPR***). The CJEU held that the concept of personal data within the EUDPR must be interpreted in the same way as that contained in the General Data Protection Regulation (***GDPR***). It reaffirmed that information must be considered as personal data when it relates to an "*identifiable natural person*", even if additional information in the hands of another person may be needed to identify the data subject. The CJEU specified that the identifiability of personal data must be assessed in the light of the means reasonably likely to be used to that end, rather than in the light of what is possible for an "*average reader*".

Background

An investigation by the European Anti-Fraud Office (***OLAF***) exposed a complex fraud scheme orchestrated by a scientist (the ***Applicant*** or ***Appellant***) and her international research network. OLAF discovered that the scientist, leading a project funded by an EU research grant, had embezzled funds meant for team members. The affected researchers were unaware of their association with the project and the fraudulent bank accounts opened in their names, while the lead scientist accessed the funds as a co-beneficiary. Following the release of OLAF's findings in a press statement, a German journalist identified and publicly disclosed the lead scientist's identity. The scientist then brought an action for damages against the European Commission before the General Court of the European Union (***GC***), claiming a violation of her right to protection of personal data enshrined in the EUDPR, as well as the presumption of innocence contained in the Charter, and seeking compensation for non-material damage. On 4 May 2022 the GC dismissed her action (case T-384/20, *OC v Commission*).

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The Applicant appealed this judgment to the CJEU, challenging the GC's interpretation of "*identifiable natural person*" under the EUDPR, which she argues should have included the information contained in the press release. She also contended that the GC's ruling denied her the chance to address the violation of the presumption of innocence and claimed that the court distorted evidence regarding her right to good administration.

Judgment

First, the CJEU addressed the concept of "*identifiable natural person*" under Article 3, point 1, of the EUDPR. The CJEU noted that the concept of personal data under the EUDPR is "*essentially identical*" to that of the GDPR. Much like the GDPR, the EUDPR also considers the possibility of indirect identification. This led the CJEU to refer to its judgment in *Breyer* (C-582/14, § 41, *see*, this Newsletter, Volume 2016, No. 10), in which it held that "*in order to treat information as personal data, it is not necessary that that information alone allows the data subject to be identified*." In the words of the Court, "*it is not required that all the information enabling the identification of the data subject must be in the hands of one person". The fact that further information may be necessary to that end "does not mean that the data at issue cannot be classified as personal data*" (*OC v. Commission*, §§ 47 to 49).

Second, the CJEU analysed whether the information contained in the press release was personal data. The GC had considered that this would have been the case if the identification of the appellant had been possible by an "*average reader*", based on the information contained in the press release alone. The CJEU disagreed, emphasising that this conflated two different assessments: that on the personal nature of data, on the one hand, and that on EU liability for the conduct of its bodies, on the other hand. This is because "*it is inherent in the 'indirect identification' of a person that additional information must be combined with the data at issue for the purposes of identifying the person concerned*", which may come from a source other than the data controller.

The CJEU thus clarified that external factors beyond OLAF's conduct could lead to the identification of an individual, therefore considering the information in the press release as personal data under the EUDPR. The CJEU criticised the GC's reliance on the "*average reader*" standard, which did not account for the information's potential use by professional journalists, who should not be equated with average readers. Instead, according to the CJEU case law, the data will only fall outside the scope of personal data if the identification of the natural person is unlikely based on an evaluation of the reasonable means which could be used to try and identify a natural person. This test will be met when such means are prohibited by law, or when they require disproportionately high efforts that make the risk of identification insignificant. By contrast, in the case at hand, the press release contained details like the applicant's gender, nationality, profession, grant amount, and awarding body - factors that significantly raised the possibility of identifying the individual.

In conclusion, the CJEU considered that the GC erred when it held "*that the identifiers in the press release at issue did not reasonably allow the appellant to be identified*" and that the information contained in the press release was not covered by the concept of personal data. Consequently, the CJEU held that the applicant was justified in claiming a breach of the presumption of innocence.

However, the CJEU dismissed the allegations of evidence distortion related to the right to good administration.

The CJEU overturned the GC's judgment and sent the case back to the GC to reexamine the claims regarding the presumption of innocence and the EU's extra-contractual liability.

DATA PROTECTION

Court of Justice of European Union Holds that Courts Authorised to Grant Access to Telephone Records Must Also Have Power to Refuse or Restrict Such Access

On 30 April 2024, the Court of Justice of the European Union (***CJEU***) delivered its judgment in case C-178/22, *Procura della Repubblica presso il Tribunale di Bolzano* in response to a request for a preliminary ruling related to the application of an Italian law that permits accessing personal data for offences that carry a minimum three-year prison term to identify the culprits.

