June-July 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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COMMERCIAL LAW

Book 6 of New Civil Code on Tort Law Published

On 1 July 2024, the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) published the Law of 7 February 2024 containing Book 6 of the New Civil Code on Tort Law (*Wet van 7 februari 2024 houdende boek 6 "Buitencontractuele aansprakelijkheid" van het Burgerlijk Wetboek / Loi du 7 février 2024 portant le livre 6 "La responsabilité extracontractuelle" du Code civil* – the ***Book on Tort Law***) (For discussion, *see*, this Newsletter, Volume 2023, No. 3).

The Book on Tort Law will enter into force on 1 January 2025 and will apply to harmful events giving rise to liability occurring on 1 January 2025 or later.

Default Commercial Interest Remains Unchanged

On 30 July 2024, the Belgian Official Journal (*Belgisch Staatsblad / Moniteur belge*) published the default interest rate for commercial transactions applicable in the second semester of 2024. It amounts to 12.5%, remaining unchanged from the rate applied in the first semester of 2024 (*See*, this Newsletter, Volume 2024, No. 2). Pursuant to the Law of 2 August 2002 on combating late payment in commercial transactions (*Wet van 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties / Loi du 2 août 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales* – the ***Law***), the default commercial interest rate for commercial transactions applies to compensatory payments in commercial transactions (*handelstransacties / transactions commerciales*), *i.e.*, transactions between companies or between companies and public authorities, but may be deviated from by contract. The Law implements into Belgian law the Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions. In September 2023, the European Commission submitted a proposed Regulation updating Directive 2011/7/EU (*See*, this Newsletter, Volume 2023, No. 9).

Supreme Court Clarifies Burden of Proof under United Nations Convention on Contracts for International Sale of Goods

On 6 June 2024, the Supreme Court (*Hof van Cassatie / Cour de cassation*) clarified the provisions of the United Nations Convention on Contracts for the International Sale of Goods (also known as the Vienna Convention – ***CISG***) governing the examination of the goods on delivery, the notification of a lack of conformity, and the resulting distribution of the burden of proof between the seller and the buyer of the goods (Supreme Court, 6 June 2024, *Frigera NV t. D.E.C. Srl*, C.23.0431.N, available here).

Background

The petfood producer Frigera NV (***Frigera***) had purchased a large quantity of ham bones from the Italian company D.E.C. Srl (***D.E.C.***) for resale to a customer. The goods were delivered directly to Frigera's customer on 16 and 18 January 2019 and were invoiced to Frigera in four distinct invoices. On 8 February 2019, Frigera received a complaint from its customer alleging that the ham bones were not in conformity due to the presence of mould. Frigera notified D.E.C. of the issue on 11 February 2019, withheld payment of D.E.C.'s invoices, and brought an action before the Antwerp Enterprise Court, Division Tongeren, (***Enterprise Court***) seeking (i) the appointment of an expert; (ii) the retroactive dissolution of the sales agreements; and (iii) compensation for the harm suffered due to the non-conforming delivery.

Siding partially with Frigera, the Enterprise Court dissolved the sales contract linked to two of D.E.C.'s four invoices and awarded damages to Frigera. However, it ordered Frigera to pay D.E.C.'s other two invoices.

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D.E.C. appealed the judgment to the Antwerp Court of Appeal (***Court of Appeal***), arguing that Frigera had failed to (i) examine the goods within the shortest practicable period in accordance with Article 38(1) CISG; and (ii) notify D.E.C. of the lack of conformity within a reasonable time as required by Article 39(1) CISG, 26 and 24 days respectively after the delivery of the goods. The Court of Appeal accepted these arguments. It held that Frigera had forfeited the right to rely on the lack of conformity of the goods and ordered Frigera to pay all four of D.E.C.'s invoices as well as interests. It noted that Frigera had failed to examine the goods upon their delivery and failed to demonstrate that the lack of conformity was invisible at the time of delivery.

Frigera lodged in turn an appeal to the Supreme Court, challenging the Court of Appeal's interpretation of the CISG. Frigera argued that the lack of conformity was invisible at the time of delivery of the goods and that, therefore, the reasonable period for notification could not begin to run from the time when it was required to examine the goods pursuant to Article 38(1) CISG, but only from the time when a reasonably diligent buyer would have discovered the lack of conformity. Furthermore, Frigera contended that the evidential burden of demonstrating that the lack of conformity was visible at the time of delivery, and that the reasonable period for notification under Article 39(1) CISG therefore began to run from the time when Frigera was required to examine the goods pursuant to Article 38(1) CISG, rested with D.E.C.

Supreme Court Judgment

The Supreme Court started its analysis by noting that pursuant to Articles 7 and 79(1) CISG (i) matters governed by the CISG which are not expressly settled in it are to be dealt with primarily in accordance with the general principles on which the CISG is based to ensure uniformity in the CISG's application; and (ii) although the CISG does not provide an all-encompassing framework for the allocation of the burden of proof, the question of distribution of burden of proof is a matter governed by the CISG in that the latter requires parties to provide evidence of the claims which they make.

The Supreme Court continued that, on this basis, the burden of proof is distributed as follows:

- The buyer should provide evidence of the defect or lack of conformity.
- If the seller claims that the buyer failed to give timely notice, it rests with the seller to provide evidence of the time when the buyer knew, or ought to have known, the defect or lack of conformity and, their visibility.
- If, however, the buyer failed to examine the goods, the buyer should prove that the defect or lack of conformity was not visible at the time of delivery.

Applying the above principles to the case at hand, the Supreme Court held that the Court of Appeal had rightly decided that the burden of demonstrating the invisible nature of the lack of conformity at the time of delivery rests with the buyer (*i.e.*, Frigera). Consequently, it dismissed Frigera's appeal.

This ruling serves as a useful reminder to parties engaged in the international sale of goods of the potential impact of the CISG on their transaction.

On account of its Article 1(1), the CISG applies *ex officio* to contracts of sale of goods between parties whose places of business are in different countries when (i) the countries concerned are party to the CISG; or (ii) the rules of private international law give rise to the application of the law of a country party to the CISG. However, parties can decide to exclude the application of the CISG (*See*, Article 6 CISG).

COMPETITION LAW

Belgian Competition Authority Publishes Annual Report for 2023 and Shows What Lies Ahead

On 29 July 2024, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) published its annual report for 2023 (the ***Report***). Combined with its enforcement priorities for 2024 made public a few weeks ago, the Report offers a good view on the BCA's current thinking and short-term plans.

The Report contains a reminder that the BCA:

- was able to increase its staff significantly as it benefited from additional government funding (p. 2 and p. 8); and
- is gearing up for sector inquiries "when a specific part of the economy shows signs of market distortions" (p. 2).

Additionally, the Report refers to the first investigation of an alleged abuse of economic dependency (p. 2). Other public sources indicate that the targeted firm is likely to be Tiense Suiker, following a complaint filed by sugar beet producers.