In response to a violent incident involving the theft of two mobile phones, the Public Prosecutor's Office of Bolzano requested judicial authorisation to access telephone records from various telecommunications companies to identify the perpetrators. However, the Italian court wondered whether this request was compatible with the Directive on Privacy and Electronic Communications (Directive 2002/58/EC – the ***ePrivacy Directive***), read in light of Articles 7, 8, 11 and 52(1) of the Charter of Fundamental Rights of the European Union. The Italian court had concerns regarding the law's application to offences causing only minor social disruption that may not warrant a significant infringement of fundamental rights like privacy and personal data protection. Consequently, the Italian court referred the matter to the CJEU for a preliminary ruling.

In its judgment, the CJEU held that the ePrivacy Directive does not prohibit such a national law but added that accessing telephone records, which significantly interferes with fundamental rights, should be restricted to cases involving suspects of serious offences. It emphasised that although defining what constitutes a 'serious offense' falls within the purview of Member State law, Member States must exercise this power judiciously and avoid misclassifying lesser offences as serious.

Additionally, the CJEU ruled that it is essential that access to retained telephone records should be subject to a review by a court or an independent administrative body. This court or independent administrative body must have the authority to deny or limit access to the data if it determines that the potential infringement of fundamental rights is significant and the offence in question does not truly constitute a serious crime.

INTELLECTUAL PROPERTY

World Intellectual Property Organisation Issues Strategic Plan on Standard Essential Patents

The World Intellectual Property Organisation (***WIPO***) issued a strategic plan for the 2024-2026 period addressing standard essential patents (***SEPs***). The plan is in response to growing concerns with regard to SEP related issues, such as forum shopping, methodologies for assessing essentiality, and the approach to determine fair, reasonable, and non-discriminatory (***FRAND***) licensing terms.

The aim of the strategic plan is to encourage the use of the patent system in a way that protects incentives for innovators while guaranteeing that technological innovation benefits society at large.

The three guiding principles of the new SEP strategy are neutrality, complementarity, and making sure that the activities or services deployed by WIPO are voluntary in nature.

To achieve these principles, WIPO identified four thematic clusters of initiatives that make up its strategic plan:

1. The first focuses on WIPO as a forum for global dialogue. This initiative aims to build a shared understanding of SEPs as well as create cross-fertilisation of concepts and practices amongst member states.

2. The second initiative aims to establish WIPO as a source of knowledge and data.

3. The third initiative focuses on establishing WIPO as a venue for amicable agreement through encouraging alternative dispute resolution and deal facilitation.

4. The fourth initiative is WIPO's establishment as a provider of services and aims to facilitate access to publications and standardisation documentation held at Standard Developing Organisations (***SDOs***) as well as pooled resources from intellectual property offices.

The establishment of more uniform procedures for regulating SEPs serves to benefit all stakeholders. WIPO's strategic plan produces insights on ways to achieve this through transparency and cooperation.

Royal Decree Creates Office for Combating Copyright Infringements on Internet

On 6 May 2024, the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) published a Royal Decree of 18 April 2024 concerning the establishment of the service for the fight against the infringement of copyright and related rights on the internet and the illegal operation of online gambling games (*Koninklijk Besluit van 18 april 2024 betreffende de oprichting van de Dienst voor de strijd tegen inbreuken op het auteursrecht en de naburige rechten op het internet en tegen de exploitatie van onwettige onlinekansspelen/ Arrêté royal du 18 avril 2024 relatif à la création du Service de lutte contre les atteintes au droit d'auteur et aux droits voisins commises en ligne et contre l'exploitation illégale de jeux de hasard en ligne* - the ***Royal Decree***).

The Royal Decree introduces two main novelties.

First, pursuant to Article 8 of the Royal Decree, Articles 87 to 95 of the Law of 19 June 2022 transposing Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (the ***Implementing Law***) entered into force on 1 June 2024. Most of the provisions of the Implementing Law had already been transposed last year (*See*, this Newsletter, Volume 2022, No. 8).

The Implementing Law also introduced a new procedure to combat online copyright infringement and related rights, such as database rights. However, the entry into force of the provisions related to this new procedure was subject to the publication of the Royal Decree. As discussed previously (*See*, this Newsletter, Volume 2022, No. 8), the Implementing Law introduced a new

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"special procedure" to obtain preliminary measures in the case of a "clear and significant online infringement of copyright, neighbouring rights and database rights". Pursuant to this procedure an affected party may bring an action before the President of the Brussels Enterprise Court and seek interim measures. The procedure only applies to online copyright infringements and the operation of illegal online gambling.