Separately, and in keeping with a practice followed by several European competition authorities, the BCA claims that the enforcement work which it concluded in 2023 has allowed consumers to save at least EUR 445 million (p. 2). This avowedly conservative estimate results from calculations made in accordance with a methodology sanctioned by the OECD. Less conservative methodologies used by the European Commission suggest consumer savings in 2023 of EUR 641 million or even EUR 1,086 million (p. 35 and p. 36).

The BCA announces that it will continue what it refers to as its capacity building effort, which involves the development of practice groups, specialisations, sector inquiry capabilities, and IT solutions. The BCA also plans to focus on digital enforcement and on sustainability.

The BCA will focus on the agricultural and food industries, telecommunications, healthcare and pharmaceuticals industries, energy, services to business and to consumers, and public procurement. The BCA has been earmarking most of these areas as priority enforcement matters for several years.

Belgian Competition Authority Investigates Deal Between Proximus, Fiberklaar, Wyre, and Telenet for Roll-out of Fibre Networks in Flanders

The Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) announced on 26 July 2024 the opening of an investigation into an agreement on the rolling out of fibre telecommunications networks in Flanders. The BCA's move was prompted by a Memorandum of Understanding (***MoU***) concluded the previous day between telecommunications operator Proximus, Fiberklaar (a joint venture company between Swedish investment firm EQT and Proximus), telecommunications operator Telenet, and Wyre (a joint venture company between utilities firms Fluvius and Telenet).

The MoU sets forth the basic principles for cooperation regarding the roll-out of fibre networks in geographical areas of medium and low population density. It would concern 2.7 million residences. In medium density population areas (which cover 2 million homes), Wyre and Fiberklaar would build complementary Fiber-to-the-Home (***FTTH***) networks and set up reciprocal wholesale access for their respective partners, Proximus and Telenet. In areas that are sparsely populated (0.7 million homes), Proximus would offer services via the Hybrid Fiber Coax network of Wyre. Elsewhere (in large cities and densely populated zones), network competition would fully play out and both groups would roll out their own separate infrastructure.

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The parties do not expect to sign a fully-fledged cooperation agreement before the fourth quarter of 2024 and expressly indicated that they would seek approval from both the BCA and the Belgian Institute for Postal Services and Telecommunications (*Belgisch Instituut voor Postdiensten en Telecommunicatie / Institut belge des services postaux et des télécommunications* – the ***BIPT***).

Despite the parties' apparent intention to clear the transaction with the authorities (mandatory merger control rules would not seem to apply), the BCA was quick to announce an investigation of its own motion. The BCA stated that it would be particularly interested in learning whether the envisaged cooperation is likely to reserve a fair share of the cost-savings and other efficiency gains for network users. The BCA apparently has in mind access conditions, scope and speed of roll-out, and other payoffs of the close cooperation. It said it would take a long-term perspective, given the large investments at stake. The BCA would do well to consider also the societal benefits of the reduced volume of public works which the cooperation promises.

The BCA's new investigation follows on from the BCA's inquiry into NetCo, as Wyre was formerly known. The BCA was concerned that the creation of NetCo would give rise to conflicts of interest distorting competition in the deployment of fibre networks, due to (i) the indirect ownership of Fluvius by Flemish cities and municipalities responsible for the granting of public works permits; (ii) the unique position of Fluvius as a network operator in the fields of energy, heating and water; and (iii) the dealings between Fluvius and telecommunications network operators in the framework of public work synergies. Telenet and Fluvius accommodated these concerns by adopting a series of measures that would apply for seven years, starting in April 2023. The BCA then decided to terminate its inquiry. The creation of NetCo was separately authorised by the European Commission under the EU merger control rules in May 2023.

Subsequent to this, the BCA announced on 16 October 2023 that it would examine any form of cooperation between telecommunications operators for the roll-out of fibre infrastructure in Belgium in close cooperation with the BIPT (*See*, this Newsletter, Volume 2023, No. 10). The BCA message mirrored the position of the BIPT which had been made public a few days earlier and was widely regarded as an attempt to balance the need for promoting effective infrastructure-based competition with an awareness of the economic impact of duplicating FTTH infrastructure.

Belgian Competition Authority Steps Up Fight Against Bid Rigging and Strikes Down Fire Protection Cartel

On 8 July 2024, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) concluded a settlement agreement with firms found guilty of bid rigging practices in the fire protection business. In keeping with its enforcement priorities for 2024, the BCA went after Ansul and Somati Fie (both owned by London Security plc) as well as Sicli. These firms had agreed to refrain from bidding for specific contracts or to submit "cover" bids (*i.e.*, bids that are deliberately priced higher than rival bids) to allow each of them to keep historical customers in the public sector in areas as diverse as education, social housing and public transport.

The London Security firms obtained immunity from fines because they had been the first to report the cartel to the BCA. For its part, Sicli was given a fine of EUR 2.2 million which reportedly reflects a 50% reduction on the "normal" rate as a reward for cooperating with the BCA in its inquiry. Unusually, the London Security firms also proposed terms to compensate customers that were defrauded by the cartel. Separately, 6 individuals were given immunity from prosecution.

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Belgian Competition Authority Tackles Tendering Cartel but Also Penalises No-Poaching Arrangement in Private Security Firms Cartel Case

On 3 July 2024, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) announced that it imposed fines totalling EUR 47 million on three private security firms, G4S, Securitas, and Seris, for collusive behaviour that lasted from 2008 to 2020.

The infringement was three-pronged:

- The parties engaged in a price-fixing cartel by agreeing to apply minimum hourly tariffs for their security services.
- The parties coordinated their behaviour in relation to public procurement and other tendering procedures. They decided which party would participate in a given procedure, made sure that a firm would not lose existing customers, and agreed on prices.
- The parties agreed not to poach each other's employees. This is the first no-poaching arrangement penalised by the BCA which characterised the practice as an infringement by object.

Despite its novelty, this decision will not be tested in court, as the parties settled the case. This means that, in exchange for a reduced fine, the parties admitted guilt and waived their right to appeal the decision. Securitas did not receive a fine as it obtained immunity under the BCA's leniency programme. G4S and Seris also benefitted from fine reductions under both the leniency and the settlement programmes. G4S was given a fine of EUR 35,895,112 while Seris was fined EUR 11,200,000.

This settlement does not come as a surprise given the plea agreement of G4S with the US Department of Justice (***DOJ***) and the prosecution by the DOJ of several more parties, including Seris. The involvement of the DOJ is explained by the fact that the suspected price-fixing and bid rigging practices covered agreements to provide security services to facilities of the US Department of Defense and the North Atlantic Treaty Organisation located in Belgium. In this plea agreement, G4S acknowledged that it had "participated in a conspiracy among major Belgian security services providers, the primary purpose of which was to suppress and eliminate competition by allocating customers, rigging bids, and fixing prices for certain contracts for the provision of security services in Belgium". According to the plea agreement, the largest US contract affected by these practices amounted to EUR 70 million.