Second, the Royal Decree establishes within the FPS Economy an office for the fight against the infringement of copyright and related rights on the Internet and the illegal operation of online gambling games (the ***Office***). The Office can be asked to advise on and specify interim measures that were imposed pursuant to the special procedure. However, the Office does not have the power to alter, limit, or expand the scope of the decision. On the website of the Federal Public Service Economy, the Office will publish an indicative list of websites that are considered to respect the rights of the holders of the protected works and performances.

Following the publication of the Royal Decree, all the provisions of the Implementing Law have now fully entered into force.

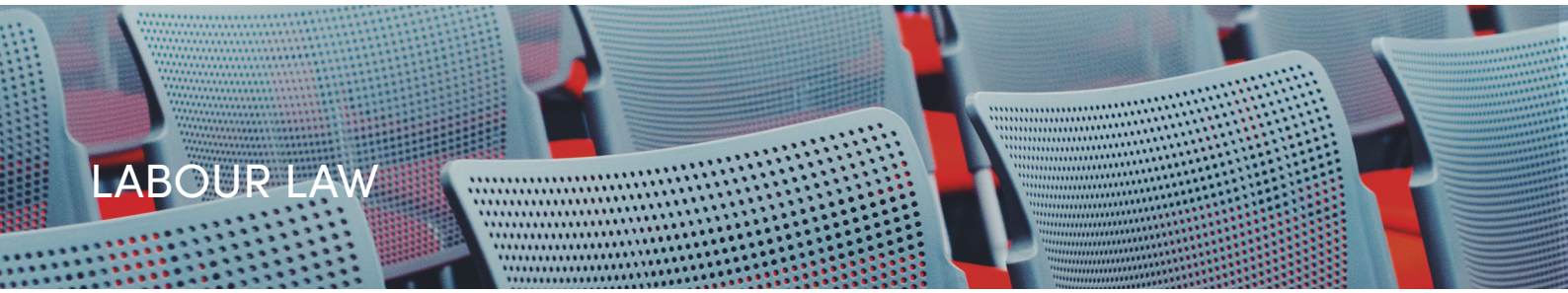
Supreme Court Asks Court of Justice of European Union if Right to Choose Applicable Law Applies to Copyright Ownership Contracts

On 8 February 2024, the Supreme Court referred a request for a preliminary ruling to the Court of Justice of the European Union (***CJEU***) to ascertain whether clauses relating to the ownership of copyright in a work created under an employment agreement or a commission contract falls under the concept of "contractual obligations" of the Convention on the law applicable to contractual obligations (the ***Rome Convention***), as replaced by Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the ***Rome I Regulation***) (Case C-106/24, *WEAREONE.WORLD BV*).

The Rome Convention established a uniform set of rules for determining the law applicable to contracts in situations involving a choice between national laws. The guiding principle of these instruments is the freedom of choice of the parties, which means that they can select the national law applicable to the whole or part of the contract. The Rome Convention and the Rome I Regulation both only apply to situations involving "contractual obligations." They do not explicitly include or exclude contractual clauses relating to the ownership of copyright and this explains the request of the Supreme Court.

The ability of contractors to choose which Member State's copyright rules apply to employment or commission contracts may give them the ability to choose rules that are more favourable to their interests. For instance, in France, the employee or commission agent is, by default, the owner of the copyright in the works which he or she created. The transfer of such rights therefore requires a specific contract. But this is not the case in all EU countries.

A notice summarising the request for a preliminary ruling can be found here.



LABOUR LAW

New Law Reforms Social Criminal Code Amending Criminal Offences and Sanctions

On 8 May 2024, the federal Chamber of Representatives approved governmental bill 55K3914 to supplement and amend the Social Criminal Code (the ***SCC***) and various provisions of social criminal law (*Wetsontwerp tot aanvulling van het Sociaal Strafwetboek en verscheidene bepalingen van het sociaal strafrecht / Projet de loi complétant et modifiant le Code pénal social et diverses dispositions de droit pénal social* – the ***Bill***). The Bill introduces higher sanction levels, new penalties and criminal offences, whilst lowering the penalties for specific minor offences.

The Bill resulted in the publication of the Law of 15 May 2024 in the Belgian Official Journal of 21 June 2024 (*Wet van 15 mei 2024 houdende wijziging van het sociaal strafrecht en diverse arbeidsrechtelijke bepalingen/Loi du 15 mai 2024 modifiant le droit pénal social et diverses dispositions en droit du travai* - the ***Law***).