The DOJ also indicted Seris and several other defendants for a period starting "at least as early as Spring 2019 and continuing until at least Summer 2020" and challenged meetings and encrypted messages aiming at allocating tenders and making sure that the participants that were not allocated a tender would offer artificially high prices.

This case also had ramifications elsewhere. The former CEO of G4S became the CEO of postal operator bpost in 2019 but was then let go in March 2021 because he allegedly gave bpost insufficient information regarding the competition case (and its ramifications in the US, where he is facing charges).

The decision adopted by the BCA may not be the last procedural step in this case: while 11 individuals obtained immunity from prosecution, one unidentified person, presumably the former CEO of G4S, is still being prosecuted.

COMPETITION LAW

Belgian Competition Authority Approves Hospitals Merger Under Conditions

On 1 July 2024, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) conditionally approved the merger between two Antwerp hospitals, namely Ziekenhuis Netwerk Antwerpen vzw (***ZNA***) and GasthuisZusters Antwerpen (***GZA***).

This is the first hospital merger to be reviewed by the BCA since the legislative change that recently curtailed the BCA's competence in this sector. The BCA lost the power to review mergers between hospitals, unless the parties achieve at least EUR 250 million turnover individually and at least EUR 900 million turnover collectively, which is much higher than the standard thresholds applicable to other sectors of the economy (EUR 40 million per party and EUR 100 million collectively). The BCA protested against this reduction of its powers, but without success (*See*, this Newsletter, Volume 2024, No. 1 and this Newsletter, Volume 2024, No. 2).

ZNA operates in the province of Antwerp and is what the BCA describes as the largest general hospital in Belgium, which includes seven campuses, an outpatient clinic, and a medical centre where minor traumatology can be treated. For its part, GZA operates a general hospital with three campuses and an outpatient clinic, also in the province of Antwerp. Post-merger, these hospitals will continue to operate jointly under the name "Ziekenhuis aan de Stroom" (***ZAS***). The BCA observed that the merger would give rise to "a market leader in the relevant local market", which would also be "by far the largest hospital in Belgium in terms of number of beds and one of the five largest in Europe".

The BCA identified two relevant markets: (i) the local market for hospitalisations; and (ii) the local market for specialised ambulatory care. These markets were defined geographically based on the travel time required to reach the hospital: within 25 minutes for hospitalisations and within 22 minutes for specialised outpatient care.

The BCA investigated the impact of the transaction on fee supplements (unregulated prices), quality of care and accessibility of care, and detected potential anti-competitive effects on unregulated prices. The BCA feared that, post-transaction, competing hospitals would have a clear incentive to follow the example of the merged entity while determining maximum fees and room supplements, which are both publicly known:

- Fee supplements determine the fees that a doctor may charge and therefore have an immediate impact on the doctor's income and his or her willingness to join or stay at a particular hospital. Given the fight over talent, the BCA found that competing hospitals tend to follow the market leader to avoid the risk of not being able to attract or retain the doctors of their choice.

- Increased room supplements contribute to the hospital's revenue and margin. Again, the BCA considered that, post-transaction, competing hospitals would be incentivised to align their room supplements on those of the market leader, especially since the level of room supplements was not found by the BCA to materially influence the patients' choice of hospital.

In addition to these unilateral effects, the BCA was concerned that the transaction would facilitate tacit coordination on fees and room supplements. The BCA found this risk to be heightened by preexisting market conditions, such as a limited number of market players, symmetry in services offered, high barriers to entry and expansion, stable demand, market transparency and information exchanges (because of regulation). The BCA again pointed to the fight over talent which gave rise to "indications of a possible no-poaching agreement between hospitals in the Antwerp region".

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The BCA also found that there would be efficiency gains brought by the concentration in the form of development of expertise, improvement of care processes, including cost savings, continuity of care in a context of staff shortages, increasing investment capacity and efficient use of scarce staff on the various sites. At the same time, the BCA considered that these efficiency gains would not neutralise the specific unilateral and coordinated harmful effects of the transaction.

The parties eventually won the BCA's approval by offering commitments to address the BCA's concerns.

- Regarding the unilateral effects, the parties agreed to freeze for three years the maximum level of fee supplements for hospitalisations to 200%. They will also notify the patients if fee supplements exceed 150%. The BCA observed that the regulatory framework requires a maximum percentage to be fixed on the fee supplements in single cases. It thus found that freezing the maximum fee supplements addresses unilateral and coordinated concerns and avoids the risk of exceeding this ceiling for three years while also limiting the scope for harmonisation of effective fees (charged by the doctor). This commitment applies for three years, a duration which the BCA regards as sufficient because fee supplements are currently frozen until the end of 2024 and a reform of hospital financing is on the cards.

- A sufficient offer of outpatient care at conventional rates will be provided for each medical discipline at each ZAS site where the medical discipline provides ambulatory care. The parties committed to a maximum of 100% fee supplements for consultations on appointment for a duration of three years.

- The parties undertook not to increase the current room supplements per room type and per ZAS campus for three years.

- The parties made an additional (undisclosed) commitment addressing the risk of coordination with regard to higher room and fee supplements in case of hospitalisation in a single room for five years.

- Finally, the merged entity will organise internal competition law training and will report annually to the BCA regarding compliance with the commitments.

Belgian Competition Authority Welcomes Idea of Merging with Other Market Regulators

The Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) published on 13 June 2024 an opinion analysing the benefits and drawbacks of a possible merger with other market regulators (the ***Opinion***).

The Opinion was in response to two draft Resolutions regarding a possible merger of several market regulators tabled with the Chamber of Representatives of the federal Parliament (draft Resolutions 55K3033 and 55K0073). The Belgian Institute for Postal Services and Telecommunications (*Belgisch Instituut voor Postdiensten en Telecommunicatie / Institut belge des services postaux et des télécommunications* – the ***BIPT***), the Commission for Electricity and Gas Regulation (*Commissie voor de Regulering van de Elektriciteit en het Gas / Commission de Régulation de l'Electricité et du Gaz* – the ***CREG***), the Financial Services and Markets Authority (*Autoriteit voor Financiële Diensten en Markten / Autorité des services et marchés financiers* – the ***FSMA***) and the Pricing Observatory (*Prijzenobservatorium / Observatoire des prix*) were also asked to give their views.