Higher Penalties and New Specific Sanction

The SCC classifies all criminal offences into four levels, each associated with distinct penalties. Levels one and two encompass minor infractions, while level three addresses moderately serious offences, and level four pertains to the most severe violations.

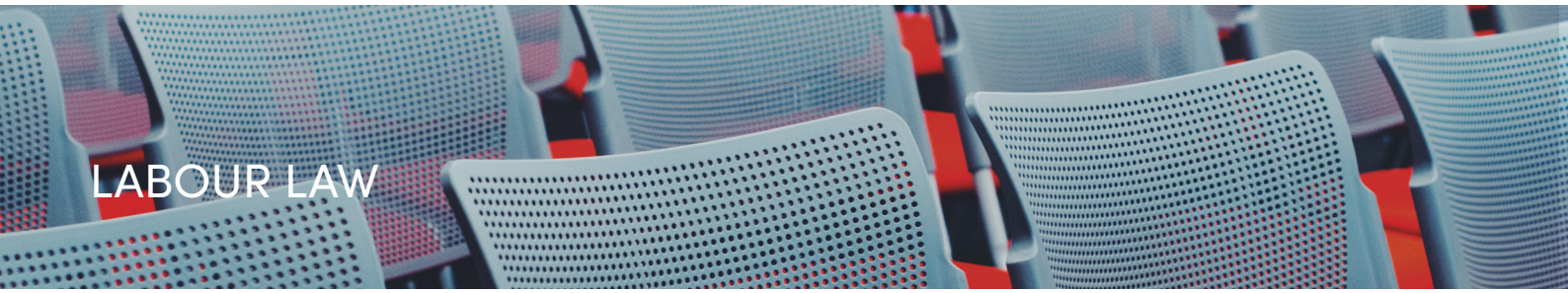
The Law enshrines the primary role of criminal and administrative fines while restricting imprisonment to the most severe cases. Although the four levels of sanctions remain unchanged, the amounts of the administrative and criminal fines for level three and four criminal offences are increased. The amounts, inclusive of statutory surcharges (but often to be multiplied with the number of employees concerned, capped at 100 employees), are as follows:

	Administrative fines		Criminal fines		Imprisonment	
	Before	After	Before	After	Before	After
Level 1	EUR 80 to 800	EUR 80 to 800				
Level 2	EUR 200 to 2,000	EUR 200 to 2,000	EUR 400 to 4,000	EUR 400 to 4,000		
Level 3	EUR 400 to 4,000	EUR 400 to 4,000	EUR 800 to 8,000	EUR 800 to 8,000		
Level 4	EUR 2,400 to 24,000	EUR 2,400 to 24,000	EUR 4,800 to 48,000	EUR 4,800 to 48,000	Six months to three years	Six months to three years

The Law also creates a new special sanction in the realm of public procurement which is in addition to the existing operating ban, the prohibition on conducting specific activities and the business closure: the exclusion from the right to register for government contracts or obtain concessions. These special sanctions can only be imposed for level three and four offences and only if they are considered necessary to prevent repeat offences and in proportion with the socio-economic interests at stake.

Changed Criminal Offences

The Law also updates the SCC by including offences that were either not incorporated at the time of its drafting or were adopted or came into effect after the Code was established in July 2010. In addition, the Law aligns the description of offences already covered by the SCC with changes made to the underlying obligations by subsequent laws.



LABOUR LAW

This results in various criminal offences being escalated from sanction level two to sanction level three. These include (i) the non-payment or late payment of salaries; (ii) the failure to comply with rules regarding salary deductions; and (iii) the non-payment of various social security contributions to the National Social Security Office. Conversely, specific offences are downgraded to a lower sanction level, such as the failure to keep a copy of the part-time employment contract or a relevant extract at the workplace where the work rules can be consulted (from sanction level three to level two); and the non-compliance with the obligation to inform employees in advance about medical examinations (from sanction level two to level one).

Moreover, specific criminal offences are abolished altogether, such as the failure to allocate the budget of disciplinary fines for the benefit of employees.

Lastly, new criminal offences are introduced, such as the non-compliance with obligations regarding flexible working schedules (sanction level two) or the non or non-timely allocation of eco vouchers (sanction level two).

The various provisions of the Law will not all come into effect simultaneously. While certain provisions have clear timelines, others are pending further determination (in the light of predetermined deadlines). The remaining provisions came into effect on 1 July 2024.

The Law can be found here (in Dutch) and here (in French).