COMPETITION LAW

The BCA is favourable to the idea of a merger. According to the BCA, "merging several market regulators into a single institution with a clearly defined identity and mandate could (in addition to possibly reducing costs) streamline procedures and improve the consistency and effectiveness of interventions, to the benefit of the market and the end consumer". While such a merger poses "a number of challenges" (loss of specialised knowledge of officials, complex transition phase during the merger, conflicts between the various tasks of the merged authority), the BCA considers that these challenges are "not insurmountable". In practice, the BCA envisages three scenarios:

- A merger between all market regulators; the BCA is not favourable to this idea, as not all regulators have similar responsibilities. The BCA refers to the FSMA, whose tasks are very different from its own.

- A merger with regulators of network industries (the BIPT and the CREG). The BCA notes that, "given their remit to develop and maintain competition, these regulators deal with competition issues", which is why it is "particularly coherent to consider merging them with the BCA". However, the BCA notes that some of the tasks of the sector regulators are "far removed from the powers and concerns of the BCA", which "reduces the value of the merger by blurring the positioning of the merged regulator in the eyes of the public".

- A merger uniting "the regulatory institutions responsible for cross-cutting market, competition and consumer issues, in the broadest sense". This would include not only the BCA and regulators of network industries but also specific departments of the Federal Public Service Economy (the Pricing Observatory and the Economic Inspectorate). The BCA believes that this would "lead to the creation of a market authority with a coherent mandate to serve Belgian consumers".

Interestingly, the BIPT does not share the BCA's position. In an opinion of 29 April 2024 (*See* here and here) the BIPT expressed the view that "such a merger only makes sense if there are real synergies ...]. However, this has not been demonstrated and, on the contrary, appears to us to be unfounded".

These conflicting views also exist outside Belgium. For instance, the Spanish Parliament is currently considering the separation of previously merged regulators, while in the Netherlands, the *Autoriteit Consument & Markt* (ACM) has a broad remit and oversees competition, sector regulation and consumer protection. In Belgium, it is unclear whether the yet to be formed new federal government and the incoming federal Parliament will pursue this issue.

Belgian Competition Authority Conditionally Clears Acquisition of Porsche Centre East-Flanders by D'Ieteren

On 1 June 2024, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence* – the ***BCA***) cleared the acquisition of a Porsche dealership by the independent car dealer and importer, D'Ieteren.

D'Ieteren imports and distributes many car brands (including Porsche) and original equipment manufacturer (***OEM***) car parts and accessories (including Porsche's) and operates approximately 40 dealerships for several brands (including Porsche). Importantly, following an agreement with Porsche AG, D'Ieteren is responsible for the approval of official Porsche dealers. D'Ieteren is also active in the independent aftermarket (***IAM***) of spare parts for all brands. Lastly, D'Ieteren sells used cars, operates in the bodywork market, and offers leasing and financing services (which can also apply to Porsche vehicles).

The Porsche network currently includes nine locations in Belgium, six of which already belong to D'Ieteren. D'Ieteren notified the BCA of its proposed acquisition of a seventh site.

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The BCA identified the following vertically relevant markets:

- the national wholesale market for the sale of brand-specific OEM spare parts for Porsche passenger cars;
- local brand-specific markets for passenger car and light commercial vehicles (***LCV***) maintenance and repair;
- the non-branded market(s) for passenger car and LCV bodywork services (local or national) and;
- the national brand-specific retail market for the sale of OEM and/or non-original (IAM) spare parts for light motor vehicles (passenger cars and LCVs).

The BCA's investigation raised possible competition law concerns in the maintenance and repair markets due to already high market shares in specific local markets. The BCA feared that, post-transaction, these market shares would further increase, which would reduce the remaining competitive pressure due to non-coordinated unilateral effects and might lead to higher prices and/or lower quality.

The BCA also pointed to the risks of foreclosure of the remaining independent Porsche dealerships as these are highly dependent on D'Ieteren for the supply of new vehicles, as well as for obtaining and/or maintaining their official recognition for the sale of new Porsche vehicles. The BCA pointed to a "strong link between how effectively a garage can compete for maintenance and repair services and other after-sales services [...] and whether it has official approval for sales".

D'Ieteren addressed these concerns by offering the commitments which were market tested and accepted by the BCA:

- D'Ieteren offered to voluntarily notify the BCA of any future acquisitions of a remaining Porsche dealership even if such acquisitions were to fall below the statutory thresholds.
- D'Ieteren committed not to terminate existing dealerships without prior approval of the BCA, except in two specific cases: (i) gross misconduct; and (ii) an overall restructuring of the Porsche network coming from Porsche AG.
- D'Ieteren offered to treat new applications for after-sales services in a fair, reasonable and non-discriminatory manner in accordance with the applicable criteria of Porsche AG, without imposing any additional conditions.
- D'Ieteren offered to maintain a separation between its import division (D'Ieteren Automotive NV, Porsche Import division) and its retail division (D'Ieteren Mobility Company NV) as regards commercially sensitive information from independent authorised Porsche dealers to which the notifying party has access in its capacity as an importer of the Porsche brand.
- D'Ieteren also made a general commitment to act in a fair, reasonable and non-discriminatory manner towards independent authorised Porsche dealers and service partners as it would do towards its own retail operations.
- D'Ieteren also undertook measures relating to the monitoring of these commitments.

The commitments apply for a period of 10 years.

CONSUMER LAW

New Directive on Repair of Goods is Published

On 10 July 2024, the Official Journal of the European Union published Directive (EU) 2024/1799 of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828 (the ***Directive***).

To prevent the disposal and waste of repairable products, the Directive introduces measures that encourage consumers to maximise the lifespan of their purchases. EU Member States are required to implement and apply these measures by 31 July 2026.

For more information on the key aspects of the Directive *see*, this Newsletter, Volume 2023, No. 4 and Volume 2024, No. 1.

The Directive is available here.

CORPORATE LAW

New EU Rules for Identification and Registration of Ultimate Beneficial Owners are Adopted

On 31 May 2024, a package of new European rules to prevent money laundering and terrorist financing was adopted (the ***AML Package***). As part of the AML Package, Regulation (EU) 2024/1624 on preventing the use of the financial system for the purposes of money laundering or terrorist financing changes the rules governing the identification of the Ultimate Beneficial Owners (***UBOs***) of legal entities and their registration in the local UBO Register. The new rules came into effect on 10 July 2027.

1. *New regime for senior managing officials-UBOs*: If no UBOs holding a sufficient participation in a legal entity or controlling the legal entity otherwise are identified, there will simply be no UBOs (contrary to the current approach of taking the senior managing officials as a leftover category). In such a case, the legal entity will have to submit to the UBO Register a substantiated declaration confirming that no UBO could be identified. Nevertheless, legal entities will still have to register their information pertaining to senior managing officials.

2. *Change in registration of UBO-information*: While legal entities will still have to register their UBOs' identity document number and a description of their ownership and control structure, there is no longer the requirement to submit a copy of the identification document.

3. *More stringent rules for the exemption of listed companies:* Specific listed companies are currently exempt from a series of obligations to obtain, hold and register UBO-information. The AML Package narrows these exemptions to companies listed on EU regulated markets that are not themselves subject to any form of direct or indirect control. In addition, the AML package removes the exemptions for 100% subsidiaries of such listed companies.