LITIGATION

Supreme Court Limits Power of Court of First Instance to Set Aside Arbitral Awards

On 12 April 2024, the Supreme Court (the ***Supreme Court***) applied Article 1717, §3, b), (ii) of the Belgian Judicial Code and held that in order to set aside an arbitral award, a court of first instance must examine the effects of that award on public order, but it is not allowed to reassess the merits of the arbitral dispute.

Background

An arbitral dispute arose between a US-based company and the Republic of Poland following a judgment of the Polish Supreme Court. The arbitral tribunal ruled that the Polish Supreme Court had adopted a manifestly discriminatory attitude towards the US company, hence holding Poland liable for a denial of justice by its highest court.

The Republic of Poland then requested the French-language Court of First Instance of Brussels (the ***Court of First Instance***) to set aside that arbitral award. In a judgment dated 18 February 2022 the Court of First Instance, adjudicating at last instance, acceded to this request on the basis that the arbitral award was contrary to public policy. The Court of First Instance considered that the arbitral tribunal could not reasonably have considered that the Polish Supreme Court had adopted a manifestly discriminatory attitude towards the US company.

The US company then brought an appeal against the Court of First Instance's judgment to the Supreme Court and sought an interpretation of Article 1717, §3, b), (ii) of the Belgian Judicial Code.

Supreme Court Judgment

The Supreme Court noted that according to this provision, "*the arbitral award can only be set aside if the court of first instance finds that the award is contrary to public order*".

It then held that this provision does not imply that the first instance judge setting aside the award can reassess the dispute in view of the public order provisions which the arbitral tribunal applied. This provision only requires the Court of First Instance to verify whether the award itself is contrary to public policy.

The Supreme Court further ruled that by failing to examine the effects of that arbitral award on public order, the Court of First Instance had violated Article 1717, §3, b), (ii).

The full judgment is available here.

Procedural Indemnity Adapted to Consumer Price Index

A Royal Decree of 16 May 2024 amending the Royal decree of 26 October 2007 setting the rate for procedural indemnities was published on 5 June 2024 in the Belgian Official Journal.

As from 6 June 2024, the rate set for procedural indemnities (*i.e.*, the lump-sum payment which the losing party must pay to contribute to the costs and lawyer fees of the winning party) was adapted to the consumer price index.

The starting index will be that for March 2007, *i.e.*, 105.78. The next indexation will take place on the first day of the month following the month in which an index of 145.78 or 165.78 is reached.

The Royal Decree is available here (in Dutch) and here (in French).

LITIGATION

Supreme Court Limits Res Judicata of Descriptive Seizures

The Supreme Court (the ***Supreme Court***) held on 24 March 2024 in a case concerning a descriptive seizure (*beschrijvend beslag / saisie-description*), that an order of the attachment judge only has *res judicata* (*gezag van gewijsde / autorité de la chose jugée*) as regards the parties and the attachment judge.

Background

A dispute arose between Belgian companies, as plaintiffs, and US companies, as defendants, concerning a descriptive seizure.

In an order of 13 June 2006, the attachment judge had authorised the defendants to proceed with a descriptive seizure on the plaintiffs. The latter then lodged a third-party opposition (*derdenverzet / tierce opposition*) against that order before the Court of Appeal of Antwerp.

On 12 October 2006, the same attachment judge held that part of his order (in which he authorised the sealing of information media) had to be revoked (the ***Attachment Decision***). The defendants appealed to another chamber of the Court of Appeal of Antwerp which quashed the Attachment Decision on 1 February 2017.

Following the Attachment Decision, the defendants summoned the plaintiffs before the Court of First Instance of Antwerp to have it order the plaintiffs to pay damages for copyright infringement. In a judgment dated 14 October 2014, the Court of First Instance of Antwerp acceded to the request.

The plaintiffs appealed against that judgment to the Court of Appeal of Antwerp which confirmed in a judgment dated 14 May 2018 the copyright infringements and the order to pay damages. The plaintiffs then appealed to the Supreme Court.

Supreme Court Judgment

The Supreme Court first considered the principles applicable to descriptive seizures as detailed in Articles 1369bis/1, §1 and §7 of the Judicial Code and the former Article 1481 of that same Code.

The Supreme Court held on that basis that an order granting descriptive measures only has *res judicata* as regards the parties and the court that ordered these measures, but not for the trial court which has to consider the results of these descriptive measures.

The Supreme Court went on to rule that if the trial court finds that no descriptive seizure could be granted, the attachment order must be set aside. This also applies to the evidence that was obtained in the seizure and which can no longer be used as evidence before the trial judge.

Accordingly, the Supreme Court held that by considering that the order of the attachment judge had *res judicata* in the broadest terms, the Court of Appeal of Antwerp had erred in law.

The full judgment is available here (in Dutch only).

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