4. *Introduction of registration obligation for non-EU legal entities*: Non-EU legal entities will have to register the same UBO information as EU entities in one EU Member State if they (i) acquire real estate or specific luxury goods; (ii) enter into a business relationship with an obliged entity which is presumed to be at medium or high risk of money laundering and terrorism financing; or (iii) receive tender-based contracts in an EU Member State.

DATA PROTECTION

Data Protection Authority holds that Data Protection Officer Workload Does Not Absolve Company from Responsibility for Violations of General Data Protection Regulation

On 3 June 2024, the Litigation Chamber of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* – the ***DPA***) imposed a EUR 172,431 fine on an unidentified firm because of that firm's failure to handle properly a customer's request to erase his personal data and cease sending marketing communications.

Background

The case began in June 2022 when a dissatisfied customer noticed an unanticipated EUR 1.50 'energy contribution' charge on his invoice for May 2022. The customer requested a refund for this surcharge and asked for the deletion of his personal data. Although the company declined to refund the surcharge, it acknowledged the request for deletion and assured the customer that it would handle the request promptly. However, the customer continued to receive marketing communications. In November 2022, he sought mediation from the DPA and then filed a formal complaint when the company failed to respond to the mediation request.

During the proceedings, the company attributed the absence of a response during the mediation period to the lack of oversight of its former data protection officer (***DPO***). The current DPO and the management team were reportedly unaware of the issue, as the former DPO had only been working part-time and had not communicated the correspondence with the DPA or the data subject internally. The company argued that it had since recruited a new, full-time DPO and a two-person supporting team.

DPA Decision

First, the DPA found that the company infringed both Article 17 General Data Protection Regulation (***GDPR***), which grants individuals the right to have their data erased, and Article 21 GDPR, which allows them to object to the processing of their personal data for direct marketing purposes. The DPA determined that the data subject had clearly expressed a desire to terminate all commercial relations with the company, including the total deletion of his personal data and an objection to any use of his data for direct marketing. Although the company attempted to invoke the exception provided for by Article 17(3)(b) GDPR, which allows for the retention of data to comply with legal obligations (such as tax audits), the DPA held that this exception could only justify the retention of data for legal purposes, not for direct marketing objectives. Consequently, the DPA concluded that the company had failed to comply with both Articles 17 and 21 of the GDPR.

Second, the DPA ruled that the company breached the principles of fairness, lawfulness, and transparency, as laid down in Article 5(1)(a) GDPR, since the company had continued to use the data subject's information after his right to erasure and objection had been exercised and without any legal basis. The DPA also criticised the company's failure to inform the data subject of the actions taken in response to his requests.

Lastly, the DPA found that the company fell short of its accountability obligations under Articles 5(2) and 24 GDPR. According to the DPA, the company failed to demonstrate that it had implemented effective measures to comply with the GDPR. The DPA took particular issue with the inadequate support and resources provided to the DPO, noting that the DPO's part-time status and excessive workload had hindered prompt and effective compliance actions. The fact that the DPO was overburdened while working part-time pointed to a failure by the company to implement appropriate organisational measures necessary for GDPR compliance. The DPA noted that it is part of the company's obligation to ensure that the DPO has

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sufficient time and resources to perform his or her duties, to communicate the DPO's appointment to all employees, and to provide continuing training to keep the DPO's knowledge up to date.

A copy of the decision can be found here (in French).

Data Protection Authority Accepts Legitimate Interests as Legal Basis to Develop Mathematical Models

On 15 March 2024, the Litigation Chamber of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données* – the ***DPA***) rejected a complaint against a bank which had used personal data to develop and refine a mathematical model designed to offer personalised discounts to customers.

Background

A customer of the bank raised objections after discovering that his personal data, including transaction details, had been used to create mathematical models for a 'personalised discounts' service and filed a complaint with the DPA in January 2020. In response, the bank initially claimed that it had obtained consent to use the data for the discounts service but relied on a legitimate interest to build the supporting models, stating this constituted further processing. The bank distinguished between 'tailored information' based on consent, which the customer could withdraw, and 'model building' based on a legitimate interest, to which the customer had objected. The bank also argued that since the customer had never activated the discount service and had objected to the data use - which the bank had honoured by deleting his personal data - the complaint should be considered inadmissible.

DPA Decision

First, the DPA held that the complaint was admissible since, although removed after the customer's request, his personal data had still been processed when used in the bank's initial model development. This granted the data subject grounds to challenge the legal basis for the data usage.

Second, the DPA rejected the argument that using personal data to build data models was conducted for research or scientific purposes (which would have made it compatible with the initial purpose, as established by Article 5(1)(b) GDPR) and confirmed that developing mathematical models constituted a new purpose, not disclosed at the outset of the customer relationship. This new purpose, solely for commercial benefits, was deemed incompatible with the original purpose of executing and recording payments.

However, upon reviewing the legal basis for this re-purposed data use, the DPA accepted the bank's reliance on a "legitimate interest". In accordance with Article 6(1)(f) GDPR and case law of the Court of Justice of the European Union (***CJEU***), the DPA observed that three cumulative conditions must be satisfied for a data controller to invoke a legitimate interest: (i) the controller pursues a legitimate interest; (ii) the processing of personal data is necessary for the pursuit of the legitimate interest; and (iii) the fundamental rights and freedoms of the data subject do not take precedence following a balancing of the interests at stake. The DPA conducted this test, noted the necessity of the data models for the discounts, assessed the balance of interests and concluded that the processing had a minimal impact on the data subject. Consequently, the DPA upheld the bank's argument, recognising a legitimate commercial interest in building data models to enhance its market position.

Interestingly, the DPA considered that data subjects would expect that their data would be used to develop data models, unless they had objected to such use. The DPA thereby reiterated a recommendation from its 2017 Report on "Big Data" that any direct identifiers should be removed from datasets to develop big data models.

The DPA furthermore considered that the defendant had sufficiently informed data subjects by announcing its personalised discount system and allowing data subjects to opt out.

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Although the DPA does not specifically mention artificial intelligence (***AI***) in this decision, it provides good guidance for the development of AI models. Clearly, the DPA is of the opinion that legitimate interests can provide a legal basis for training AI models with user data (provided that the controller applies the three-step legitimate interests test to the case at hand), and that its recommendations from the 2017 Big Data Report still remain relevant (including its recommendations on how to curate datasets before including them in training data).

A copy of the decision can be found here (in Dutch) and here (in French).

Court of Justice of European Union Rules on Compensation for Non-material Damages Caused by Fear and Theft with regard to Personal Data

Two recent judgments delivered by the Court of Justice of the European Union (***CJEU***) offer guidance as to the criteria to be applied for awarding compensation for non-material damages under Article 82(1) of the General Data Protection Regulation (***GDPR***). These cases addressed the conditions that give rise to a right to compensation, the nature of such compensation and how to calculate damages. The judgments covered two scenarios: the fear of personal data being disclosed to third parties, and theft resulting from a data breach.

Damages for sending mail to wrong address? Only if you can show actual damage

In the first judgment (C 590/22 - available here), *AT, BT v. PS GbR, VG, MB, DH, WB, GS* (***AT, BT v PS***), the CJEU handled a case in which a tax consultancy had sent tax returns to a client who had moved to a new address. Despite being informed of the move, the consultancy sent the information to the old address, where the mail was inadvertently opened by the new occupants. The client considered that its sensitive information had been exposed to third parties and sued the tax consultancy for non-material damages under the GDPR before the Court of Wesel, Germany (*Amtsgericht Wesel*).

The Wesel court referred various questions to the CJEU for a preliminary ruling. These related to the conditions for the right to compensation, the nature of the compensation, and the criteria for assessing the amount owed. In particular, the referring court asked whether the simple fear that personal data has been disclosed to third parties would be enough to give rise to the right to compensation. The court also inquired whether the calculation of damages should consider violations of other national data protection laws not directly related to the GDPR.

The CJEU reaffirmed its prior ruling (Case C 340/21, available here, *Natsionalna agentsia za prihodite*, §§ 79-86), holding that the fear of personal data misuse by a third party may form justification for compensation under the GDPR. However, the CJEU added that the mere fear is not enough: actual proof of injury must be presented. Additionally, the Court clarified that violations of other national data protection laws do not affect the entitlement or amount of compensation pursuant to the GDPR. Yet, it recognised that national courts could decide to increase the damages if national laws, which do not serve the purpose of the GDPR, fail to provide "*sufficient or appropriate*" remedies in the face of other infringements.

Second Judgment

In the second judgment (Joined Cases C 182/22 and C 189/22, *Scalable Capital*, – available here) the CJEU considered the case of a company managing a trading application, which suffered a data breach pursuant to which the personal data of several users was accessed by unknown third parties. Although there was no evidence that this data had been used for fraudulent activities, the affected individuals brought an action before the Court of Munich, Germany (*Amtsgericht München*), seeking compensation for the non-material injury suffered as a result of the breach. The questions raised by the Munich court to the CJEU also related to the nature and calculation of non-material damages under the GDPR. In addition, the referring court also asked whether symbolic compensation could be

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awarded, and whether the concept of "identity theft" required "*an offender to have actually assumed the identity of the person concerned*" to give rise to compensation.

The CJEU reiterated key principles which it had already expressed in previous judgments (Case C 741/21, *GP v.juris*, available here; *see also* our Client Alert of 25 July 2024, and Case C 300/21, *AT Post*, available here), stating that the mere violation of the GDPR does not automatically entitle data subjects to compensation. There must be proven material or non-material damage and a causal link between the infringement and the damage.

Second, the CJEU noted that damages under Article 82(1) of the GDPR are compensatory, not punitive, and do not require a threshold of "*seriousness*": any proven injury, regardless of its extent, qualifies for compensation if it meets the necessary conditions.

Finally, regarding the calculation of the damages, the CJEU observed that while the GDPR does not specify any rules governing the calculation of damages, the assessment should be based on criteria of national law, in line with the principles of equivalence and effectiveness. The assessment criteria used to calculate administrative fines cannot be used by analogy. Importantly, the CJEU noted that the occurrence of multiple GDPR violations does not influence the compensation, focusing instead on the actual damages suffered. It also clarified that since the text of the GDPR does not establish any hierarchy between physical, material and non-material damage, these damages must be treated equally. The court held that any other approach would "[call] *into question the principle of full and effective compensation*".

Concerning "identity theft", the CJEU observed that while the concepts of identity theft or fraud involve the intention to misuse stolen personal data, compensation should not be restricted solely to these scenarios. If the three main conditions laid down in Article 82(1) GDPR (breach of GDPR, damage suffered, and causal link) are satisfied, then the data subject has a right to compensation, even in the case of a simple theft of data.

INTELLECTUAL PROPERTY

Court of Justice of European Union Rules on Implications of Brexit on Earlier Trade Mark Rights Originating in United Kingdom and Protects Those Rights

On 20 June 2024, the Court of Justice of the European Union (***CJEU***) delivered a judgment in the case C-801/21 *EUIPO v Indo European Foods*, which clarifies the implications of Brexit on a trademark dispute before the General Court (***GC***).

In June 2017, an individual named Mr. Chakari sought to register the figurative mark containing the word "Basmati" before the European Union Intellectual Property Office (***EUIPO***) for goods made from rice, under Classes 30 and 31 of the Nice Agreement. On 13 October 2017, Indo European Foods opposed the trademark registration by Mr. Chakari. The opposition was based on Article 8(4) of Regulation 2017/1001 of 14 June 2017 on the European Union trademark (***EUTMR***). Indo European Foods argued that the non-registered trademark "Basmati" qualified as an "earlier mark" for the purposes of Article 8(4) EUTMR as it was protected under the UK common law tort of "extended passing off". However, both the Opposition Division and the Board of Appeal of the EUIPO rejected the opposition brought by Indo European Foods which appealed the last EUIPO decision to the GC in 2020.

The EUIPO argued in front of the GC, that due to the end of the withdrawal period, during which the UK had remained part of the EU until 31 December 2020, the opposition was devoid of purpose and that Indo European Foods no longer had any interest, which is required for an action under Article 263 TFEU, in bringing proceedings, as the UK rights could no longer be relied upon. The GC did not agree with the EUIPO and instead held that the subject matter of the case is the last decision of the EUIPO's Board of Appeal. The GC confirmed that the crucial moment to assess the validity of an opposition is the date on which the EUIPO adopted its last decision. In the case of Indo European Foods, this decision had been made before the end of the transition period. As a result, the GC reasoned that the dispute had retained its purpose and relevance.

The EUIPO disagreed with the judgment of the GC and appealed to the CJEU on the ground that the applicant must retain an interest in bringing proceedings. After declaring the appeal admissible, the CJEU upheld the judgment of the GC and dismissed the appeal. The CJEU first held that the applicable substantive law should be that which was in place at the time of the EUIPO's final decision. Second, the CJEU reasoned that the GC was justified in finding that the purpose of the action had not disappeared. Third, the CJEU held that in paragraph 27 of its judgment the GC had confined itself to finding that Indo European Foods had an interest in bringing proceedings before the GC and supported the finding that such an interest in bringing proceedings continued to exist.

This case is one of many resulting from Brexit and its final result is not surprising. The CJEU confirmed its case-law (*Creative Technology v OHIM*, C-314/05 P and *Strack v Commission*, C-127/13 P) regarding the powers of the GC over the EUIPO. The CJEU also clarified that the GC was, for procedural reasons, correct in its judgment and offered clarification regarding the timeline by which to determine whether an applicant has an interest in bringing opposition proceedings in the light of the Brexit transition period.

The judgment of the CJEU is available here.

INTELLECTUAL PROPERTY

Court of Justice of European Union Clarifies Concept of Communication to Public

On 20 June 2024, the Court of Justice of the European Union (***CJEU***) delivered its judgment in case C-135/23 *GEMA v GL*, in which the CJEU examined the question whether the provision of television sets equipped with indoor antennas in apartments, allowing tenants to receive and watch television broadcasts, constitutes a "communication to the public" pursuant to Article 3 of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (later replaced by Directive 2019/790/EU on copyright and related rights in the Digital Single Market - the ***DSM Directive***).

The dispute arose between GEMA, a collective management organisation that handles music copyright, and GL, the operator of a building comprising 18 apartments. GEMA brought an action for damages before the Amtsgericht Potsdam (the ***Referring Court***) because it was of the opinion that GL had infringed German copyright law by providing television sets equipped with an indoor antenna enabling signals to be picked up and broadcasts to be made in those apartments.

The Referring Court stayed the proceedings and referred the question to the CJEU whether providing the television sets should be considered as a "communication to the public" within the meaning of Article 3(1) of the DSM Directive since the building at issue is not equipped with a "central antenna" enabling signals to be distributed to those apartments.

The CJEU first noted that the term "communication to the public" must be interpreted broadly, in line with the objectives of the DSM Directive, since that concept is not specifically defined in the DSM Directive. The CJEU then observed that "communication to the public" encompasses two essential elements: (i) the transmission or retransmission of a work; and (ii) making that work accessible to the public. As regards the first condition, complementary criteria like the indispensable role of the user, the deliberate nature of the user's intervention, as well as the profit-making nature of the activity should be taken into account. The second condition refers to reaching an indeterminate number of potential recipients and implies a fairly large number of people. Furthermore, when the act in question follows an initial communication to the public, it is necessary to determine whether it reaches a "new public".

Applying these principles to the case at hand, the CJEU held that GL, by installing television sets and indoor antennae which, without further intervention, are capable of picking up signals and enable broadcasts to be made, deliberately makes an intervention in order to give GL's customers access to those broadcasts. Moreover, GL's intervention must be considered an additional service performed with the aim of obtaining some benefit. The CJEU considered as irrelevant the fact that the television sets are connected to an "indoor" antenna rather than a "central" antenna.

As regards the second condition, the CJEU indicated that if the apartments are let on a short-term basis, in particular as a form of tourist accommodation, their tenants could be classified as a "public", since together they constitute, an indeterminate number of potential recipients. Such tenants could also be considered a "new public" unless the tenants had actually established their residence there.

In this judgment, the CJEU offers further guidance regarding the concept of "communication to the public". Although the clarification is welcome, the CJEU could have provided a more precise distinction between short-term and residential stay since both concepts are not defined in the judgment, which is available here.

INTELLECTUAL PROPERTY

Benelux Office for Intellectual Property Publishes Annual Report for 2023

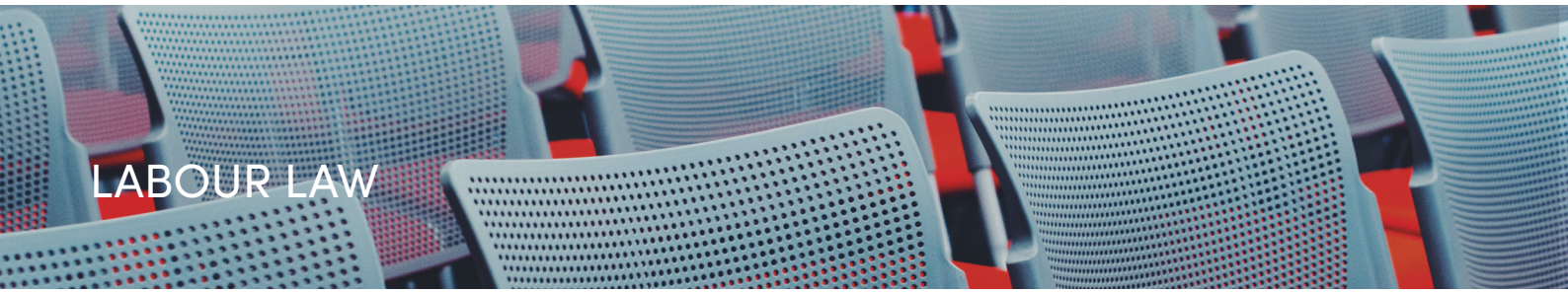
On 5 July 2024, the Benelux Office for Intellectual Property (***BOIP***) published its annual report for 2023. The following findings are particularly noteworthy:

- In comparison to 2022, there was an increase in trademark applications, design applications, and i-DEPOTS in 2023. That year, there were 20,407 trademark applications, with 25% of them originating from Belgium. About 10% of all trademark applications were either provisionally or finally refused. Additionally, there were 706 design applications and 4,834 i-DEPOTS, with approximately 38% of the i-DEPOTS also originating from Belgium.

- The number of renewed trademark registrations and inter partes proceedings continued to be low.

- The BOIP recorded a budgetary surplus of EUR 5,836,000 for the year 2023.

The annual report is available here.



LABOUR LAW

Flanders Creates Enhanced Liability for Illegal Employment of Third-Country Nationals by Subcontractors

On 26 April 2024, the Flemish Government adopted a Decision amending the Decision of the Flemish Government of 7 December 2018 implementing the Law of 30 April 1999 on the employment of foreign workers, with respect to the data to be provided in the event of subcontracting (*Besluit van de Vlaamse Regering tot wijziging van het Besluit van de Vlaamse Regering van 7 december 2018 houdende uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers, wat betreft de aan te brengen gegevens bij onderaanneming* – the ***Decision***). The Decision establishes a checklist of information to be requested from subcontractors, ensuring that the main contractor fulfills its duty of care and avoids joint liability for specific violations committed by the subcontractor.

Liability for Illegal Employment of Third-Country Nationals

Under Belgian law, specific social matters give rise to 'chain liability'. This implies that an organisation can be sanctioned for failing to fulfill the employer's obligations which it is not initially responsible for or be required to fulfill those obligations on behalf of the actual employer. This system is designed to deter organisations from collaborating with other organisations that do not meet their employer's obligations by making the first set of organisations potentially liable.

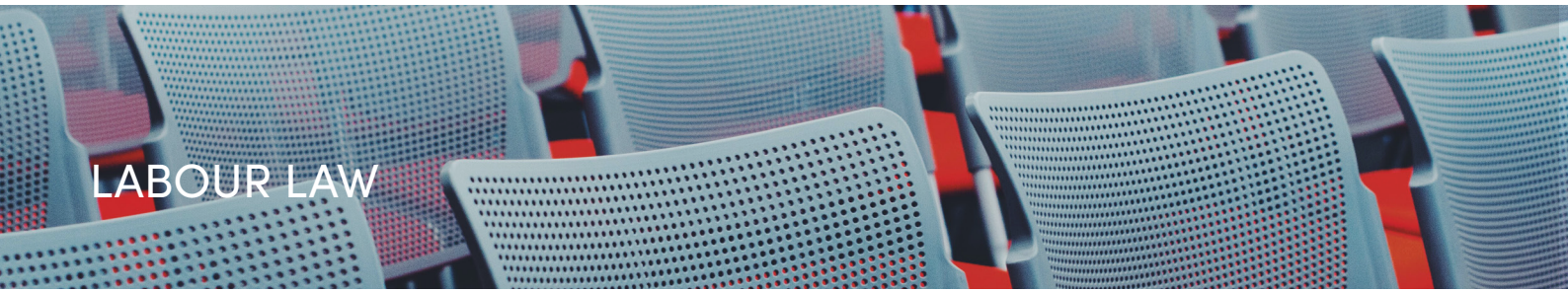
One example of chain liability concerns the illegal employment of third-country nationals (i.e., an individual who is not a citizen of an EU Member State, Iceland, Norway, Liechtenstein or Switzerland). The main contractor can be held liable if the employer (*i.e.*, the subcontractor) employs such individuals illegally without obtaining valid residence and work permits. Under previous regulations, the main contractor could avoid such liability by maintaining a duty of care, which included obtaining a written confirmation from the subcontractor that he would not illegally employ any employees. This allowed contractors to exclude their liability easily based on a contractual clause.

By adopting the Decree of 27 October 2023 amending the Law of 30 April 1999 relating to the occupation of foreign workers, the Decree of 30 April 2004 relating to the control of social laws, the Decree of 22 December 2017 providing a premium to stimulate the transition of job seekers to entrepreneurship and the Decree of 10 December 2010 relating to private placement (*Decreet van 27 oktober 2023 tot wijziging van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers, het Decreet houdende sociaalrechtelijk toezicht van 30 april 2004, het Decreet van 22 december 2017 houdende een premie om de transitie van werkzoekenden naar ondernemerschap te stimuleren en het Decreet van 10 december 2010 betreffende de private arbeidsbemiddeling* – the ***Decree***), the Flemish Parliament sought to close this contractual loophole. While the main contractor can still avoid liability by fulfilling his duty of care, an additional requirement has now been introduced to ensure the duty of care is properly met. The main contractor must not only obtain the above written declaration but must also show that, at the start of the collaboration with the subcontractor, he requested specific documents and information regarding the subcontractor's employees and/or self-employed contractors.

Information to be Requested from Subcontractor

With the Decision, the Flemish Government has now specified the exact information that must be requested and obtained from the subcontractor:

- a copy of a valid passport or ID card;
- a copy of a valid Belgian or EU residence permit;
- a copy of a valid Belgian work permit / single permit or Belgian professional card (or proof that this is not required, for example in case the situation falls within one of the work permit / single permit or professional card exemption categories);



LABOUR LAW

- a copy of the "Limosa" declaration (if Belgian social security does not apply);
- a copy of a "Dimona" declaration (if Belgian social security would apply); and
- a copy of an A1 certificate or a Certificate of Coverage (if Belgian social security does not apply).

If any information is missing, the main contractor must request the missing documents from the subcontratcor. If the subcontractor fails to provide the requested documents, the main contractor must notify the social inspection authorities. Once the necessary information is obtained, or the social inspection authorities have been notified of the missing information, the main contractor is considered to have fulfilled his duty of care and will no longer be held liable.

Sanctions

In the event of the illegal employment of third-country nationals, the employer and main contractor can be sanctioned with a prison sentence of between six months and three years (for legal entities, this translates to a fine ranging between EUR 24,000 and EUR 576,000) and/or a criminal fine of between EUR 4,800 and EUR 48,000 or an administrative fine of between EUR 2,400 and EUR 24,000, multiplied by the number of employees involved with a maximum of 100.

The Decision and the relevant provisions of the Decree will enter into force on 1 January 2025 at which time, the main contractor will have to request, obtain, and retain the specified information to avoid administrative or criminal sanctions in the event of the illegal employment of third-country nationals by his subcontractor.

The Decision is availabe in Dutch (here) and French translation (here), while the Decree is also availabe in Dutch (here) and French translation (here).

LITIGATION

Supreme Court Rules on Interpretation Power of Attachment Judge

On 17 June 2024, the Supreme Court confirmed the application of Article 793, §2 of the Judicial Code which had been made by the Court of Appeal of Ghent acting as attachment judge (*beslagrechter / juge des saisies*). According to that provision, attachment judges are allowed to interpret an obscure or ambiguous decision provided that they do not extend, restrict or modify the rights enshrined therein.

Background

The dispute pitted H.D.Z (the ***Claimant***) against the city of Ghent (the ***First Defendant***) and VDB-Concept BV (the ***Second Defendant***). The Court of First Instance of Ghent (the ***Court of First Instance***) had granted a public right-of-way (*publiekrechtelijke erfdienstbaarheid / servitude de passage de droit public*) on a piece of land owned by the City of Ghent, which was then sold to VDB-Concept for the construction of student housing. The Court of First Instance had also ordered the First Defendant and Second Defendant to remove any obstruction that would prevent or restrict the use of that right-of-way, with a penalty of a fine of EUR 100 per day (with a maximum of EUR 20,000). While the First Defendant complied with the decision of the Court of First Instance, the Second Defendant failed to do so.

The Claimant hence requested the payment of that penalty before the attachment judge of the Court of First Instance. In a judgment of 15 September 2020, the attachment judge declared the payment orders unlawful against the First Defendant and lawful against the Second Defendant but limited the penalty to half of the amounts provided for by those orders.

The Claimant then brought an appeal against that decision before the attachment judge of the Court of Appeal of Ghent (the ***Court of Appeal***). Since the First Defendant had complied with the decision of the Court of First Instance but the Second Defendant had not, the Court of Appeal chose to interpret that first instance decision. It found, in a judgment dated 14 December 2021, that the penalty of EUR 100 per day amounted to a penalty of EUR 50 per day per person.

Following the judgment on appeal, the Claimant appealed to the Supreme Court, arguing that the Court of Appeal had violated Article 793, §2 of the Belgian Judicial Code.

Supreme Court Judgment

The Supreme Court dismissed the appeal and noted the principle set out in Article 793, §2 of the Judicial Code, ruling that the Court of Appeal had correctly interpreted the judgment of the Court of First Instance, insofar as it did not extend, restrict or modify the rights enshrined in it.

The full judgment is available here (in Dutch).

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